

Center for Growth and Opportunity at Utah State University
Public Interest Comment on the U.S. Fish and Wildlife Service
and the National Marine Fisheries Service proposed rule

Endangered and Threatened Wildlife and Plants: Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat

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Executive Summary

On August 4, 2020, the Fish and Wildlife Service and the National Marine Fisheries Service (collectively referred to as the Services) proposed a rule to define “habitat” as used in the Endangered Species Act (ESA) of 1973. The ESA does not itself define the term “habitat,” but does define the related term “critical habitat,” which is a regulatory tool used to designate and protect areas considered essential for the conservation of a listed species. The term “habitat” must also be defined, however, because a recent Supreme Court case (*Weyerhaeuser v. Fish and Wildlife Service*) held that only “habitat” could be designated as “critical habitat,” without answering the question of what qualifies an area as habitat in the first place.¹ This proposed rule would help answer the question left open by *Weyerhaeuser*.

Our research suggests that the proposed rule is likely to benefit both landowners and endangered species alike. Establishing a clear definition of the term “habitat” will benefit listed species and the regulated public by reducing conflict that has too often distracted from species recovery while also sapping agency, landowner, and conservation groups’ resources. Such conflict has regularly arisen under the ESA due to uncertainty and resulting ill will among landowners and other stakeholders that species rely upon for their survival. Uncertainty over which areas could be designated as critical habitat and the regulatory burdens that would ensue makes it difficult for private landowners, states, and businesses to operate within the law and to plan future decisions about development and conservation. A clear definition of habitat that provides proper constraints on burdensome and potentially counterproductive critical habitat designations will reduce this uncertainty and thus reduce conflict.

While both the proposed definition and the alternative definition will reduce uncertainty, the alternative definition better resolves the question left open by the *Weyerhaeuser* case. Specifically, the alternative definition excludes from habitat unoccupied land that currently lacks attributes needed to support a species. The Services could further improve the alternative definition by adding the following language (in italics below):

“The physical places that individuals of a species use to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where *all* the necessary attributes to support the species presently exist *in such close proximity that it is likely an individual of a species could access all such attributes during their normal life cycle.*”

This additional change would clarify an area is habitat only if it has all of the necessary attributes to support a species (not just one or two attributes that may support only part of a species life cycle), and that the features must be close enough together to allow individuals of a species to access them for their survival. This change avoids designating areas that are unsuitable as habitat in their current form but where an isolated habitat feature may be present, as in the *Weyerhaeuser* case.

By reducing uncertainty and providing a common working definition of what is meant by “habitat,” the proposed alternative definition will help reduce uncertainty, allowing landowners, states, and businesses alike to make more effective long-term decisions about conservation on lands they manage. Because endangered species rely on private landowners and numerous stakeholders for their effective recovery, providing regulatory certainty and reducing conflict will also benefit listed species.

¹ *Weyerhaeuser Co. v. United States Fish and Wildlife Service et al.* 139 S. Ct. 361 (2018).

Reducing Uncertainty Can Reduce Conflict and Benefit Species

The importance of private land in providing habitat for wildlife and other species has been well-documented. According to FWS, more than 50 percent of species listed as endangered or threatened rely on private land for at least 80 percent of their habitat.² Because private landowners manage large areas of environmentally important land, they are crucial partners in effective conservation efforts.

Our research from the Center for Growth and Opportunity reviewed surveys of private landowners from the academic literature to better understand their attitudes toward conservation and the factors that impact their willingness to help the endangered species recover. This research found that the vast majority of landowners value being good stewards of their land and agree with the goal of recovering endangered species. It also found that landowners are more willing to engage in conservation efforts that are non-regulatory, incentive-based, and locally-driven.³

Finally, surveys also asked which factors are most likely to deter landowners from participating in species-related conservation. Fear of future regulation and concerns about government involvement on their land were the most commonly cited. Likewise, assurances against future regulation were among the most popular incentives for landowners to become active in conservation programs. Programs like Safe Harbor Agreements and Candidate Conservation Agreements with Assurances are both examples in which landowners agree to actively assist in species conservation on their land in exchange for assurances against more burdensome regulatory restrictions in the future.⁴ Recent research finds evidence that Safe Harbor-type programs have been effective at encouraging landowners to reduce their harvesting of timber by 7 to 13 percentage points in potential habitat areas.⁵ This suggests voluntary and incentive-based programs can play an important role in conservation.

A large body of research suggests that a heavy-handed regulatory approach to conserving endangered species discourages landowners from becoming active in their conservation. In fact, in some cases, it may encourage actions that are directly harmful to species. For example, scholars documented how landowners in North Carolina harvested trees earlier than they otherwise would have to avoid their land becoming habitat for the red-cockaded woodpecker. This was done to avoid the potential for regulatory restrictions that would limit what private landowners could do with their land.⁶ Other scholars have shown that the fear of regulation may lead landowners to actually remove species like the Utah prairie dog from their land or to prevent surveyors from coming onto their land to observe species.⁷

Overall, available evidence suggests that critical habitat should be designated judiciously because it can undermine species recovery at least as easily as facilitating it. Although a few studies have found that the Fish and Wildlife Service is more likely to report a species as improving if critical habitat has been designated than if it hasn't, others have shown that this effect disappears when unrelated spending on recovery

2 "Our Endangered Species Program and How It Works with Landowners," US Fish and Wildlife Service, July 2009, <https://www.fws.gov/endangered/esa-library/pdf/landowners.pdf>.

3 Megan Jenkins, Rebekah Yeagley, Sarah Bennett, and Jennifer Morales. "Cooperative Conservation: Determinants of Landowner Engagement in Conserving Endangered Species." The Center for Growth and Opportunity, November 28, 2018. <https://www.thecgo.org/research/cooperative-conservation-determinants-of-landowner-engagement-in-conserving-endangered-species>.

4 Jenkins et al., "Cooperative Conservation." 2018.

5 Jacob Byl. "Perverse incentives and safe harbors in the Endangered Species Act: Evidence from timber harvests near woodpeckers." *Ecological Economics*, 157 (2019).

6 Dean Lueck and Jeffrey A. Michael, "Preemptive Habitat Destruction under the Endangered Species Act," *Journal of Law and Economics* 46 (2003): 51

7 Amara Brook, Michaela Zint, and Raymond Deyoung, "Landowners' Responses to an Endangered Species Act Listing and Implication for Encouraging Conservation," *Conservation Biology* 17, no. 6 (2003): 1644; R. Dwayne Elmore, "Recovery of the Utah Prairie Dog: Public Perception and Cattle Grazing as a Management Tool" Ph.D. Dissertation, Utah State University, (2006): 7.

efforts is accounted for.⁸ Still other studies show that a critical habitat designation can increase development pressures, thereby undermining conservation.⁹

Although the majority of private landowners value conservation, uncertainty about how regulation will impact them is a common concern. Without a clear definition of the term “habitat,” overly broad designations of critical habitat may result. An overly broad interpretation of habitat, and the aggressive critical habitat designations such an interpretation could lead to, is likely to spur ill will by making the presence of endangered species a liability rather than an asset. This can lead to preemptive habitat destruction, as in the case of the red-cockaded woodpecker or the Utah prairie dog. Moreover, any uncertainty created by a vague definition and the possibility of future regulatory restrictions could make it more difficult to engage landowners in proactive conservation of endangered species.

Reducing uncertainty with a carefully tailored definition of what is meant by the term habitat may reduce conflict with private landowners and reduce the incentive to destroy habitat or prevent species from coming onto their land. Our research suggests that a more cooperative approach to conservation tends to be much more effective at engaging landowners and in benefiting species.¹⁰

The Alternative Definition Further Reduces Uncertainty

Although both the proposed and alternative definitions offered by the Services would help reduce uncertainty and provide clarity, the alternative definition would better achieve these goals by better defining when unoccupied areas can be deemed habitat for a species.

Weyerhaeuser demonstrates why treating as habitat land which presently lacks the capacity to support a species because it is missing one or more necessary attributes breeds conflict and uncertainty without benefiting species. After the dusky gopher frog was listed as endangered, the Fish and Wildlife Service designated about 1,500 acres of private land in Tammany Parish, Louisiana, as critical habitat. This area had one of the habitat features required by the frog (ephemeral ponds), even though it lacked others. The dusky gopher frog had not been seen in the state of Louisiana for decades as the landscape was converted from longleaf pines savannas to denser plantings of forests for timber production. The landowners sued the agency, arguing that their land was not suitable habitat for the dusky gopher frog because it lacks the open-canopied longleaf forest the frog needs to survive. What’s more, for the area to provide usable habitat for the frog, the existing trees would have to be harvested, longleaf pine planted in its place, and regular prescribed burns used to maintain suitable ground cover. The landowners argued that since the area was not currently suitable as habitat for the frog and they had no intention of converting it to habitat, it could not be designated as critical habitat.¹¹

In a unanimous decision, the Supreme Court held that an area could not be designated as critical habitat unless it first qualifies as “habitat,” although the Court did not define that term.¹² In proposing a rule to define habitat, the Services are correctly seeking to avoid conflicts like that which occurred in *Weyerhaeuser* and to provide much needed clarity to the regulated public.

The proposed and alternative definitions for “habitat” provided in the proposed rules are as follows:

⁸ See Jonathan Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Lands* in *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* 6-31 (2011).

⁹ See *id.*

¹⁰ Jenkins et al., “Cooperative Conservation,” 2018.

¹¹ Tate Watkins, “If a frog had wings, would it fly to Louisiana?” PERC Reports Volume 37, No. 1, Summer 2018. <https://www.perc.org/2018/07/13/if-a-frog-had-wings-would-it-fly-to-louisiana/>

¹² *Weyerhaeuser Co. v. United States Fish and Wildlife Service et al.* 139 S. Ct. 361 (2018).

Proposed definition:

“The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species.”

Alternative definition:

“The physical places that individuals of a species use to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist.”

The alternative definition better captures the meaning of the term habitat, by clarifying that currently unoccupied areas are habitat only if they “have the capacity to support such individuals” and “the necessary attributes to support the species presently exist.” This important distinction notes that the attributes needed to support a species must already be present in an area for it to be considered habitat. It is not sufficient to claim that an area *could* support a species if extensive management were to be undertaken. The site must be able to support species in its present condition.

This change is crucial in avoiding ill will among landowners. In the past, overly broad critical habitat designations, including the designation of areas that are not currently suitable for a species’ survival, have generated ill will among landowners and often resulted in litigation. Such designations can even result in preemptive habitat destruction in which landowners take action to make their land less hospitable to a species, thus reducing the chance that they will be subject to regulatory restrictions later.

The clarification made by this rule change directly addresses the source of conflict in the *Weyerhaeuser* case—namely designation of an area that was (1) currently unoccupied by the species and (2) would require extensive habitat restoration and management to be able to actually support the species. The alternative definition rightly states that an area can be habitat even if it is unoccupied by the species, but only if the area can support the species in its current state because it presently has all the necessary attributes to support the species.

The alternative definition could be further strengthened with the following additional clarification:

“The physical places that individuals of a species use to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where *all* the necessary attributes to support the species presently exist *in such close proximity that it is likely an individual of a species could access all such attributes during their normal life cycle.*”

This change would ensure that an area must have *all* of the required attributes to help species carry out their crucial life processes, not just one or several of them. It would also clarify that the attributes must be in such close proximity that individuals of the species could access all the attributes necessary to carry out all life processes. This avoids the categorization as habitat of areas that include one or more isolated habitat features, but for which other necessary attributes are so distant that individuals of a species would not be able to effectively rely on them for survival. The application of this standard would vary based on the species’ characteristics and needs, of course. For relatively immobile species like the dusky gopher frog, which has been known to migrate a maximum of 900 feet, a habitat feature like ephemeral ponds would not be considered habitat if other necessary features are dozens or hundreds of miles away. But for highly migratory species, like the whooping crane, habitat features separated by long distances may qualify as habitat.

Conclusion

The alternative definition put forward by the Services promises to reduce conflict and provide much-needed regulatory certainty to private landowners, states, and businesses who manage land that is or could be important habitat for species. This comment proposes several small changes that further clarify the definition of habitat.

The Services' final definition should provide clarity and certainty to stakeholders, including landowners, businesses, states, and environmental practitioners working to help species recover. This certainty will help to reduce conflict including costly litigation, and instead promote more cooperative approaches to conservation that are likely to better help endangered species recover and thrive.