



## Proposed Definition of "Habitat": New Ground for Endangered Species Act Regulations

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The U.S. Fish & Wildlife Service and the National Marine Fisheries Service (together, the "Services") recently issued a proposed rule adding a definition of "habitat" to the regulations implementing Section 4 of the Endangered Species Act (ESA). Many infrastructure and development projects hang in part on review by the Services (as well as by state natural resource agencies) of their potential impacts on listed endangered and threatened species. These determinations take into account any adverse impacts on protected species' habitat. Thus, what qualifies as "habitat" under the new definition can dictate whether a project will succeed or fail.

The ESA itself already defines the term "critical habitat" for purposes of conserving protected species. However, the U.S. Supreme Court made clear in its 2018 decision in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service* that any "critical habitat" must first qualify as habitat. As a result, the Services must make a threshold determination of the habitat for the species before designating it as "critical habitat." To implement that two-step process, the Services propose to establish for the first time a definition of "habitat." As the Services note, the regulatory definition of "habitat" needs to be distinct from, but broader than, the definition of "critical habitat." Thus, if an area meets the definition of "critical habitat," then it must necessarily be part of, but not necessarily be all of, the species' overall "habitat."

The proposed rule offers for public comment a primary proposed definition and an alternative proposed definition. The definitions are:

1. "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." [Primary Definition]

OR

2. "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."

[Alternate Definition]

As is reflected by these alternatives, one of the key issues raised is whether “habitat” should be based on a species’ *dependence upon* or on its *use of* the territory in question, or perhaps some other factors. That is, which concept better reflects the relationship between the species and the area in question for purposes of protection under and consistency with the goals and limits of the ESA? The circumstances of dependence upon or use of any physical place vary greatly among species and include such variables as time of year, length of stay, and the benefits offered (food and water supply, cover, mating and nursery grounds, etc.). As a result, the Services are seeking comment on which alternative, or some other factors, provides the appropriate degree of flexibility in assessing that relationship while still staying within the statutory mandates and limits.

The debate over which conceptual approach should control has significant consequences, yet ambiguities associated with each approach create lingering uncertainties. Either of the concepts could be interpreted narrowly or broadly without clearer direction as to how direct and consistent such dependence or use needs to be for the species “to carry out one or more life processes.” In addition, the Primary Definition’s reliance on the concept of dependence still begs potential conflation of meanings of “habitat” with “critical habitat,” even if intended to be distinct. More specifically, because “critical habitat” as currently defined in the ESA focuses on the “physical and biological features” of the territory in question that are essential for the conservation of the species, if a species is directly and consistently dependent on a physical place, does that also mean the place is necessarily “critical habitat?”

In addition, the second sentences of the Primary Definition and the Alternative Definition address to different degrees whether an area unoccupied by the species at the time of the listing must have the elements needed to sustain the species. The Services note that, as compared to the Primary Definition, the second sentence of the Alternative Definition “expressly limits unoccupied habitat for a species to areas ‘where the necessary attributes to support the species presently exist,’ and explicitly excludes areas that have no present capacity to support individuals of the species.” Environmental groups already have complained that either of these second sentences could hinder long-term planning for species conservation by preventing protection of areas that could be occupied by protected species in the future, even if the necessary habitat attributes do not exist at the time of the agency action. On the other hand, say others, forecasting whether such attributes would materialize in the future in a manner capable of sustaining the species can prove to be a rather speculative exercise. Regardless, when making short-term and long-term investment and infrastructure planning decisions, there needs to be reasonable certainty as to whether an area is or could be expected to become subject to ESA protection.

The definition of “habitat” may satisfy the mandate of the *Weyerhaeuser* decision to fill a definitional hole in the ESA regulatory program, but the term’s new home within the ESA regulatory landscape will have important implications for planning and permitting of development and infrastructure projects. Comments on the proposed definition were due by September 4, 2020, and the Services will be sorting out the comments for some time to come before finalizing the definition. Of course, any change in Administrations based on the upcoming election would likely alter the course of this regulatory action. In any event, interested parties will be hoping that the final version of the definition of “habitat” will not

leave them out in the cold.

**Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, [85 Fed. Reg. 47333](#) (August 5, 2020).**

**[Weyerhaeuser Co. v. United States Fish and Wildlife Serv.](#), 586 U.S. \_\_\_\_, 139 S. Ct. 361, 202 L.Ed.2d 269 (2018).**

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