



Public Comments Processing

Attn: FWS-HQ-ES-2020-0047

U.S. Fish & Wildlife Service

MS: PRB (3W)

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August 31, 2020

I welcome the opportunity to comment on the U. S. Fish & Wildlife Service/National Marine Fisheries Service proposed first-ever regulatory definition of “habitat” under the Endangered Species Act (ESA). As the proposal correctly points out, the term “habitat,” unlike the term “critical habitat,” is not defined in the ESA. This significant omission has caused confusion and led to costly and protracted litigation since the ESA was enacted in 1973. In the over four decades since the statute went into effect, FWS and NOAA Fisheries undertook no effort to provide a definition, adding to the ESA’s lack of transparency and clarity.

A definition of habitat was, however, necessitated by the 2018 Supreme Court decision in *Weyerhaeuser v. FWS*, a case involving the critical habitat of the dusky gopher frog. That ruling stated that any area designated as critical habitat must also be habitat for the species in question. FWS and NOAA Fisheries are to be applauded for seizing the opportunity the high court’s ruling presented and taking the long-overdue step of bringing more clarity to the ESA.

The public is specifically solicited to comment on both the proposed definition of habitat and on the alternative definition. Of the two, the alternative definition is preferable because of the clarity bestowed on it by its second sentence. It 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.

This clarification is crucial. It will be recalled that in *Weyerhaeuser v. FWS*, the government not only designated unoccupied land in Louisiana as potential critical habitat for the dusky gopher frog. It also acknowledged that the land in question would have to undergo significant ecological modification, including the planting of trees and other measures, before becoming suitable habitat for the frog. The Supreme Court rejected this argument, providing the Trump administration an opportunity to write a regulatory definition of habitat.

Because, as the proposal argues, critical habitat cannot be separated from habitat, having clarity on what does and does not constitute the latter will bring much-needed transparency and consistency to the ESA. The danger of not setting such clearly defined boundaries is that FWS officials in the future

could be sorely tempted to designate an overly expansive habitat for the plant or animal in question rather than focus on the important task of recovering the species in areas suitable for its survival.

The federal code is fraught with terms that are either poorly defined or, in some cases, not defined at all. This has been an open invitation to litigation and, in the case of the ESA, has resulted in a burden that falls disproportionately on rural landowners who have threatened or endangered species on their property. If the proposed regulatory definition of habitat reduces that burden, that will be a step in the right direction.

Thank you very much.

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