



Jordan Wimpy
jwimpy@mwlaw.com
(501) 688-8872

Endangered Species Act: U.S. Fish & Wildlife Service Finalizes Rule to Rescind Definition for the Term "Habitat"

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On Friday, June 24, 2022, the U.S. Fish & Wildlife Service (the Service) finalized a rule rescinding the regulatory definition of "habitat," as the term was used in the Endangered Species Act (the Act) and the various implementing regulations. *See* 87 Fed. Reg. 37,757 (June 24, 2022). The rule removing the definition becomes final and effective on July 25, 2022.

We previously reported on the Service's promulgation and publication of the first and only attempt to define the term "habitat," found in 85 Fed. Reg. 81,411 (Dec. 16, 2020). A link to the prior post on the proposed rulemaking can be found [HERE](#).

Background

A keystone element of the Service's protection of threatened or endangered species under the ESA is the designation, conservation, and protection of "critical habitat." Section 3(5)(A) of the ESA defines "critical habitat" to include:

1. the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
2. specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A); *see also*, 50 CFR 424.12. Once designated as critical habitat, an area is protected from Federal actions that would result in the "destruction" or "adverse modification" of the critical habitat. 16 U.S.C. § 1536

The ESA does not define the broader term "habitat" and until late 2020 the Service had never adopted a specific definition through regulation. But the Service sprung into action after the U.S. Supreme Court's 2018 review of the scope and breadth of a "critical habitat" designation. The Court stated succinctly in 2018 that "Section 4(a)(3)(A)(i) [of the ESA] does not authorize the Secretary to designate an area as critical habitat unless it is also habitat for the species." *Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361, 368

(2018). The Court's focus on the broader term "habitat" set the course for the Service's 2020 effort to define the term.

The Definition of "Habitat"

The Service promulgated a final definition stating that:

For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.

See 85 Fed. Reg. at 81,412 (codified at 50 CFR 424.02). The definition took effect on January 15, 2021.

Rescinding the Definition of "Habitat"

On January 20, 2021, President Biden issued Executive Order (E.O.) 13990, requiring a review of all Federal regulations and actions taken by the previous executive administration. This included the Service's 2020 definition of "habitat."

Following its review, the Service "determined [the definition] was unclear and confusing and inconsistent with the conservation purposes of the Act." 87 Fed. Reg. at 37,775. Accordingly, the Service published a proposal to rescind the rule. See 86 Fed. Reg. 59,353 (Oct. 27, 2021). By the close of the public comment period in mid-December last year the Service had received nearly 13,000 public comments.

Based on its review of the *Weyerhaeuser Co.* case, the administrative record of the prior rulemaking, and the public comments, the Service concluded that "codifying a single definition in regulation could impede the Services' ability to fulfill their obligations to designate critical habitat based on the best scientific data available." 87 Fed. Reg. at 37,758. The Service articulated several distinct reasons for its conclusion:

- The text of the definition and the supporting statements in the December 2020 preamble "are in tension with the conservation purposes of the Act because they could inappropriately constrain the Services' ability to designate areas that meet the definition of 'critical habitat.'"
- The "habitat definition rule is not clear and thus does not achieve the ambitious goals of providing transparency and reproducibility of outcome."
- The "lack of clarity and potential confusion extend to how the Services would use, or be required to use, the 'habitat' definition."

In sum, the Service determined "the definition is unhelpful, unnecessary, and improperly and excessively constrains the Services' authority under the statute." *Id.* at 37,759.

A copy of the final rule rescinding the definition of the term "habitat" can be found [HERE](#).