

Endangered Species Act: U.S. Fish & Wildlife Service Proposes Regulatory Definition for "Habitat"



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08/07/2020

The U.S. Fish & Wildlife Service ("Service") proposed on August 5th for the first time a regulatory definition for the term "habitat" as it is used in the Endangered Species Act (ESA) and the various implementing regulations. See 85 Fed. Reg. 47333 (Aug. 5, 2020).

The Service is accepting comments on the proposed definition, and an alternative definition, until September 4, 2020.

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 defined "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). 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 the Service has never adopted a specific definition through regulation. A couple of years ago, however, the U.S. Supreme Court had occasion to inquire into the scope and breadth of a "critical habitat" designation, and stated succinctly that "Section 4(a)(3)(A)(i) [of the ESA] does not authorize the Secretary to designate 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 Wednesday's announcement of the proposed definition.

The Proposal

The Service proposes to add the following definition of habitat to the definitions in the implementing regulations at 50 CFR 424.02:

Habitat. 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.

The Service is also soliciting comment on an alternative definition, which states:

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 Service was careful to note that “[i]n proposing to establish this definition, we do not intend to create a new procedural step that would need to be undertaken prior to designating critical habitat in every case.” 85 Fed. Reg. at 47335. The criteria and process for designating critical habitat will continue to rely, primarily, on the regulatory requirements found in 50 CFR 424.12. The Service also noted that the new proposal applied only prospectively and would not require that previously finalized critical habitat designations be revisited. *Id.*

Comments

The Service is seeking comments on all aspects of the proposal, with specific attention to:

- Whether “depend upon” in the proposed definition sufficiently differentiates areas that could be considered habitat, or whether “use better describes the relationship between a species and habitat.
- Whether either definition is too broad or too narrow or is otherwise proper or improper, and on whether other formulations of a definition of “habitat” would be preferable, including formulations that incorporate various aspects of the two definitions.
- Whether the words “existing attributes” are appropriate to include and whether they warrant further clarification or should be differently or further defined or explained.

A copy of the proposed rule can be found [here](#).