

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



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On Wednesday, December 16, 2020, the U.S. Fish & Wildlife Service (the Service) finalized for the first time a regulatory definition for the term "habitat," as the term is used in the Endangered Species Act (ESA) and the various implementing regulations. *See* 85 Fed. Reg. 81,411 (Dec. 16, 2020). The definition becomes effective on January 15, 2021.

We previously reported on the Service's publication of the proposed definition, 85 Fed. Reg. 47,333 (Aug. 5, 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:

- i. 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
- ii. 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 the Service has never adopted a specific definition through regulation. Recently, however, the U.S. Supreme Court had occasion to inquire into the scope and breadth of a "critical habitat" designation, and the Court 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 proposed definition published in August, and the Service's publication of the final definition on Wednesday.

The Final Definition of "Habitat"

The Service, after reviewing and considering many comments on the proposed alternative definitions, revised and simplified the final definition as follows:

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 (to be *codified at* 50 CFR 424.02).

In response to comments, the Service was careful to note, “the regulatory definition of ‘habitat’ will not be used to create a new procedural step or regulatory process, nor will it result in any new regulatory burdens or landowners or other parties.” 85 Fed. Reg. at 81,414. 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 reiterated that the new proposal applied only prospectively and would not require that previously finalized critical habitat designations be revisited. 85 Fed. Reg. at 81,411.

Changes from the Proposed Rule

Some of the Service’s key changes to the proposed rule included:

- Reducing the definition to a single sentence;
- Adding an introductory phrase (“For the purposes of designating critical habitat only”);
- Replacing the phrase “physical places” with the phrase “abiotic and biotic setting”;
- Including the phrase “resources and conditions”; and
- Replacing the phrase “depend upon to carry out” with the phrase “necessary to support”.

Important Preamble Language

Several commenters stated that “many of the terms used in the [Service’s] proposed and alternative definition were ambiguous, unclear, and undefined” and requested the Service “clearly define the terms that are used in the definition in the final rule.” 85 Fed. Reg. at 81,415. The Service revised the definition for clarity, but elected not define further the individual terms and phrases that comprise the definition of “habitat.” The Service, instead, used the *preamble* to state its intended meaning for, or define, key terms such as: “setting”, “condition”, and “necessary to support.” See, e.g., 85 Fed. Reg. at 81,412–413. The Service’s *preamble* to the final definition is chock full of the Service’s “intent” and its explanations. This language may prove critical in future disputes regarding the Service’s regulatory determinations.

A copy of the final rule can be found [HERE](#).