U.S. Chamber of Commerce

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Re: Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 86 Fed. Reg. 59,353 (Oct. 27, 2021); Docket No. FWS-HQ-ES-2020-0047

Dear Mmes. Fahey and Somma:

The U.S. Chamber of Commerce, American Gas Association, American Road & Transportation Builders Association, Associated General Contractors of America, Interstate Natural Gas Association of America, National Association of Manufacturers, National Cattlemen's Beef Association, National Rural Electric Cooperative Association, and the Public Lands Council ("the Associations") appreciate the opportunity to comment on the U.S. Fish and Wildlife Service's and National Marine Fisheries Service's (collectively the "Services") proposed rule, "Endangered and Threatened Wildlife and Plants: Regulations for Listing Endangered and Threatened Species and Designated Critical Habitat." The proposed rule would rescind the currently effective rule titled "Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat," which defined the term "habitat" for the purposes of making "critical habitat" designations found at 50 C.F.R. § 424.02.

The Associations support the Endangered Species Act's ("Act") goal of protecting species threatened with extinction and the habitat those species depend on. Determining what areas are "habitat" and "critical habitat" for listed species is instrumental to that goal. Defining "habitat" serves the critical objective of ensuring regulatory certainty and consistent application of the Act. The United States is embarking on a much-lauded bipartisan effort to repair, rebuild, and improve our infrastructure. The resources of the Services and the whole of the Federal government will be called upon to efficiently carry out their obligations with regard to project approval and permitting. It is therefore unwise to revoke the current definition. For the reasons described in more detail below, the Associations urge the Services to withdraw the proposal.

1. The Associations Support Wildlife Conservation Efforts and the Endangered Species Act's objectives.

The Endangered Species Act seeks to protect and recover imperiled species and the ecosystems they depend on. The Associations support these objectives and several organizations may have supported initiatives to help improve wildlife conservation. For example, several have supported:

- America's Conservation Enhancement Act of 2020, which reauthorized the North American Wetlands Conservation Act and the associated grant program to conserve wetlands for waterfowl and other birds. Over the last two decades, the program has funded over 3,000 projects totaling $1.83 billion in grants. More than 6,350 private and business partners have contributed another $3.75 billion in matching funds.[1] Almost 30 million acres of bird habitat has been acquired, restored, or enhanced under the program.

- Neotropical Migratory Bird Conservation Act, which provided over $75 million grants to support 628 projects in 36 countries, including Canada and Mexico. These projects have positively affected approximately five million acres of bird habitat and spurred partnerships of an additional $286 million.[2]

- Great American Outdoors Act, which would not only improve our national parks system, but would also help protect migratory birds and other wildlife. Almost $800 million in annual royalties from oil and gas revenues from production in the Gulf of Mexico could be directed to this conservation effort each year.

- Farm Bills that provide incentives to private landowners to create conservation easements and partnership programs to improve millions of acres of wildlife habitat, including that of migratory birds.

The funding and other incentives in these federal programs will help support migratory birds and other wildlife, including threatened and endangered species, through the development and protection of their habitat. These programs also demonstrate the United States' strong commitment to our neighbors concerning wildlife protection. Coupling the funding provided through these conservation programs with the voluntary industry efforts will help minimize and often times avoid impacts to listed species.

The Associations firmly believe that conservation efforts and the business community can thrive at the same through disciplined application of the Act. However, as noted below,

[1] North American Wetlands Conservation Act, Protecting, Restoring, and Enhancing Wetland Habitats for Birds, U.S. Fish and Wildlife Service, https://www.fws.gov/birds/grants/north-american-wetland-conservation-act.php.
2 Neotropical Migratory Bird Conservation Act, Conserving Birds Across the Americas, https://www.fws.gov/birds/grants/neotropical-migratory-bird-conservation-act.php.

balancing, and achieving these objectives requires certainty, adherence to the law, and focused and efficient analyses.

2. Rebuilding our infrastructure requires, among other things, focused ESA analyses.

Thanks to the bipartisan Infrastructure Investment and Jobs Act, the United States will be undertaking a much-needed effort to, among other things, improve access to broadband, provide clean drinking water to millions of families, upgrade our energy grid, and grow our economy. This includes the single largest investment in bridges since construction of the Interstate Highway System and the largest-*ever* single investment in innovation, efficiency, and resiliency. It will require "all hands-on deck" across the federal agencies, as many of these projects will require federal reviews, approvals, and evaluations, or touch federal lands.

Implementing these efforts requires efficient federal reviews focused on compliance with our environmental statutes and goals, while furthering this great effort to improve the economy and the well-being of millions of Americans. Consistent, efficient, and clear environmental evaluations, including Endangered Species Act consultations performed by the Services and critical habitat designations that may have implications for various projects, are essential for major projects enabled by both the government and private sector. The clear, efficient, and timely fulfilment of the Services' duties is needed now more than ever.

Too often, however, delays and associated costs from overly expansive environmental reviews that fail to focus on their statutorily defined objectives result in the cancellation of projects or long delays in their implementation. The United States cannot realize the promise of the Infrastructure Investment and Jobs Act if it cannot efficiently complete its various environmental reviews in reasonable timeframes, including habitat and critical habitat evaluations under the Act.

The Associations are concerned that the proposal, which would revoke the current definition of habitat without any clear replacement or boundaries, will complicate these efforts. It will lengthen review times and waste resources on unnecessarily broad habitat evaluations. Importantly, and as noted further below, it is legally flawed because it is arbitrary and capricious. This will jeopardize both this rule and the certainty of any later analyses performed under it.

A. Proper implementation of the Endangered Species Act requires the clarity and certainty surrounding what constitutes "habitat" that the current definition provides.

Under the Act, upon listing a species as endangered, the Secretary of Interior, acting through the Services, must also designate the "critical habitat" that is "essential to the conservation of the species."[3] The Act does not specify what constitutes a species' "habitat," but all agree it is equal to or broader than what constitutes "critical habitat." Moreover, the Supreme

[3] 16 U.S.C. § 1533(a)(3)(A)(i).

Court clarified in *Weyerhaeuser v. U.S. Fish & Wildlife Service* that an area cannot be "critical habitat," if it is not first habitat for the species in question.[4]

Accordingly, understanding what does and does not constitute habitat is the starting point for any evaluation of "critical habitat." To that end, the current definition of "habitat" instructs that "[f]or 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."[5] It is this definition that the Services now propose to rescind without replacement.

The current definition flows from the plain language, structure, and context of the Act. "Habitat" normally is understood as "the place where a plant or animal species naturally lives and grows" or "the kind of site or region with respect to physical features . . . naturally or normally preferred by a biological species."[6] The Act says that "critical habitat," of which habitat is a subset, means: (1) "the specific areas within the geographic area occupied by the species at the time it is listed . . . on which are found those . . . *physical or biological features essential to the conservation of the species* . . ." and (2) the "specific areas outside the geographical area occupied by the species at the time it is listed" that are "*essential to the conservation of the species*."[7] Both the plain language understanding of "habitat" and the definition of "critical habitat" focus on the physical and biological attributes of an area that form either the reason why the species occupies the area or why it could—in other words, the setting with the "resources and conditions necessary to support" its life processes.

The current definition makes particular sense in context. The sole provision of the Act addressing the Secretary's authority designate "critical habitat" directs the Secretary to "designate any habitat of [a listed] species which is then considered to be critical habitat" concurrently with listing the species (reserving the ability to revisit later).[8] The Secretary must do this with a narrow focus. For example, the designation must focus on only those areas within a habitat that are "essential to the conservation of a species."[9] It must consider only "the best scientific and commercial data" available.[10] It must take into account efforts by others (*i.e.*, state and foreign governments) to protect the species and the habitat within their jurisdictions.[11] It must consider "the economic impact, the impact on national security, and any other relevant impact, of specifying any particular areas as critical habitat."[12] The designation may exclude any area that might constitute critical habitat if the benefits of exclusion outweigh the benefits of designation (and so long as exclusion will not cause extinction).[13] In short, statutory context

[4] *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 139 S. Ct. 361 (2018).
[5] 50 C.F.R. § 424.02.
[6] *See, e.g.*, Webster's Third New Int'l Dictionary (1976).
[7] 16 U.S.C. § 1532(5)(emphasis added)
[8] *Id.*
[9] 16 U.S.C. § 1533(a)(3)(A)(i).
[10] 16 U.S.C. § 1533(b)(1)(A).
[11] *Id.*
[12] 16 U.S.C. § 1533(b)(2).
[13] *Id.*

shows the Services must take great care to narrowly focus on the habitat and critical habitat within it to make only those designations necessary to conserve the species while minimizing the potential negative consequences of designation.

The current definition puts helpful, concrete parameters on the specific features within an area occupied or unoccupied by a listed species that form its habitat and should be evaluated for whether they are essential to conservation. In contrast, the unmoored approach that the Services propose to return to by revoking the definition of habitat relied on fluid, undefined criteria. Prior to the 2020 rule, this caused uncertainty, litigation, and delay without any clear link to better species preservation.

That was in part because it required more case-by-case evaluation of what might or might not be "habitat" by Service staff based on non-binding guidance. Rescinding the definition, particularly without proposing a new one, will lead to longer decision making, uncertainty, increased costs, and will open the door for untailored decisions that are more vulnerable to litigation.

C. The proposed bases for rescinding the definition are misplaced, arbitrary, and capricious.

Contrary to the Services' contention, the current definition of habitat is consistent with the Act's conservation goals. The Services primarily base their contention that the definition conflicts with those goals on the Act's definition of "conservation." "Conservation" includes using "all methods and procedures necessary to bring any endangered or threated species to the point at which the measures," such as "scientific resources management . . . habitat acquisition and maintenance, propagation, life trapping, and transplantation," are "no longer necessary."[14] However, Congress set forth its conservation goals in every provision of the Act, not just that single definition. As noted above, the current definition of habitat flows from the text and context of the Act's language dealing with critical habitat designation. Adhering to the language of the statute cannot be inconsistent with the Act's goals.

The Services also worry that the definition might exclude "areas not currently in an optimal state to support the species" but "could nonetheless be considered 'habitat' and 'critical habitat.'"[15] However, in the context of critical habitat, Congress clearly directed the Services to evaluate the protection of habitat "on which *are* found" the features essential to conservation. Additionally, Supreme Court made it very clear that before an area could be considered critical habitat for a species, it must first, in fact, be that species' habitat.[16] Dropping the current definition in order to give the Services opportunity to evaluate areas that cannot support the species (and are thus not habitat) is contrary to the Act and the Supreme Court's direction.

[14] 86 Fed. Reg. at 59,354 (quoting 16 U.S.C. § 1532(3)).
[15] *Id.*
[16] *Weyerhaeuser,* 139 S. Ct. at 369.

The Services' concerns also are belied by the fact that the Act has other important provisions and programs that promote the conservation and recovery of species, including provisions and programs that promote the restoration and maintenance of areas that are or could be habitat.[17] Maintaining the current regulatory definition of habitat will not in fact impede conservation and recovery, as it facially has no impact on those programs. Returning to an unreasonable broad, vague, and indeed undefined and unbounded conception of habitat is not required by the conservation recovery goals of the Act. Nor is it required by the specific provisions of the Act that promote those goals.

Moreover, contrary to the proposal's suggestion, nothing in the current definition of habitat prevents the Services from considering whether unoccupied habitat meets the Act's criteria for unoccupied critical habitat.[18] The definition focuses on the physical and biological settings "that currently or periodically contain[] the resources and conditions necessary to support one or more life processes of a species."[19] If a setting outside the area currently occupied by a species has the resources and conditions necessary to support the species' life processes and meets the Act's other criteria, the Services may still consider it for unoccupied critical habitat designation.[20]

Nor does anything in the current definition preclude evaluation or application of the best available science. To be clear, the Associations support the use of the best available science. That science absolutely should be used in assessing whether a setting has "the resources and conditions necessary to support one or more life processes of a species."

Finally, the proposal is based on conclusory assessments of the current definition's limitations on the Service's authority, making it arbitrary and capricious. When an agency reverses itself, it "must show that there are good reasons for the new policy."[21] It must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[22] Here, the Services have not provided any concrete examples of how the definition has limited their assessment of habitat or critical habitat. They also have not provided any concrete examples of how the definition has led to analyses that conflict with the Act's requirements or goals. This has deprived stakeholders a meaningful opportunity to comment on the bases for the proposal.[23] Finalizing the rule on the bases provided in the proposal would be arbitrary and capricious and would threaten the viability of any decisions that rely on the poorly founded proposal.

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[17] *See, e.g.*, 16 U.S.C. § 1534 (authorizing federal acquisition of important habitat); *id.* § 1539(a)(2)(governing habitat conservation plans).
[18] 86 Fed. Reg. 59,354.
[19] 50 C.F.R. § 424.02
[20] *Id.;* 16 U.S.C. § 1533(b)(2). The proposal's assertion that language from the preamble to rule promulgating the current definition suggests otherwise is inconsequential. *See* 86 Fed. Reg. at 59,354. The Services can always address this through an additional notice and comment rulemaking regarding the meaning of the current definition.
[21] *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009).
[22] Id. at 515-16.
[23] *See e.g., Asiana Airlines v. FAA*, 133 F.3d 393, 396 (notice and comment proceedings must provide notice and meaningful opportunity to comment on bases for proposal).

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D. Rescinding the rule will cause uncertainty and delay decision making.

Expanding critical habitat evaluations beyond the current definition of habitat without replacing that definition would leave the Services, partner agencies, and project proponents without clear boundaries on the scope of those evaluations. This would lead to unnecessarily expansive evaluations that consider irrelevant factors, reach areas that could never meet the statutory definition of critical habitat, and take longer and cost more than they should. The proposal is particularly arbitrary given the absence of any evidence that the current definition has had any detrimental effect on critical habitat or conservation of listed species. It would be arbitrary and capricious to impose these new burdens on stakeholders.

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For the above reasons, the Associations respectfully urge the Services to withdraw the proposal.

Sincerely,

American Gas Association
American Road & Transportation Builders Association
Associated General Contractors of America
Interstate Natural Gas Association of America
National Association of Manufacturers
National Cattlemen's Beef Association
National Rural Electric Cooperative Association
Public Lands Council
US Chamber of Commerce