

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

[Docket No. FWS–HQ–ES–2020–0047, FF09E23000 FXES1111090FEDR 201; Docket No. 200720-0197]

RIN 1018–BE69; 0648–BJ44

Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat

AGENCIES: U.S. Fish and Wildlife Service, Interior; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the “Services” or “we”), propose to add a definition of “habitat” to our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act).

DATES: We will accept comments from all interested parties until [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Please note that if you are using the Federal eRulemaking Portal (see ADDRESSES below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. In the Search box, enter FWS–HQ–ES–2020–0047, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on “Comment Now!”

(2) *By hard copy*: Submit by U.S. mail to: Public Comments Processing, Attn: FWS–HQ–ES–2020–0047; U.S. Fish & Wildlife Service, MS: PRB(3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see Public Comments below for more information).

FOR FURTHER INFORMATION CONTACT: Gary Frazer, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240, telephone 202/208-4646; or Samuel D. Rauch, III, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427–8403. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS) at 800/877–8339.

SUPPLEMENTARY INFORMATION:

Background

The Secretaries of the Interior and Commerce (the “Secretaries”) share responsibilities for implementing most of the provisions of the Endangered Species Act of 1973, as amended (“Act”; 16 U.S.C. 1531 *et seq.*). Generally, marine and anadromous species are under the jurisdiction of the Secretary of Commerce, and all other species are under the jurisdiction of the Secretary of the Interior. (For ease of reading, we refer to “the Secretary” in this rule, which

could be either the Secretary of the Interior or the Secretary of Commerce.) Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of FWS and by the Secretary of Commerce to the Assistant Administrator for NMFS.

The purposes of the Act are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. 16 U.S.C. 1531(b). Moreover, the Act states that it is the policy of Congress that the Federal Government will seek to conserve threatened and endangered species and use its authorities to further the purposes of the Act. 16 U.S.C. 1531(c)(1).

One of the tools under the Act to conserve species is the designation of critical habitat. The purpose of critical habitat is to identify the areas that are essential to the species' recovery. In section 3(5)(A) of the Act, Congress defined "critical habitat" as:

(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).

Our existing implementing regulations at 50 CFR 424.02 set forth relevant definitions pertaining to listing species under the Act and designating critical habitat.

Proposed Regulatory Revisions

We are proposing a regulatory definition of “habitat,” as that term is used in the context of critical habitat designations under the Act. The Act defines “critical habitat” in Section 3(5)(A), establishing separate criteria depending on whether the relevant area is within or outside of the geographical area occupied by the species at the time of listing, but does not define the broader term “habitat.” *See* 16 U.S.C. 1532(5)(A). Nor have the Services previously adopted a definition of the term “habitat” through regulations or policy; rather, we have traditionally applied the criteria from the definition of “critical habitat” based on the implicit premise that any specific area satisfying that definition was habitat.

However, the Supreme Court recently held that an area must logically be “habitat” in order for that area to meet the narrower category of “critical habitat” as defined in the Act, regardless of whether that area is occupied or unoccupied. *Weyerhaeuser Co. v U.S. FWS*, 139 S. Ct. 361 (2018). The Court stated: “Section 4(a)(3)(A)(i) does not authorize the Secretary to designate [an] area as critical habitat unless it is also habitat for the species.” 139 S. Ct. at 368. Given this holding in the Supreme Court’s opinion in *Weyerhaeuser*, we are proposing to add a regulatory definition of “habitat.” We took an initial step to address the Supreme Court’s decision in *Weyerhaeuser* in our recent revisions to the implementing regulations governing designation of critical habitat (at 50 CFR 424.12). In those revisions, the Services made some modifications to the regulatory requirements that must be met for areas outside the geographical area occupied at the time of listing to be considered “essential for the conservation of the species” (which is the standard that an unoccupied area must meet to be considered “critical habitat”). Because the factual situation at issue before the Supreme Court involved unoccupied areas, it made sense to address that aspect of our regulations first. However, we noted that we were not attempting to define “habitat” in those revisions, but instead were considering

developing such a definition through separate rulemaking. We now undertake that task in order to provide transparency, clarity, and consistency for stakeholders.

Under the text and logic of the statute, the definition of “habitat” must inherently be broader than the statutory definition of “critical habitat.” To give effect to all of section 3(5)(A), the definition of “habitat” we propose is broad enough to include both occupied critical habitat and unoccupied critical habitat, because the statute defines “critical habitat” to include both occupied and unoccupied areas.

Definition of Habitat

We propose to add the following definition of the term “habitat” to § 424.02.

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.

In addition, we have provided, and solicit comment on, an alternative definition of “habitat” as follows:

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.

We solicit comment on these definitions, in particular on 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 its habitat. We also solicit comment on the second sentence of the alternative definition. Though it is similar to the second sentence of the proposed definition, 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. We invite comment on 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 to either of the two definitions, including formulations that incorporate various aspects of these two definitions.

The proposed definition¹ reflects the principle that a species’ habitat is based on its particular ecology. In developing this particular definition of habitat, we reviewed many definitions of habitat from the ecological literature; however, no pre-existing definition was adequate to address the particular regulatory framework that we are implementing. Therefore, we incorporated useful concepts from the literature to the extent appropriate and added concepts based on our decades of expertise so as to define the term “habitat” in a manner that would be sufficiently broad to fully encompass both the occupied and unoccupied prongs of the definition of “critical habitat” in the Act. In particular, the proposed definition is written so as to include unoccupied habitat, whereas many of the definitions in the ecological literature that we reviewed did not appear to consider unoccupied areas. While we have intentionally refrained from using within this proposed regulatory definition of “habitat” terms of art from other definitions in the Act to avoid potential confusion, including the phrase “physical or biological features” from the definition of “critical habitat,” we propose “existing attributes” to include, but not be limited to, such “physical or biological features.” We invite comment on this issue, including whether the

¹ We believe that the following discussion of the proposed definition applies generally to both the main definition and the alternative definition described above. Nonetheless, we invite comment on whether any aspects of this discussion apply more to one definition than to the other definition. We also invite comment on the significance of any such differences.

words “existing attributes” are appropriate to include and whether they warrant further clarification or change or should be differently or further defined or explained.

The Services are responsible for a vast array of species, including freshwater vertebrates and invertebrates; terrestrial plants and animals; and marine fish, marine mammals, turtles, and corals. Because of this diversity, the definition of the term “habitat” must be somewhat generic to accommodate the wide variety of abiotic or biotic attributes species need to carry out their life processes. Habitat contains food, water, cover, or space that individuals of a species depend upon to carry out one or more of their life processes.

Seasonally or intermittently used areas also constitute habitat for various species and may include reproductive habitat, nursery habitat, dispersal habitat, migration habitat, and overwintering habitat. For example, a terrestrial mammal may need a particular space for denning at a certain time of the year separate from areas needed for feeding. We would consider both the seasonally used breeding areas and the feeding areas to be habitat for this species. In other instances, species’ habitat may be variable, both temporally and spatially, such as beach overwash areas, early-successional riparian communities, or riverine sandbars. For example, the sand bars that interior least terns use in a river may develop during particular times of the year correlating to changes in flow rates of a stream or river system. Although we are not able to predict exactly where within the river sand bars will form, we know they will form within that general setting and their precise location will likely change from year to year. In this case, the particular stream reach in which the sand bars are known to periodically form constitutes “habitat” for the tern.

In 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. We expect

that in the vast majority of cases that would be unnecessary, in light of the specific criteria of the statutory definition of “critical habitat” coupled with the changes recently finalized at 50 CFR 424.12. Specifically, we interpret the statutory definition of "critical habitat," as it applies to occupied habitat, to inherently verify that an area meeting that definition is "habitat." By application of the statutory definition, such an area is by definition part of the species' occupied range at the time of listing and contains one or more of the essential physical or biological features. In those fewer cases where unoccupied habitat is at issue, we would consider any questions raised as to whether the area is “habitat” in the context of the new regulatory requirements at § 424.12(b)(2) and document the determination whether the area is habitat. In this way, the proposed regulatory definition of “habitat” would not impose any additional procedural steps or change in how we designate critical habitat, but would instead serve as a regulatory standard to help ensure that unoccupied areas that we designate as critical habitat are “habitat” for the species and are defensible as such. With the addition of the regulatory definition of “habitat,” the process of designating critical habitat will remain efficient by limiting the need to evaluate whether an area is “habitat” to only those cases where genuine questions exist.

In proposing the specific definition in this rule and setting out the accompanying clarifying discussion in this preamble, the Services are proposing prospective standards only. Nothing in this proposed regulation is intended to require that any previously finalized critical habitat designations (i.e., designations that were made final on or before the date on which this rule becomes effective) be reevaluated on the basis of any final revisions to this proposed rule.

Public Comments

We solicit comment on all aspects of this proposal, including whether any other language should be included in or excluded from the final definition to be set forth in our regulations and

whether the main and alternative definitions have (or do not have) implications for the use of the term “habitat” as it appears in other provisions of the Act.

You may submit your comments and materials concerning the proposed rule by one of the methods listed in **ADDRESSES**. Comments must be submitted to <http://www.regulations.gov> before 11:59 p.m. (Eastern Time) on the date specified in **DATES**. We will not consider mailed comments that are not postmarked by the date specified in **DATES**.

We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that

regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This proposed rule is consistent with Executive Order 13563, and in particular with the requirement of retrospective analysis of existing rules, designed “to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.”

Executive Order 13771

This proposed rule is an Executive Order 13771 “other” action.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or his designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certify that, if adopted as proposed, this proposed rule would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking implements applicable Supreme Court case law and revises and clarifies procedures for NMFS and FWS regarding designating critical habitat under the Endangered

Species Act to reflect agency experience and, with minor changes, codifies current agency practices. The proposed changes to these regulations do not alter the reach of designations of critical habitat.

NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that designate critical habitat under the Endangered Species Act. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts from this rule.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.):

(a) On the basis of information contained in the Regulatory Flexibility Act section above, this proposed rule would not “significantly or uniquely” affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this rule would not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the proposed rule would not place additional requirements on any city, county, or other local municipalities.

(b) This proposed rule would not produce a Federal mandate on State, local, or tribal governments or the private sector of \$100 million or greater in any year; that is, this proposed rule is not a “significant regulatory action” under the Unfunded Mandates Reform Act. This proposed rule would impose no obligations on State, local, or tribal governments.

Takings (E.O. 12630)

In accordance with Executive Order 12630, this proposed rule would not have significant takings implications. This proposed rule would not directly affect private property, nor would it

cause a physical or regulatory taking. It would not result in a physical taking because it would not effectively compel a property owner to suffer a physical invasion of property. Further, the proposed rule would not result in a regulatory taking because it would not deny all economically beneficial or productive use of the land or aquatic resources and it would substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this proposed rule would have significant Federalism effects and have determined that a federalism summary impact statement is not required. This proposed rule pertains only to designation of critical habitat under the Endangered Species Act, and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This proposed rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This proposed rule pertains only to designation of critical habitat under the Endangered Species Act.

Government-to-Government Relationship with Tribes

In accordance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” the Department of the Interior’s manual at 512 DM 2, and the Department of Commerce (DOC) Tribal Consultation and Coordination Policy (May 21, 2013), DOC Departmental Administrative Order (DAO) 218–8 (April 2012), and NOAA Administrative

Order (NAO) 218–8 (April 2012), we are considering possible effects of this proposed rule on federally recognized Indian Tribes. The Services have reached a preliminary conclusion that the changes to these implementing regulations are general in nature and do not directly affect specific species or Tribal lands. These regulations clarify the processes for designating critical habitat and directly affect only the Services. With or without these regulatory revisions, the Services would be obligated to continue to designate critical habitat based on the best available data. Therefore, we conclude that these regulations do not have “tribal implications” under Section 1(a) of E.O. 13175, and therefore formal government-to-government consultation is not required by E.O. 13175 and related policies of the Departments of Commerce and Interior. We will continue to collaborate with Tribes on issues related to federally listed species and their habitats and work with them as we implement the provisions of the Act. *See* Joint Secretarial Order 3206 (“American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act”, June 5, 1997).

Paperwork Reduction Act

This proposed rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act. This proposed rule will not impose recordkeeping or reporting requirements on State, local, or Tribal governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We are analyzing this proposed regulation in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation

of the National Environmental Policy Act (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 8), the NOAA Administrative Order 216–6A, and the NOAA Companion Manual (CM), “Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities” (effective January 13, 2017). This rulemaking responds to recent Supreme Court case law.

As a result, we anticipate that the categorical exclusion found at 43 CFR 46.210(i) applies to the proposed regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: “Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.”

NOAA’s NEPA procedures include a similar categorical exclusion for “preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature.” (Categorical Exclusion G7, at CM Appendix E).

We are continuing to consider the extent to which this proposed regulation may have a significant impact on the human environment or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We invite the public to comment on these or any other aspects of NEPA analyses needed for these revisions. We will complete our analysis in accordance with applicable NEPA regulations before finalizing this regulation.

Energy Supply, Distribution or Use (E.O. 13211)

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The proposed revised regulations are not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

If you believe that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible.

Authority

We issue this proposed rule under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 *et seq*).

List of Subjects in 50 CFR Part 424

Administrative practice and procedure, Endangered and threatened species.

/s/ George Wallace,

Assistant Secretary for Fish and Wildlife and Parks,

Department of the Interior.

July 30, 2020

/s/ Chris Oliver,

Assistant Administrator, National Marine Fisheries Service,

National Oceanic and Atmospheric Administration.

July 22, 2020

Proposed Regulation Promulgation

For the reasons set out in the preamble, we hereby propose to amend part 424, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

PART 424—LISTING ENDANGERED AND THREATENED SPECIES AND DESIGNATING CRITICAL HABITAT

1. The authority citation for part 424 continues to read as follows:

AUTHORITY: 16 U.S.C. 1531 *et seq.*

2. Amend § 424.02 by adding a definition for “Habitat” in alphabetical order to read as follows:

§ 424.02 Definitions.

* * * * *

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.

* * * * *