



# MARINE MAMMAL COMMISSION

4 September 2020

Mr. George Wallace  
Assistant Secretary for Fish and Wildlife and Parks  
Department of the Interior

Mr. Chris Oliver  
Assistant Administrator  
National marine Fisheries Service

Attn: FWS–HQ–ES–2020–0047

Dear Messrs. Wallace and Oliver:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the proposed rule (85 Fed. Reg. 47333) published jointly by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the Services) on 5 August 2020 to add a definition of the term “habitat” to their Endangered Species Act regulations (50 C.F.R. § 424.02). The Commission provides the following comments and recommendations based on its review of the proposed rule.

## Background

The proposed rule was prompted by the opinion in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 139 S. Ct. 361 (2018), in which the Supreme Court ruled that, for an area to qualify as “critical habitat,” it must constitute “habitat” for the listed species. That case presented unusual facts in that the designated critical habitat included not just areas currently unoccupied by the species, but also areas in which the species could not survive absent modification to convert it into suitable habitat. Given that many species are listed as endangered or threatened primarily because of habitat loss and corresponding loss or fragmentation of their range and population declines, the Commission hopes that habitat reclamation and conversion remain an integral part of species recovery efforts, when appropriate, and that critical habitat designations will be updated to incorporate new areas as they become suitable habitat.

The proposed rule sets forth and invites comments on two alternative definitions of the term “habitat.” First is the definition being proposed by the Services, which would define habitat as—

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.

Although not being proposed at this time, a possible alternative definition identified by the Services is—

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.

## Discussion

The Services are soliciting comments on particular aspects of these alternative definitions. First is the choice between the phrase “depend upon” in the proposed regulatory definition versus the word “use” in the second alternative. In the Commission’s view, including the phrase “depend upon” adds an unnecessary filter in determining whether an area constitutes habitat. That phrase adds a value judgment that makes the definition needlessly subjective and its application less predictable. In an ecological sense, it should be enough that a species occupies a particular area on some regular basis for it to constitute habitat. The species’ presence indicates “use,” and that should be a sufficient indicator that an area is habitat for the species. As such, the Commission prefers the second alternative in this regard, and recommends that the final rule include the word “use” or “occupy,” rather than the phrase “depend upon.” Further in this regard, a determination of “dependency” is akin to the requirement in the definition of the term “critical habitat” that the area include features “essential” to the conservation of the species. Dependency of the species on a particular area is something best considered when determining whether habitat is critical, not whether it is habitat.

On a related point, the Commission recommends that the proposed requirement that the species use the area “to carry out one or more life processes” be interpreted expansively. Specifically, the preamble to the final rule should explain that the use of habitat by a species, by itself, should be a sufficient indicator that the species is carrying out one or more life processes within that area without need for further identification or elucidation of what those processes are in a particular instance.

As indicated above, the Commission is recommending that the Services adopt a fairly expansive definition of the term habitat. One of the Services must still determine that the area is essential to the conservation of the species and may require special management or protection before it is designated as critical habitat and has any regulatory implications. The primary determination that needs to be made for any occupied habitat is whether the species occurs in the area regularly or frequently enough for that area to be considered habitat. This is where the Services appropriately should use their discretion.<sup>1</sup> For instance, a one-time occurrence of a gray whale off the coast of Israel, or similar highly unusual sightings, should not be sufficient basis for determining that an area constitutes habitat for a species. On the other hand, repeated sightings, such as the

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<sup>1</sup> For rare, cryptic, or poorly studied species in particular, it may not be possible to ascertain at the outset whether unusual sightings represent sufficient use of an area by the species for it to constitute habitat. For example, a one-time sighting may not be enough, whereas rare or infrequent sightings over a longer time span may be indicative of range reoccupation or expansion. In such instances, ongoing monitoring and periodic revisiting of habitat delineations will be important.

occurrence of California sea otters north of San Francisco Bay, would be a sufficient basis, even if the species is not found there reliably or predictably.

The trickier situations are those in which a species does not currently occupy an area, but the area has attributes arguably capable of supporting the species. Clearly, the statute anticipates that such areas may constitute critical habitat and, as observed by the Supreme Court, those areas, although currently unoccupied by the species, can be habitat. Based on the ruling in *Weyerhaeuser*, the crucial question is the timing as to *when* an area is capable of supporting the species. The Court stated clearly that it did not believe that an area currently incapable of supporting the species, and that required modification before it could do so, should be considered habitat. On the other hand, the Court believed that any area that includes attributes currently capable of supporting the species, whether occupied or not, should be considered habitat. Often, such areas are within the historical range of the species and, on that basis, should be considered suitable for the species, or at least suitable at some point in the past.

The two alternative definitions of habitat included in the proposed rule offer slightly different formulations on the timing element. The proposed definition would require that, for an area to constitute habitat, it must include “existing attributes that have the capacity to support individuals of the species.” Under the second definition, which explicitly applies only to areas not currently occupied by the species, the area would constitute habitat if it has the capacity to support individuals of the species, but “only where the necessary attributes to support the species presently exist.” As we interpret both of these possible definitions, they would apply to “current” conditions, which could change over time. For example, currently unoccupied habitat, now incapable of supporting the species could, through restoration efforts, be made habitable. It makes sense from a conservation perspective that such situations not be locked in time, and that habitat expansions be accommodated in the definition.

The Commission is much more concerned about the potential loss of habitat over time and how that would be factored into the definition. Here, we are struck by the statutory definition of critical habitat, which for both occupied and unoccupied habitat is tied to the situation that existed at the time of listing. Applying a similar standard to the definition of habitat, it seems that, at a minimum, any area that constituted habitat at the time of listing should continue to be considered habitat thereafter. The downside of this approach is that a species’ habitat changes naturally over time (e.g., through ecological succession) and that an area that supplied habitat for a species at the time of listing may no longer provide habitat decades later. On the other hand, locking in what constitutes a species’ habitat, either prior to or no later than the time of listing,<sup>2</sup> would provide a disincentive to those who may seek to adversely alter occupiable habitat, in order to make it uninhabitable by the species, and thereby avoid a potential critical habitat designation. From a conservation perspective, the Services should avoid adopting a definition that includes a temporal element that could encourage a property owner or custodian to modify occupiable habitat to render

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<sup>2</sup> The Commission prefers a construction that would look at whether unoccupied habitat included features capable of supporting the species prior to publication of a final listing rule—for example, as of the time when the species is identified as a candidate for listing, a listing petition is received, a determination is made that listing may be warranted, or a proposed listing rule is published. It is at these stages when a land owner or person with control over a species’ habitat would receive notice that listing is being considered and when any subsequent adverse habitat modification should be discouraged.

it unfit or less fit for the species as a strategy to avoid possible designation of the area as critical habitat. Both of the suggested definitions suffer from this problem. The Commission therefore recommends that neither of the proffered definitions be adopted without modifications to address this problem.

What is needed is a new definition that accommodates natural habitat change and shifting use patterns by the species over time, but that does not encourage (or inadvertently facilitate or enable) human-caused changes that would render an area less fit for eventual occupation by the species, particularly if that area is sufficiently important that it merits consideration for designation as critical habitat. Human-caused alterations that occur after a species has been listed should not be a basis to exclude an area from qualifying as habitat. Better yet, to prevent pre-listing alteration of habitat that would make it unable to support the species, what constitutes habitat should be set at some earlier stage in the listing process (see footnote 2).

To address the identified shortcomings with the proposed definition and its alternative, the Commission recommends that the Services adopt a definition of the term “habitat” along the following lines—

The physical places<sup>3</sup> that are occupied by individuals of a species (except for highly unusual occurrences) and are therefore presumptively used by those individuals to carry out one or more life processes. Habitat also includes areas not currently occupied by individuals of the species but that (1) had the capacity to support individuals at the time the Secretary determined that listing the species may be warranted<sup>4</sup>, or (2) through natural or human-induced alteration, subsequently become capable of supporting individuals of the species.

The Commission recognizes that its suggested definition does not address those situations in which an area is suitable for occupation by a species at the time a “may be warranted” finding is issued<sup>5</sup> but subsequently loses, through natural processes, the ability to support the species. However, this is not particularly troubling. Although our definition may be overly broad in this one respect, presumably areas that naturally lose their ability to support the species over time would no longer qualify as critical habitat and would prompt the Service to revisit any earlier designation.

The Commission also recommends that the Services avoid using the word “presently” in whatever definition it adopts. The term has two meanings (without undue delay or at the present time) and therefore creates unnecessary ambiguity. “Currently” would be a better word choice if the intent is to convey the situation that exists “at the present time.”

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<sup>3</sup> The Commission is using the term “physical places” here to track the alternatives being put forward by the Services. We note, however, that using the term “physical” could create some confusion given the separation of physical and biological features elsewhere in section 424.02. As an alternative, we suggest that the Services use the term “geographical area,” which is used elsewhere in the regulatory definitions.

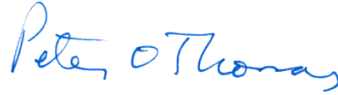
<sup>4</sup> The Commission selected this option because it is about midway in the pre-listing process and because it often is the first point at which the Service takes a substantive position on the merits of a listing initiated by an outside party. Some other tolling event could also be used, such as identification of the species as a candidate for listing, receipt of a listing petition, or publication of a proposed listing rule.

<sup>5</sup> Or some alternative tolling event occurs.

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The Commission appreciates the opportunity to comment on this proposed rule. Please contact me if you would like to discuss any the Commission's comments and recommendations.

Sincerely,



Peter O. Thomas, Ph.D.,  
Executive Director

cc: Gary Frazer, Assistant Director for Endangered Species, Fish and Wildlife Service  
Donna Wieting, Director, Office of Protected Resources, National Marine Fisheries Service