



December 13, 2021

Submitted via www.regulations.gov

Public Comments Processing
Attn: FWS-HQ-ES-2020-0047
U.S. Fish & Wildlife Service
MS: JAO PRB(3W)
5275 Leesburg Pike
Falls Church, VA 22041-3803

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

Dear Sir/Madam:

Western Energy Alliance and the American Exploration & Production Council (the Trades) submit the following comments on two proposed rules from the U.S. Fish & Wildlife Service (FWS) on the regulations defining habitat and establishing critical habitat designations under the Endangered Species Act (ESA). The Trades strongly supported the revisions to these regulations that went into effect in January 2021 and urge FWS to reconsider the proposed rescission of those rules.

The two rules FWS is proposing to rescind were necessary in light of the U.S. Supreme Court's 2018 decision in *Weyerhaeuser Company v. United States Fish and Wildlife Service*, which demonstrated the importance of specifically tailored definitions of both "habitat" and "critical habitat." In *Weyerhaeuser*, the Supreme Court concluded that FWS's critical habitat designation for the Dusky Gopher Frog was overly broad, so the Court vacated a circuit court decision upholding the designation and specifically directed FWS to define those terms more thoroughly. By rescinding the January 2021 rules, FWS will remain unresponsive to that Supreme Court decision and increase regulatory uncertainty to entities that may be affected by ESA listing decisions and subsequent critical habitat designations.

In recent years, there has been a gradual erosion of the standards for listing species and designating critical habitat. In the face of intense litigation pressure, FWS has listed species that do not credibly meet the ESA's definition of threatened or endangered species and designated critical habitat on such massive scales, including areas deemed as historic habitat or unoccupied, that they cannot be credibly construed as necessary to conserve species. The *Weyerhaeuser* decision affirmed that FWS was exceeding its statutory authority with these expansive designations, and required the agency to reconsider the definitions of habitat and critical habitat.

The 2021 final rules provided reasonable and responsible revisions to the listing and critical habitat processes and created a legally defensible framework for avoiding speculative or overly precautionary listings and designations. They further preserved a pathway through which threatened and endangered species and habitats can be protected. If FWS proceeds with rescissions of these two rules, the agency

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will be reintroducing uncertainty around these important concepts and potentially subjecting future decisions to litigation.

The Trades affirm our support of the 2021 final rule defining habitat and urge FWS to reconsider the proposed rescission of the rule. Please do not hesitate to contact us with any questions.

Sincerely,



Tripp Parks
Vice President of Government Affairs
Western Energy Alliance



Wendy Kirchoff
Vice President, Regulatory Policy
American Exploration & Production Council