



September 4, 2020

*Submitted via [www.regulations.gov](http://www.regulations.gov)*

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

**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) support the U.S. Fish & Wildlife Service and National Marine Fisheries Service's (the Services) addition of a definition of "habitat" to the regulations implementing Section 4 of the Endangered Species Act (ESA). We support the Services' proposed definition, which is a reasonable and necessary amendment to the ESA regulations and is consistent with a recent decision by the U.S. Supreme Court, and we urge the Services to finalize this rulemaking expeditiously.

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The Alliance represents independents, the majority of which are small businesses with an average of fourteen employees.

AXPC is a national trade association representing the largest independent oil and natural gas exploration and production companies in the United States. AXPC's members are "independent" in that their operations are limited to the exploration for and production of natural gas and crude oil.

The Trades share and support the Services' interest in clarifying and improving regulations promulgated pursuant to the ESA. Member companies of the Trades own valid and existing federal, state, and private oil and natural gas leases across the nation, both on and offshore. Their ability to explore for, develop, and transport oil and natural gas resources on these and future leases is directly impacted by the listing of species and designation of critical habitat under the ESA.

In recent years certain interest groups have adopted the ESA and the Services' regulations as tools to prevent or unnecessarily hinder responsible resource development in the United States, instead of the Act's intended goal of protecting imperiled species. In the face of intense litigation pressure, the Services have designated critical habitat on such massive scales, including areas deemed as historic or unoccupied habitat, that they cannot be credibly construed as necessary to conserve and protect species.

For the Trades' members, this overreaching approach to listing species and designating critical habitat resulted in reduced access, increased costs, unwarranted or unjustified permit requirements, delays, and a multitude of operational constraints that significantly impact their ability to responsibly explore for, develop and transport oil and natural gas resources. These constraints are in fact the goal for groups that use the ESA not for conservation, but as a highly effective tool to lock up or limit areas from development, and limit, delay, or fully preclude oil and natural gas activities.

The Trades greatly appreciate recent ESA rulemakings intended to limit overreaching and overly burdensome regulations, and believe providing a definition of "habitat" is another reasonable and necessary rule. This is especially true in light of the U.S. Supreme Court's recent decision in *Weyerhaeuser Company v. United States Fish and Wildlife Service*, which demonstrated the importance of narrowly tailored definitions of both habitat and critical habitat. In *Weyerhaeuser*, the Supreme Court concluded that the Fish & Wildlife Service's critical habitat designation for the Dusky Gopher Frog was overly broad, so the Court vacated a circuit court decision upholding the designation.

As noted in the proposed rule, the Services "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," which the Trades strongly supported. Providing a definition of habitat is the logical next step, and it is appropriate for the Services to do so through this rulemaking.

Specific to the proposed and alternative definitions in the rule, the Trades support the use of the term "depend upon" instead of "use" for the description of the relationship between a species and its habitat. We are concerned that "use" is too vague a term that could be interpreted to include areas which are not important or necessary for the long-term survival of a species.

As noted above, the Services are frequently subject to litigation challenging all aspects of ESA implementation, and this includes habitat designations for listed species. The term "use" could potentially include any and all areas that a species has been observed in at any point in time, and there is little doubt that activist groups would file legal challenges that rely on this ambiguity with the goal of forcing overly expansive habitat designations. The term "depend upon" has a much more direct tie to a species' survival, so it is more appropriate for purposes of designating habitat under the ESA.

Regarding the second sentence in the proposed and alternative definitions, the Trades support the language in the primary proposal. The second sentence in the alternative definition is too broad and could once again result in overly expansive habitat designations. *Weyerhaeuser* provides a clear example of the need to define habitat in a way that requires *existing* attributes that support a species. In that litigation, the challenged area that was designated as critical habitat could not support the Dusky Gopher Frog in its existing form, yet the Fish & Wildlife Service included it in the designation because of its potential to support the species if modifications were made in the future. While both definitions are intended to require an area be habitat in its existing form, the proposal is clearer and more succinct in stating so.

The Trades believe that the proposed definition is more effective than the alternative in conveying the Services' intent in adopting this rule. While any definition of this nature is ultimately subject to individual implementation for a given species, the proposal succinctly and unambiguously describes

Page 3 of 3

what qualifies as habitat for a species. We urge the Services to adopt this definition and finalize the rulemaking as expeditiously as possible. The Trades appreciate the opportunity to provide these comments. Please do not hesitate to contact us with any questions.

Sincerely,

Handwritten signature of Tripp Parks in black ink.

Tripp Parks  
Vice President of Government Affairs  
Western Energy Alliance

Handwritten signature of Anne Bradbury in blue ink.

Anne Bradbury  
CEO  
American Exploration & Production Council