

## Advocacy Comments on FWS and NMFS' Proposed Rule to Define "Habitat" in Critical Habitat Designations

On September 4, 2020, the Office of Advocacy submitted comments to the U.S. Department of the Interior's Fish and Wildlife Service (FWS) and the U.S. Department of Commerce's National Marine Fisheries Service (NMFS) ("Services") on their proposed rule to establish a regulatory definition for "habitat" to regulations designating critical habitat.

- On November 27, 2018, the U.S. Supreme Court in *Weyerhaeuser v. U.S. Fish & Wildlife Serv.* ruled that in order to be eligible for critical habitat designation, an area must be "habitat" for the listed species.<sup>1</sup>
- In response to the Court's ruling, on August 5, 2020 the Services issued this proposed rule to add a definition of "habitat" to the regulations implementing Section 4 of the Endangered Species Act for critical habitat designation.<sup>2</sup>
- Advocacy is pleased that the Services are adding a regulatory definition of "habitat" for purposes of designating critical habitat as this adds additional clarity and regulatory certainty to the existing framework. Critical habitat designations can be economically burdensome to small entities and it is therefore prudent that the Services establish a definition of "habitat" that is not overly broad and that does not have unintended negative consequences.
- Advocacy made the following comments and suggestions to the agency:
  1. The Services should clarify that this regulatory definition only applies to Section 4 critical habitat designations.
  2. The Services should consider whether an area is "habitat" before determining whether the area should be designated as occupied or unoccupied critical habitat.
  3. The definition of "habitat" should be limited to areas where the species exists or where specific features necessary for species existence are found.
  4. The Services should consider comments from small entities regarding both the substance of the definitions proposed and suggested implementation measures.

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<sup>1</sup> See *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018). At issue was whether the ESA prohibited designation of private land as unoccupied critical habitat when that land was neither habitat nor essential to species conservation. Petitioner stated that the Service erred in its determination that a site in St. Tammany Parish, LA "Unit 1" be designated as unoccupied critical habitat for the dusky gopher frog. The frog had not been spotted in Unit 1 for decades and the land was now being used as a commercial timber plantation. The Supreme Court unanimously ruled in favor of the Petitioner stating that an area is eligible for designation of critical habitat only if it is habitat for the species.

<sup>2</sup> Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 47333 (August 5, 2020).