

Proposed rule defines “habitat” under the Endangered Species Act

12 August 2020

Executive Summary:

On 5 August 2020, the U.S. Fish and Wildlife Service (FWS) along with the National Marine Fisheries Service (NMFS) published a [proposed rule](#) to define “habitat” for purposes of the Endangered Species Act (ESA). The ESA prohibits federally-authorized or funded activities to destroy or harm the critical habitat of endangered or threatened species. To date, the FWS has not defined the term “habitat” even though the ESA generally requires the identification of “critical habitat” when a species is listed. FWS may exclude land from its characterization of “critical habitat” only when “the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless . . . [it is determined] . . . that the failure to designate such an area as critical habitat will result in the extinction of the species concerned.” 16 U.S.C. § 1533 (b)(2).

The proposed definition is intended to address an issue identified by the Supreme Court in ***Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361 (2018)**. A landowner had sought to invalidate the designation of its real property as “critical habitat” under the ESA. The Court agreed that “critical habitat” could not be ascertained without first determining that it is in fact habitat for the subject species. Once a critical habitat designation is made, federal agencies cannot take action that “result[s] in the destruction or adverse modification of habitat of such species.” 16 U.S.C. § 1536(a)(2). The FWS and NMFS are currently accepting comments on the proposed definition for “habitat.”

What happened in *Weyerhaeuser Co. v. U.S. FWS*?

In ***Weyerhaeuser***, the Supreme Court considered whether the FWS had correctly included 1,544 acres of St. Tammary Parish, Louisiana as “critical habitat” of the dusky gopher frog. The landowner argued successfully that “critical habitat” must exhibit the attributes of “habitat.” The Court held that “[o]nly the ‘habitat’ of the endangered species is eligible for designation as critical habitat.” The Supreme Court found that the lower court erroneously failed to consider habitability when it upheld the FWS’ decision, considering that the frog no longer occupied the disputed acreage, presumably because the habitat’s natural characteristics had been altered over time.

For this reason, the Court vacated the Fifth Circuit’s decision to uphold FWS’ identification of critical habitat, and its failure to exclude the Weyerhaeuser land.

What happened to the dusky gopher frog?

In 2019, the FWS asked the Fifth Circuit if the agency itself could address the landowner’s concerns without resort to judicial action. The Fifth Circuit sent the case back to the district court, which decided that the FWS could re-consider the matter. The FWS and the Weyerhaeuser

plaintiffs settled under a consent decree that vacated the FWS designation of the acreage as “critical habitat” for the dusky gopher frog. For additional information on this case please see our previous publication, [Supreme Court grants a shy frog the chance to shape critical habitat designations](#).

How does the proposed rule define “habitat”?

Following the *Weyerhaeuser* ruling, the Department of the Interior in 2019 announced a [set of revisions](#) to the criteria for designating *critical* habitat, as discussed in our client alert, [ESA Revised Regulations: What to Expect](#). 84 Fed. Reg. 45053. At that time, however, FWS specifically declined to “resolve the full meaning of the term ‘habitat.’” In their [current proposal](#), however, FWS and NMFS request public comment on two alternative definitions of “habitat” to implement section 4 of the ESA:

- 1) 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.
- 2) 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. 85 Fed. Reg. 47333 (Aug. 5, 2020).

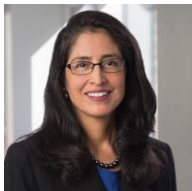
The proposed rule is meant to clarify that an unoccupied area (an area where the species in question does not actually live, but which may be essential for its conservation) may be designated as *critical* habitat when it meets the underlying criteria for “habitat.” However, environmental advocates have already expressed concern that this constraint on the definition of “unoccupied habitat” as “critical” will preclude anticipation of changed circumstances, such as global warming, in meeting the needs of endangered species.

What are the next steps?

Clients are encouraged to offer comment on this rulemaking, which takes an important and unprecedented step to address the ESA's failure to provide a definition of “habitat.” The FWS is accepting public comments through 4 **September 2020**.

Please contact us for more information on submitting a comment.

Contacts



Hilary C. Tompkins
Partner, Washington, D.C.
T +1 202 664 7831
hilary.tompkins@hoganlovells.com



Douglas P. Wheeler
Senior Counsel, Washington, D.C.
T +1 202 637 5556
douglas.wheeler@hoganlovells.com

www.hoganlovells.com

“Hogan Lovells” or the “firm” is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word “partner” is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members. For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

© Hogan Lovells 2020. All rights reserved.