

New Regulation Defines the Term “Habitat” Under the Endangered Species Act

The U.S. Fish and Wildlife Service and the National Marine Fisheries Service on December 16, 2020, jointly adopted a [final regulation](#) providing a one-sentence definition for the term "habitat" under the Endangered Species Act. Under the new regulation, "habitat" is defined as follows: "For the purposes of designating critical habitat only, the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species." As explained in the preamble to the regulation, "abiotic" means derived from nonliving sources such as soil, water, temperature, or physical processes, whereas "biotic" means derived from living sources such as a plant community type or prey species.

The new regulation substantially revises the proposed definition published in [August 2020](#), which was as follows: "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." The stated purpose of the changes in the final regulation is to make the definition clearer, simpler, and more logical.

Background. When a species is listed under the ESA as threatened or endangered, there is a statutory requirement to designate "critical habitat" for the species. The ESA defines the term "critical habitat" as encompassing both of the following:

- The specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection.
- The specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. 16 U.S.C. 1532(5)(A).

However, neither the ESA nor the implementing regulations have until now included a specific definition of the word "habitat."

In *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 139 S. Ct. 361 (2018), the U.S. Supreme Court explained that the ESA does not authorize the designation of an area as "critical habitat" for a species unless the area "is also habitat for the species." Following the Supreme Court's decision, the FWS and NMFS adopted joint regulations in August 2019 that, among other things, established the criteria for including in a critical habitat designation the areas outside the geographical area occupied by the species. See [84 Fed. Reg. 45020](#) (August 27, 2019) and our [prior update](#) on the suite of 2019 ESA regulations.

Under the 2019 regulations, an area unoccupied by the species may be considered for a critical habitat designation only if the occupied areas would be inadequate to ensure the species' conservation. And once this hurdle is cleared, an unoccupied area may be included in a designation only if "there is a reasonable certainty" **both** that the area will contribute to the species' conservation **and** that the area contains one or more of the physical or biological features essential to the species' conservation. 50 C.F.R. § 424.12(b)(2).

The New Regulation. The new definition of "habitat" is designed to further implement the Supreme Court's *Weyerhaeuser* decision. The preamble to the final regulation explains the following components of the new definition:

- It applies only in the context of critical habitat designations and not to other ESA contexts where the word "habitat" is used.
- It "is inclusive of all qualities of an area that can make that area important to the species."
- It includes "ephemeral" habitats—i.e., areas that may be variable temporally or spatially—and is not limited to areas where resources and conditions supporting the species are consistently present.
- It includes areas used by the species during a particular season (e.g., for migratory purposes) or at a particular phase in the species' life cycle (e.g., freshwater spawning habitat versus adult marine habitat).
- It is consistent with the concept that areas that are unoccupied by the species may be included in a critical habitat designation. As the preamble explains, if an unoccupied area "nonetheless provides 'the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species,' it will remain 'habitat' for the species despite the absence of the species."
- Lastly, it "excludes areas that do not currently or periodically contain the requisite resources and conditions, even if such areas could meet this requirement in the future after restoration activities or other changes occur."

Next Steps. The new regulation is slated to take effect on January 15, 2021. However, as with other recent environmental regulations, litigation is likely and it also remains to be seen whether the new definition will be the subject of a regulatory repeal effort by the new administration.

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