



## Administration Rescinds ESA Definition of “Habitat”

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On June 24, 2022, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the “Services”) rescinded their 2020 final rule that established a regulatory definition of “habitat” for the purpose of designating critical habitat under the Endangered Species Act (“ESA”) (“Final Rule”). [87 Fed. Reg. 37,757](#). That 2020 final rule defined “habitat” as “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.” The Final Rule rescinding this definition goes into effect on July 25, 2022. After the rescission is effective, though critical habitat designations may proceed, they will do so under a cloud of uncertainty due to the lack of a regulatory definition for “habitat.”

### Background on Promulgation of “Habitat” Definition

The definition of habitat was promulgated in response to the Supreme Court’s decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018), which held that an area must be “habitat” before it can meet the ESA’s narrower definition of “critical habitat.” Though the ESA defines “critical habitat,” prior to 2020, the term “habitat” had previously been undefined under the ESA and its implementing regulations. Following the *Weyerhaeuser* decision, the Services issued a final rule on December 16, 2020, providing their definition of habitat. [85 Fed. Reg. 81,411](#). The Services stated that they had developed this regulatory definition to provide stakeholders with more transparency, clarity, and consistency as to the Services’ process for designating critical habitat.

During President Biden’s first week in office, he issued [Executive Order 13990](#), which required the Services to review certain agency actions for consistency with the new Administration’s policy objectives. As a result of this review, the Services [identified several ESA regulations](#) promulgated in 2019 and 2020 to be rescinded, revised, or reinstated by the current Administration, including the 2020 final rule implementing a definition of “habitat.”

As part of a broader ESA regulatory plan announced in June 2021, the Services expressed concern that the “habitat” rule was “unclear and confusing and inconsistent with the conservation purposes of the [ESA],” and that the definition and 2020 final rule “could inappropriately constrain the Services’ ability to designate areas that meet the definition of ‘critical habitat’ under the [ESA].” Shortly thereafter, in October 2021, the Services issued a proposed rule to rescind the definition of “habitat.” See VNF’s prior alert on the proposed rule [here](#).

### Rescission of Habitat Definition

The Services offer three primary reasons for rescinding the regulatory definition of “habitat.” First, the Services state that the 2020 definition of “habitat” is inconsistent with the purposes of the ESA because it inappropriately constrains their ability to designate areas that meet the statutory definition of critical habitat. Specifically, the Services find that the 2020 definition prevents the designation of any area that does not “currently or periodically” contain a necessary “resource or condition” for a species even if the area would do so following a disturbance (e.g., fire or flood), in response to climate change, or after reasonable restoration, and the area is deemed essential for the species’ recovery.

Second, the Services claim that the 2020 definition of “habitat” is unclear and relies on overly vague terminology, and therefore does not promote transparency and “reproducibility of outcome.” The Services state that this ambiguity cannot be resolved by revising the current definition, as any definition “would need to be rather generic in order to encompass the wide range of species the Services must manage.”

Finally, the Services state there was uncertainty about how they would use or would be required to use the regulatory definition of habitat, explaining their view that many commenters misinterpreted the intent of the 2020 definition as creating an extra step in the designation of critical habitat (i.e., requiring that habitat first be identified before more narrowly identifying the scope that represents critical habitat).

The Services claim that rescinding the definition of “habitat” will eliminate this confusion and potential implementation of an extra procedural step in designating critical habitat.

### Treatment of “Habitat” After Rescission

In the preamble of the Final Rule, the Services state that “it is more appropriate to evaluate and determine what areas qualify as habitat (and that may as a separate matter be potentially also critical habitat) by considering the best available science for the particular species, the statutory definition of ‘critical habitat,’ our implementing regulations, and existing case law.” In effect, the Services are returning to the pre-*Weyerhaeuser* regime by which future designations as to whether unoccupied areas are habitat for a given species occur “on a case-by-case basis and on the basis of the best scientific data available.” While acknowledging *Weyerhaeuser* required that an area must be “habitat” before it can meet the ESA’s narrower definition of “critical habitat,” the Services rationalize their rescission by asserting that they “intend to designate as critical habitat only areas that are habitat for the given listed species,” and that they do not intend to designate as critical habitat areas that are “wholly unsuitable for the given listed species or that require extreme intervention or modification in order to support the species.” Further, the Services state that they “will ensure that the administrative records for particular designations include an explanation for why any unoccupied areas are habitat for the species.” Specifically, the Services intend to ensure that administrative records for each designation explain the needs of the species and carefully document how each designated area is habitat.

### Potential Implications

Rescission of the 2020 “habitat” definition, without replacement, returns the Services to an approach that the Supreme Court in *Weyerhaeuser* found to be an inadequate foundation for designation of critical habitat. In fact, the Services appear to be claiming broad discretion and flexibility in designating areas of critical habitat. Such discretion and flexibility for federal regulators will bring with it the return of uncertainty, inconsistency, and lack of transparency in critical habitat designations, particularly for unoccupied areas that may be considered for a critical habitat designation. For example, the Final Rule states “[t]hat a specific unoccupied area may remain inaccessible to the listed species, or may require some form of natural recovery or reasonable restoration in order to support the listed species over the long term, does not preclude a finding that the area is presently habitat or that the area is ‘essential for the conservation’ of that species if the record of evidence regarding that species’ needs and the resources available to it, such as limited availability of other habitat, supports such a conclusion at the time of designation.” Without a regulatory definition of habitat, stakeholders will be left with uncertainty about variables like what “reasonable restoration” is necessary for an area to be designated critical habitat. Furthermore, contrary to the Services’ expectation that the Final Rule will reduce the possibility of litigation, the expanded flexibility and discretion to designate areas as unoccupied critical habitat will increase regulatory implications for affected entities, add regulatory uncertainty regarding what areas may qualify for a designation, and result in the requirements for such designations being resolved and clarified through continued litigation.

### More ESA Regulatory Revisions on the Horizon

More broadly, the Final Rule is the first in a series of anticipated actions by this Administration that will significantly revise the ESA regulatory framework. As the Services have noted in the Spring 2022 Unified Agenda, other forthcoming actions include, but are not limited to, those related to:

- Rescission of critical habitat exclusion procedures (expected July 2022).
- Revising regulations for listing species and designating critical habitat (expected October 2022).
- Revising regulations for permits for take of endangered species (expected October 2022).
- Revising regulations governing experimental populations (expected November 2022).
- Reinstating protections for species listed as threatened under ESA (expected January 2023).
- Revising regulations for interagency cooperation (expected February 2023).

### FOR MORE INFORMATION

Van Ness Feldman counsels clients on ESA compliance and, when necessary, litigates to protect clients' interests. If you would like more information about the implementation of the ESA, please contact [Tyson Kade](#), [Joe Nelson](#), or any member of the firm's [Endangered Species & Wildlife Practice](#).

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