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IN FOCUS

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Final Rules Amending ESA Critical Habitat Regulations

In December 2020, the Trump Administration published two final rules amending certain regulations that implement the Endangered Species Act (ESA; 16 U.S.C. §§1531 et seq.) as it relates to *critical habitat*. The first rule defines *habitat*, and the second clarifies when the U.S. Fish and Wildlife Service (FWS) may exclude certain areas from designation as critical habitat. The final rules are effective as of specified dates in January 2021 and apply only to critical habitat designations proposed after the rules take effect. The Biden Administration has indicated it will be reviewing these rules pursuant to Executive Order 13990.

The ESA is implemented by the Secretary of the Interior, through the FWS, and the Secretary of Commerce, through the National Marine Fisheries Service (NMFS) in the National Oceanic and Atmospheric Administration. As defined in the ESA, *the Secretary* refers to either Secretary as appropriate. FWS and NMFS are jointly referred to as *the Services*.

The ESA defines *critical habitat* to include areas that are occupied and unoccupied by the species at the time of listing (16 U.S.C. §1532(5)). To be designated as critical habitat, occupied areas must contain physical or biological features that are essential to the species' conservation and may require special management. Unoccupied areas must be "essential for the conservation of the species." The act does not define *habitat*. Section 4 of the ESA also allows the Secretary to exclude areas from being designated as critical habitat if "the benefits of such exclusion outweigh the benefits of specifying such area" unless such exclusion will result in extinction of the species concerned.

Areas designated as critical habitat are subject to certain statutory restrictions. Federal agencies must ensure that their actions will not adversely affect designated critical habitat (16 U.S.C. §1536). Critical habitat designations affect private parties only when their actions require funding or approval by a federal agency (e.g., federal permits).

This In Focus summarizes the two final rules along with some of the Services' explanations for the changes. Both rules were issued, in part, in response to the Supreme Court's decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service* (139 S. Ct. 361, 2018).

Weyerhaeuser Co. v. U.S. FWS

In *Weyerhaeuser*, the Supreme Court reviewed a decision by the U.S. Court of Appeals for the Fifth Circuit upholding FWS's critical habitat designation for the dusky gopher frog, *Rana sevosa*. First, the Court held that an area must be *habitat* in order to be *critical habitat*. Second, it concluded that courts can review agency decisions not to exclude areas from critical habitat on economic grounds.

FWS's critical habitat designation for the dusky gopher frog included areas occupied and unoccupied by the species. In the rule, FWS identified three features of the occupied areas essential to the frog's conservation: (1) ephemeral ponds for breeding, (2) open-canopy forest with holes and burrows for dwelling, and (3) open-canopy forest connecting breeding and dwelling areas. FWS determined, however, that the occupied area was insufficient to conserve the species, and it therefore considered designating unoccupied areas as critical habitat. The unoccupied area at issue in the case had only one of the essential features—ephemeral ponds—because much of the site was a closed-canopy timber plantation. But FWS concluded that the high-quality ephemeral ponds in the area were a unique resource, and that the other features necessary for occupation could be restored "with reasonable effort." As such, FWS found the area "essential" and designated it as critical habitat.

Private landowners challenged the designation, arguing that the unoccupied area could not be the frog's critical habitat because it lacked two of the three "essential" features. They also argued that FWS inadequately weighed the benefits of designating the area against the economic impact.

The Supreme Court held that in order to be critical habitat, an area must first be habitat for the species. The Court reasoned that the ordinary understanding of adjectives as modifying nouns requires that critical habitat be a subset of habitat. It also examined the statutory context and observed that Section 4 of the ESA (16 U.S.C. §1533) requires the Secretary to "designate any habitat of [a listed] species which is then considered to be critical habitat." Accordingly, the Court reasoned, only areas first determined to be habitat for a species could be designated as critical habitat. Because neither the statute nor the Services' regulations defined habitat, and FWS had not defined habitat for the dusky gopher frog for purposes of the rule, the Court remanded the case to the Fifth Circuit to determine what "habitat" means in the ESA context.

The Supreme Court also addressed excluding areas from a critical habitat designation. The ESA provides that FWS may exclude an area from critical habitat based on economic impacts (16 U.S.C. §1533(b)(2)). In designating critical habitat for the dusky gopher frog, FWS declined to exclude the petitioners' private property on that basis. The Fifth Circuit determined that FWS's decision not to exclude an area from critical habitat was committed to the agency's discretion and not reviewable. The Supreme Court disagreed, concluding that the ESA provided sufficient guidance for a court to review such decisions for abuse of discretion. Accordingly, the Court also remanded the case for the Fifth Circuit to examine whether FWS abused its discretion in declining to exclude the petitioners' land.

On remand, FWS ultimately agreed in a settlement to remove the area from the critical habitat designation. The two final rules respond, in part, to *Weyerhauser* by defining habitat and clarifying FWS's process for analyzing whether to exclude areas from critical habitat designations.

Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat

The Services published a final rule, *Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat* (85 *Federal Register* [*FR*] 81411), on December 16, 2020, effective on January 15, 2021. The rule added a definition of *habitat* to the ESA's implementing regulations at 50 C.F.R. Part 424.

The definition of *habitat* added to 50 C.F.R. §424.02 is

> *Habitat.* For the purposes of designating critical habitat only, habitat is 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.

In the rule, the Services identify the Supreme Court's holding in *Weyerhaeuser* as an impetus to define *habitat*. Specifically, they cite the Court's holding that *critical habitat* must logically be a subset of *habitat* and that the ESA therefore "does not authorize the Secretary to designate the area as *critical* habitat unless it is also *habitat* for the species" (*Weyerhaeuser*, at 368). The Services stated in the proposed rule that defining habitat would "help ensure that unoccupied areas that [they] designate as critical habitat are 'habitat' for the species and are defensible as such." The Services also clarified that this definition of "habitat" applies only "for the purposes of designating critical habitat"; that *setting* is "to have its common meaning, such as the time, place, and circumstances in which something occurs or develops"; and that *life processes* has its "common biological meaning, that is, to include a series of functions … that are essential to sustain a living being."

Regulations for Designating Critical Habitat

FWS published a second final rule, *Regulations for Designating Critical Habitat* (85 *FR* 82376), on December 18, 2020, effective on January 19, 2021. The rule modifies FWS's process for determining when to exclude areas from critical habitat. According to FWS, the intention of these regulations is "to provide greater transparency and certainty for the public and stakeholders."

Prior to the final rule's effective date, 50 C.F.R. §424.19 provided the process for determining exclusions from critical habitat for both Services. Section 4 of the ESA directs the Secretary to designate critical habitat for listed species based on the best scientific data available and after taking into consideration economic, national security, and other relevant impacts of such a designation. As noted, the Services may exclude areas from critical habitat designations if, based on an *exclusion analysis*, the Secretary determines that the benefits of excluding the area outweigh the benefits of specifying the area, unless failing to designate such area will result in the species' extinction. The previously existing regulations, which are to continue to apply to NMFS, required the Services to publish a draft economic analysis of the designation for public comment and to consider economic, national security, and other relevant impacts of the designation, at a scale the Services consider appropriate, before finalizing the designation. In deciding whether to exclude any area from a critical habitat designation, the regulations allowed the Services to assign the weight given to any benefits of excluding or including the area. NMFS is to continue to use the previously existing regulations at 50 C.F.R. §424.19.

The new final rule applies to critical habitat designations proposed by FWS. Those new regulations, codified at 50 C.F.R. §17.90, generally carry over the provisions of 50 C.F.R. §424.19 but provide examples of factors FWS is to consider relevant for "economic impacts" and "other relevant impacts" and specify when FWS is to conduct an exclusion analysis. The final rule notes that under the ESA, FWS generally has discretion whether to conduct an exclusion analysis of an area. But the final rule limits that discretion by requiring FWS to conduct an exclusion analysis when a proponent for excluding a particular area provides credible and meaningful information about the economic or other impacts of designating the area.

FWS's new regulations also outline principles for the Secretary to consider when weighing the benefits of including or excluding particular areas as critical habitat. For example, for areas outside of FWS's expertise, such as nonbiological or national security impacts, the regulations direct the Secretary to give weight to information from experts and firsthand sources. The regulations also establish conditions for considering the exclusion of areas that have conservation plans, agreements, or partnerships authorized under Section 10 of the ESA (16 U.S.C. §1539) for the species in question. Information provided by outside proponents is to be evaluated on a "case-by-case basis," and in order for information to be credible, it must be "factual information" documenting "a meaningful impact" that supports excluding an area from critical habitat designation.

The new regulations *require* FWS to exclude an area from critical habitat designation when it concludes that the benefits of exclusion outweigh the benefits of designating the area as critical habitat, unless failure to designate that area will result in the species' extinction. Some commenters noted that requiring the Secretary to exclude areas from critical habitat upon a favorable exclusion analysis contradicts the purpose of the act. FWS responded by stating that "the regulation constitutes the Secretary's decision on how to exercise his discretion." The existing regulations, which still apply to NMFS, allowed the Services "discretion to exclude any particular area from the critical habitat upon" such a determination.

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