

Public Comments Processing
Attn: FWS–HQ–ES–2020–0047
U.S. Fish & Wildlife Service
MS: PRB(3W)
5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: Rulemaking FWS–HQ–ES–2020–0047, proposed definition of “habitat”

September 4, 2020

Dear Fish and Wildlife Service (FWS) and National Oceanic and Atmospheric Administration (NOAA):

Please abandon this unlawful rulemaking.

When we say “existing habitat” in our comment we mean the concept expressed in both definitions that the habitat has to currently exist, i.e. “areas with existing attributes that have the capacity to support individuals of the species” from your first proposed definition and “where the necessary attributes to support the species presently exist” from your second proposed definition.

Either “habitat” definition exceeds the Services’ powers under the Endangered Species Act (ESA or Act) because the idea of “existing attributes” undermines the statute’s purpose, policy, and mandates.

Congress did not intend federal agencies to define “habitat” so arbitrarily narrowly. In the findings and declaration of purpose and policy, Congress recognized that economic growth and development contributes to extinction. 16 U.S.C § 1531(a)(1). Development begets habitat loss and fragmentation. The Endangered Species Act’s (ESA’s) express purpose is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “to provide a program for the conservation of such endangered species and threatened species.” 16 USC §1531(b). Congress expressed its explicit policy mandating federal agencies to conserve species. *See* 16 USC §1531(c). And Congress defined “conserve”:

to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to...habitat acquisition and maintenance....

16 USC §1532(3). When one “acquires” something, one obtains it. Obtaining lost habitat can include allowing lost habitat to recover or to restore it and protect it so it can once again support the species; or, the larger “included, but are not limited to” list could be reasonably understood to include the recovery or restoration of lost or degraded habitat.

Additionally, “critical habitat” is reasonably interpreted to be broader than merely existing habitat. It is “specific areas outside the geographical area occupied by the species at the time it is

listed...upon a determination by the Secretary that such areas are essential for the conservation of the species.” 16 USC 1532(5)(A)(ii). A place where a governing ecosystem can provide a natural environment to a species includes degraded or lost habitat that could be acquired.

Defining habitat as what currently exists excludes lost and degraded habitat that can potentially recover or be restored. And because this definition would undermine Congress’s policy, purpose, and mandate to federal agencies by narrowing the toolbox for conserving species, promulgating either definition would unlawfully exceed your authority.

These definitions entirely fail to consider habitat loss.

Either habitat definition entirely fails to consider an important aspect of why species get listed and eliminates the designation of critical habitat as an important strategy to recovering them. A species may get listed as a result of several factors. 16 USC § 1533(a). One of these factors is the “present or threatened destruction, modification, or curtailment of its habitat or range.” 16 USC 1533. For example, present and continued threats from habitat degradation or destruction are exactly the factors that lead to the Service listing the following species, all found in Idaho.

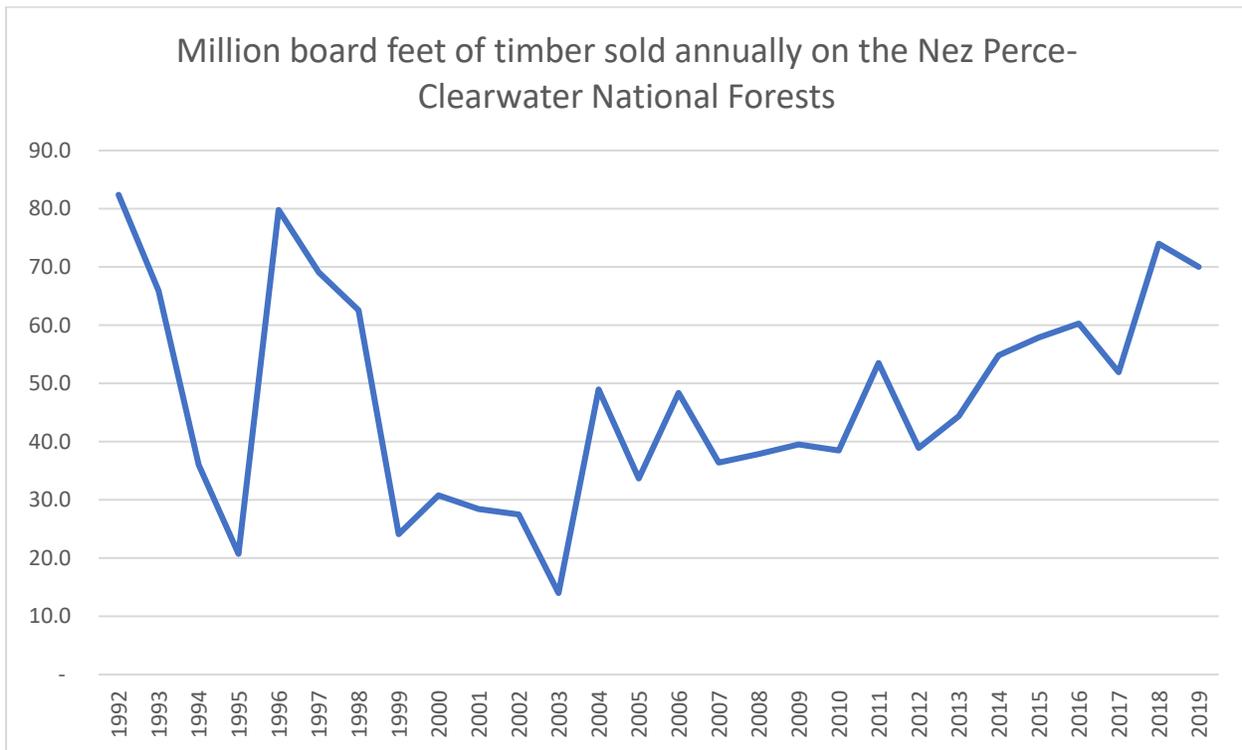
- * Bull trout: “land and water management activities...degrade and continue to threaten bull trout...includ[ing] dams, forest management practices, livestock grazing, agriculture and agriculture diversions, roads, and mining.” 63 Fed. Reg. 31647-31674, 31657 (June 10, 1998) (rule listing bull trout)
- * Lynx: “Factors affecting lynx habitat include human alteration of the distribution and abundance, species composition, successional stages, and connectivity of forests, and the resulting changes in the forest’s capacity to sustain lynx populations. People change forests through timber harvest, fire suppression and conversion of forest lands to agriculture. Forest fragmentation may eventually become severe enough to isolate habitat into small patches, thereby reducing the viability of wildlife that are dependent on larger areas of forest habitat (Litvaitis and Harrison 1989).” 65 Fed. Reg. 16052-16086, 16071 (Mar. 24, 2000) (rule listing lynx).
- * Grizzly bear: “The range of the grizzly bear, which at one time was much of the western United States, is now confined to isolated regions in Montana, Idaho, and Wyoming...Land use practices, including livestock grazing, timbering and trail construction in areas where these bears still occur have resulted in the building of numerous access roads and trails into areas which were formally inaccessible. This has resulted in making the bears more accessible to legal hunters, illegal poachers, human-bear conflicts, and livestock-bear conflicts. 40 Fed. Reg. 5-7, at 5-6 (Jan. 2, 1975) (rule listing grizzly bear).

These species have all been listed, in part, because their habitat has been degraded or lost. Because lost habitat leads to listing, attaining more areas that could naturally support these species is likely necessary to bring population levels to where FWS and NOAA could delist a species. Defining “habitat” as only existing habitat arbitrarily excludes areas that could support a

species with ecological recovery or restoration, and thus will likely prevent a species' population numbers from recovering.

We illustrate the problem with these definition proposals using a hypothetical. The hypothetical is that the FWS lists the Northern Rockies fisher; all other statements about species needs, logging, and habitat loss are based in fact. Fisher is a species that needs dense overhead cover, large trees (especially trees with heartwood decay and cavity development), and downed woody debris. That is, fisher need mature and old-growth forests.¹ These animals are native to the Nez Perce and Clearwater National Forests of north-central Idaho.

Despite these species' status as a Forest Service Region 1 sensitive species, the Forest Service on the Nez Perce and Clearwater National Forests has increased the logging it has approved, logging more annually in four of the last five years than any other year in the last twenty. In short, these logging levels are returning to more unsustainable 1990s logging levels. Friends of the Clearwater knows from project-level environmental analyses that a portion of the below-charted logging was fisher habitat and that logging eliminated that habitat.



¹ See Aubry et al. 2013. Meta-Analysis of Habitat Selection by Fishers at Resting Sites in the Pacific Coastal Region. *The J. of Wildlife Management* 77(5): 965-974; Sauder and Rachlow 2014. Both forest composition and configuration influence landscape-scale habitat selection by fishers (*Pekania pennanti*) in mixed conifer forests of the Northern Rocky Mountains. *Forest Ecology and Management* 314: 75-84; Raley et al. 2012. Habitat Ecology of Fishers in Western North America, in *Biology and conservation of Martens, Sables, and Fishers* (Eds. Aubry et al. Comstock Publishing Associates).

It takes about a century for a logged forest to regain habitat attributes necessary for fisher, so even fisher habitat logged in the 1990s has very likely has not yet recovered. Hypothetically say habitat loss contributed to listing the fisher as endangered. Under both proposed definitions, any former habitat logged in the above chart would not be existing habitat. And if the FWS does not consider those areas habitat, the FWS could not count these recovering areas as critical habitat, even though they would be “specific areas outside the geographical area occupied by the species at the time it is listed” and even though recovering this lost habitat to allow the fisher to move back into it might be “essential for the conservation of the species.” 16 USC 1532(5)(A)(ii).

Between this definition of habitat and your new regulation of critical habitat, the FWS and NOAA would impose extinction sentences on species in trouble.

Comment on “use” versus “depend upon”

Although we strongly encourage you to abandon this rulemaking effort because it likely exceeds your authority and doesn’t consider various aspects of recovering species facing extinction, we will offer a comment on the terms “use” v. “depend upon.” These terms describe the relationship between a species and its habitat. You should say “use or depend upon,” and not choose one over the other, because each word offers different things and a disjunctive will do the most for listed species.

Global warming is changing species’ ranges with changing temperatures, seasons, and natural events. This creates situations where the Services need flexibility to consider attributes that a neighboring area might provide to a species. Cold water is a good example. Listed species such as steelhead has critical habitat in the Clearwater Basin in Idaho and need cool water to spawn. Global warming is increasing the temperatures of some stretches of stream. But, the headwaters of streams in this region still provide cool water because the streams originate at a higher altitude. Thus, even if the headwaters are not critical habitat where the steelhead spawn, preserving the headwaters of the stream is important to mitigating rising stream temperatures and the timing of runoff for streams within the steelhead’s range.²

In sum, defining habitat as you’ve proposed is inappropriate because of its arbitrary narrowness that cuts out important tools necessary to achieve Congress’s purpose, policy, and mandate of the Endangered Species Act.

Withdraw this rulemaking.

Sincerely,

² See generally Wade et al. (2013), *Steelhead vulnerability to climate change in the Pacific Northwest*, J. of Applied Ecology Issue 50, pp. 1093-1104.

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P.s. On the day this letter was finalized, an early notice went out on the Federal Register email system that the US Fish and Wildlife Service (USFWS) is proposing to amend its regulation on how it designates critical habitat. The early email alert states that this notice of proposed rulemaking will be in the September 8, 2020 Federal Register, so the comment period for how USFWS designates critical habitat will start on the first business day after the comment period for the proposed regulatory definition of “habitat” closes. One day was no time to review the impending Federal Register publication before the deadline for this comment period. Habitat and critical habitat are related. This would be a third separate rulemaking that works to weaken Endangered Species Act (ESA) implementation. Issuing three separate rulemaking periods on the ESA will have cumulative effects on listed species and species that become listed. It also constructively frustrates the public from providing meaningful comments on the interplay and cumulative environmental impacts of these three separate rulemaking efforts. Please withdraw this proposed rule, withdraw the rule you are planning to publish on September 8, 2020, and take a hard look at the environmental impacts of these proposed rules on species protected by the ESA and sensitive species that may become listed, especially in light of the regulations you have already amended. The National Environmental Policy Act requires at least that.