

Comments of the Attorneys General of California, Maryland, Massachusetts, Connecticut, Illinois, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, and City of New York

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Via electronic submission to <http://www.regulations.gov>

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Public Comments Processing
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Re: Comments on the Proposed Rule: Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, FWS-HQ-ES-2020-0047, 85 Fed. Reg. 47,333 (Aug. 5, 2020)

Dear Mr. Frazer:

The undersigned Attorneys General of California, Maryland, Massachusetts, Connecticut, Illinois, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, and the City of New York (hereinafter, “the States and Cities”) respectfully submit these comments on the proposed rule by the U.S. Fish & Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) (collectively, “the Services”) entitled, “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat,” 85 Fed. Reg. 47,333 (Aug. 5, 2020) (hereinafter, the “Proposed Rule”). The Proposed Rule would add a new, restrictive definition of “habitat” to the Services’ regulations for making critical habitat designations under Section 4 of the federal Endangered Species Act of 1973, 16 U.S.C. §§ 1531 *et seq.* (the “Act” or “ESA”). Both the proposed definition and the Services’ alternative definition are contrary to the plain language and broad conservation purposes of the ESA, lack any reasoned basis, and would arbitrarily limit the Services’ ability to recover imperiled species by reducing—in some cases potentially severely—the amount and type of critical habitat that can be protected under the Act. The Services also failed to comply with the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (“APA”), and the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (“NEPA”), in issuing the Proposed Rule. There are at least three major legal flaws with the Services’ proposal.

First, the Proposed Rule’s definition of “habitat” is contrary to the ESA’s definition of “critical habitat” and overriding conservation (i.e., species recovery) purpose because it requires species to *currently* “depend upon” certain areas, and further requires that such areas contain “*existing* attributes” to support a species, limitations that undermine the Act’s substantive mandates and appear nowhere in the text of statute. This language appears designed to restrict the Services’ ability to designate currently unoccupied critical habitat that is essential to species recovery and, in some cases, their very survival. This includes, for example, currently marginal or secondary habitat that, through reasonable restoration efforts, would allow a species to expand into portions of its former range, or areas into which a species may foreseeably need to move in response to new threats posed by climate change. Indeed, these types of scenarios are likely to become even more common in the foreseeable future with increasing human-caused impacts on the survival and recovery of imperiled species.

Second, the Proposed Rule is arbitrary and capricious under the APA because the Services have failed to provide any reasoned explanation for this definition, other than that it is supposedly called for by the U.S. Supreme Court’s recent decision in *Weyerhaeuser Co. v U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018). Yet nowhere in that decision did the U.S. Supreme Court attempt to define “habitat” or encourage the Services to promulgate such a restrictive definition to implement the Act. To the contrary, the Court took no issue with the Services’ longstanding species-specific approach for defining “habitat,” tailored to species’ individual life histories, despite extensive briefing on the topic.

Finally, the Services’ suggestion that the Proposed Rule is subject to a categorical exclusion under NEPA, or that the Services might complete NEPA review at a later date, is contrary to that statute because the proposal is a major substantive change in the law which is likely to cause significant environmental effects on imperiled species and their habitat.

The States and Cities have significant interests in the conservation of the natural heritage within their borders and are uniquely qualified to evaluate, and demand withdrawal of, the Services’ Proposed Rule. Indeed, in many places, these wildlife resources are held in trust by the States and Cities for the benefit of their people. Within the States’ and Cities’ boundaries, there are hundreds of species listed as endangered or threatened under the ESA, as well as millions of acres of federal public lands, and numerous federal facilities and infrastructure projects that are subject to the ESA’s section 7 consultation requirements.

Accordingly, the ESA specifically directs the Services to “cooperate to the maximum extent practicable with the States” in implementing the Act and also gives states a special seat at the table in ensuring the faithful and fully informed implementation of the Act’s species-conservation mandates. 16 U.S.C. § 1535(a). Moreover, the States and Cities seeking to protect their natural resources would need to devote significant resources and institutional capacity to make up for the Services’ failure to properly implement the purposes of the ESA. And, as the U.S. Supreme Court has recognized, states are entitled to “special solicitude” in seeking to remedy environmental harms within their territories. *See Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 519-22 (2007).

For these reasons, the States and Cities urge the Services to withdraw this Proposed Rule and instead fulfill their longstanding statutory obligations to protect and ensure the recovery of endangered and threatened species and their habitat.

BACKGROUND

I. The Endangered Species Act.

Congress enacted the ESA nearly forty-five years ago in a bipartisan effort “to halt and reverse the trend toward species extinction, whatever the cost.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978); see 16 U.S.C. § 1531. The ESA accordingly enshrines a national policy of “institutionalized caution” in recognition of the “overriding need to devote whatever effort and resources [are] necessary to avoid further diminution of national and worldwide wildlife resources.” *Hill*, 437 U.S. at 177, 194 (internal quotation omitted). “[T]he language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.” *Id.* at 174; see also *id.* at 194. That pervasive goal “is reflected not only in the stated policies of the Act, but in literally every section of the statute.” *Id.* at 184; see also *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 698-99 (1995) (describing broad purposes of Act).

The Act declares that endangered and threatened species of “fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. § 1531(a)(3). The fundamental purposes of the ESA are to “provide a means whereby the ecosystems upon which endangered ... and threatened species depend may be conserved [and] to provide a program for [their] conservation.” *Id.* § 1531(b). The Act defines “conservation” broadly as “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.” *Id.* § 1532(3) (emphasis added); see *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (“[T]he ESA was enacted not merely to forestall the extinction of species ... but to allow a species to recover to the point where it may be delisted.”); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001) (“[T]he objective of the ESA is to enable listed species not merely to survive, but to recover from their endangered or threatened status.”). Further, “every agency of government is committed to see that those purposes are carried out.” *Hill*, 437 U.S. at 184 (quoting 119 Cong. Rec. 42913 (1973)) (emphasis in original); see also 16 U.S.C. §§ 1531(c), 1536(a)(1).

As particularly relevant here, Section 4 of the ESA, 16 U.S.C. § 1533, prescribes the process for the Services to list a species as “endangered” or “threatened” within the meaning of the statute, and to designate “critical habitat” for each such species. While the ESA does not define “habitat,” the Services’ long-held position has been that habitat is best determined on a species-by-species basis in order to account for the divergent types of life histories, behavior patterns, and survival strategies of myriad listed species. See *Weyerhaeuser*, Brief for the Federal Respondents, 2018 WL 3238924, **25-29. The ESA, however, does define “critical habitat” as:

- (i) the specific areas *within* the geographical area occupied by the species, at the time it is listed in accordance with the [ESA], on which are found those physical or biological features (I) *essential to the conservation of the species* and (II) which may require special management considerations or protection; and
- (ii) 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 U.S.C. § 1532(5)(A) (emphases added).

A critical habitat designation “places conditions on the Federal Government’s authority to effect any physical changes to the designated area, whether through activities of its own or by facilitating private development,” through issuance of federal permits and licenses. *Weyerhaeuser*, 139 S. Ct. at 365-66. In particular, Section 7 of the ESA, 16 U.S.C. § 1536, requires all federal agencies to “insure” that any action they propose to authorize, fund, or carry out “is not likely to jeopardize the continued existence” of any endangered or threatened species or “result in the destruction or adverse modification of” any designated critical habitat, *id.* § 1536(a)(2). If a federal agency action “may affect” any listed species or critical habitat, the federal action agency must initiate consultation with the relevant Service. *See id.* §§ 1536(b)(3), (c)(1).

If the federal action agency or the appropriate Service determines that the action is “likely to adversely affect” a listed species and/or designated critical habitat, the Service must prepare a biological opinion on the effects of the action on the species and/or critical habitat. *Id.* § 1536(b)(3)(A). The Services’ biological opinion must determine whether the action is likely to jeopardize the continued existence of any listed species or adversely modify or destroy any designated critical habitat. *Id.* If the Services find jeopardy or adverse modification, the biological opinion must include “reasonable and prudent alternatives” to the agency action that “can be taken by the federal agency or applicant in implementing” the action and that the Secretary believes would avoid jeopardy or adverse modification. *Id.* Finally, the biological opinion must include a written statement (referred to as an “incidental take statement”) specifying the impacts of any incidental take on the species, any “reasonable and prudent measures that the [Services] consider [] necessary or appropriate to minimize such impact,” and the “terms and conditions” that the agency must comply with in implementing those measures. *Id.* § 1536(b)(4).

II. The Proposed Rule.

The Services’ Proposed Rule would add a new, narrow definition of “habitat” for purposes of critical habitat designations under Section 4 of the Act, 16 U.S.C. § 1533. 85 Fed. Reg. at 47,333. In particular, this proposal would define “habitat” as:

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.

Id. at 47,334 (emphases added). The Services also request comment on an alternative definition that would define “habitat” as:

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*.

Id. (emphases added).

While the Services note that the ESA and its implementing regulations have never previously included a definition of “habitat,” they claim that this proposal is necessary to respond to the U.S. Supreme Court’s recent decision in *Weyerhaeuser*. 85 Fed. Reg. at 47,334. In particular, the Services cite the Supreme Court’s holding that “Section 4(a)(3)(A)(i) does not authorize the Secretary to designate [an] area as critical habitat unless it is also habitat for the species.” 139 S. Ct. at 368.

The Services further “anticipate” that adding this definition of “habitat” will be subject to a categorical exclusion under of the Department of Interior’s NEPA implementing regulations, 43 C.F.R. § 46.210(i), and NMFS’ similar NEPA procedures. 85 Fed. Reg. at 47,336 (citing NOAA Companion Manual, “Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities” (effective Jan. 13, 2017), Appendix E, Categorical Exclusion G7). The Department of Interior regulation provides an exemption for “[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” 43 C.F.R. § 46.210(i). NMFS’ NEPA procedures provide a similar exclusion for “preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature.” 85 Fed. Reg. at 47,336. The Services also state, however, that they are “continuing to consider the extent to which this proposed regulation may have a significant impact on the human environment,” without indicating when and how a final decision will be made. *Id.*

COMMENTS ON THE PROPOSED RULE

Under the APA, courts will set aside an agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A), (C). An agency action is arbitrary and capricious where the agency: (i) has relied on factors which Congress has not intended it to consider; (ii) entirely failed to consider an important aspect of the problem; (iii) offered an explanation for its decision that runs counter to the evidence before the agency; or (iv) offered an explanation so implausible that it could not be ascribed to a difference

of view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”). In addition, an agency does not have authority to adopt a regulation that is “manifestly contrary to the statute.” *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Further, where an agency changes its prior approach, it “must display awareness that it is changing position” and “show that there are good reasons for the new policy,” including providing “a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Fed. Comm'ns Comm'n v. Fox Television Stations, Inc.* (“*FCC v. Fox*”), 556 U.S. 502, 515-16 (2009).

Here, for the reasons explained below, the Services’ proposed definition of “habitat” is contrary to the plain language and conservation purposes of the ESA, is arbitrary and capricious and in violation of the APA, and fails to consider the significant environmental impacts of this action in violation of NEPA.

I. The Services’ Proposed Definition of “Habitat” Is Contrary to the Plain Language and Conservation Purposes of the ESA.

A. The Plain Language and Conservation Purposes of the ESA Demand that “Habitat” Be Broadly Interpreted.

The Proposed Rule is contrary to the plain language and conservation purposes of the ESA, as set forth by Congress and interpreted by the courts and the Services themselves. In particular, the Services’ definition of “habitat” conflicts with the statutory definition of “critical habitat” in Section 3(5)(A), 16 U.S.C. § 1532(5)(A), which requires that critical habitat be sufficient to provide for the “conservation” (*i.e.*, recovery) of listed species. *See Gifford Pinchot Task Force*, 378 F.3d at 1070 (“[T]he purpose of establishing ‘critical habitat’ is for the government to carve out territory that is not only necessary for the species’ survival but also essential for the species’ recovery”). This statutory definition specifically authorizes the designation of unoccupied critical habitat that may be essential for a species’ survival and recovery. *See* 16 U.S.C. § 1532(5)(A)(ii). Since “critical habitat” is, by definition, a subset of habitat,” *see Weyerhaeuser*, 139 S. Ct. at 368, any proposed definition of ‘habitat’ must therefore be broader – not more restrictive – than “critical habitat.” And the proposed definition conflicts with the fundamental, overarching purposes of the ESA to conserve endangered and threatened species and their habitat. 16 U.S.C. §§ 1531(b), (c), 1536(a)(1).

Courts have interpreted the ESA’s definition of “critical habitat” broadly, consistent with the ESA’s plain text and the fundamental purposes of critical habitat designation to provide for listed species’ eventual recovery.¹ As the Fifth Circuit has explained:

The ESA defines “critical habitat” as areas which are “essential to the conservation” of listed species. “Conservation” is a much broader concept than

¹ Nothing in the U.S. Supreme Court’s decision in *Weyerhaeuser*, as discussed below, overrules these numerous holdings and legal interpretations of the ESA.

mere survival. The ESA's definition of "conservation" speaks to the *recovery* of a threatened or endangered species.

Sierra Club, 245 F.3d at 441-42 (*citing* 16 U.S.C. § 1532(5)(A)) (emphasis added). The Ninth Circuit also has recognized that "it is logical and inevitable that a species requires more critical habitat for recovery than is necessary for the species' survival," which necessarily must include potentially suitable habitat areas that the species formerly occupied or may potentially occupy in the future. *Gifford Pinchot Task Force*, 378 F.3d at 1069.

Thus, for example, in *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit upheld a broad interpretation of the ESA's definition of "occupied" critical habitat as not limited strictly to those areas where a species currently "resides," but also as including areas intermittently used by the species for foraging and other activities. *Id.* at 1164-67. The court also held that the definition of critical habitat must be sufficiently broad to account for vastly different life histories of various types of listed species, including wide-ranging, highly mobile, migratory, territorial, non-territorial, and highly dispersed species. *Id.* at 1165-66; *accord Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 557-61 (9th Cir. 2016) (critical habitat may properly include areas beyond just denning sites, such as feeding areas, migration corridors, and resting sites).

Likewise, in *Home Builders Association of Northern Calif. v. U.S. Fish and Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), the Ninth Circuit held that habitat need not contain all "primary constituent elements" in order to be designated as either occupied or unoccupied critical habitat. *Id.* at 990. This is particularly important where the precise location of the habitat may change and be somewhat unpredictable from year to year based on rainfall and other circumstances, as was the situation with the vernal pool complexes at issue in that case. *Id.*

The case law concerning the authorized extent of "unoccupied" critical habitat designations further confirms the broad scope of "critical habitat" that must be designated under the ESA to ensure species recovery. *See Arizona Cattle Growers' Ass'n*, 606 F.3d at 1167 (unoccupied critical habitat includes those areas "suitable for *future* occupancy") (emphasis added); *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994-95 (9th Cir. 2015) (upholding designation of unoccupied critical habitat as essential for the conservation of the Santa Ana sucker fish because such habitat contained feeder streams that were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River"); *New Mexico Farm and Livestock Bureau v. U.S. Dept. of Interior*, 952 F.3d 1216, 1232 (10th Cir. 2020) (critical habitat that is "secondary" and "marginal" nevertheless may be considered critical habitat "essential for the conservation of the species").

Indeed, the Services themselves have repeatedly recognized that habitat restoration is a key component of endangered and threatened species recovery and that such recovery requires *both* protection and restoration of listed species' habitat. For example, the FWS has stated that the "[d]estruction, degradation, and fragmentation of habitat is the driving force behind today's

decline in species and biodiversity.”² NMFS similarly has recognized that “[o]ver the past century, habitat loss has been the most common cause of extinction for freshwater fish in the United States. Many saltwater fish are also in decline due to habitat degradation.”³

FWS has several programs to restore species habitat, including its “Partners for Fish and Wildlife Program” which “provides technical and financial assistance to landowners interested in restoring and enhancing wildlife habitat on their land.”⁴ According to FWS, “[s]ince the program’s start in 1987, some 50,000 landowners have worked with Partners staff to complete 60,000 habitat restoration projects on 6 million acres.”⁵ Similarly, NMFS has regularly highlighted its work to “increase fisheries productivity by restoring coastal habitat and supporting the recovery of protected species that rely on healthy habitat to breed, eat, rest, and grow,” and has stated that, since 1992, it has “provided more than \$750 million to implement more [than] 3,300 coastal habitat restoration projects.”⁶ NMFS works to “restore degraded or injured habitat to ensure fish have access to high quality areas to live” by, among other methods, removing dams and other barriers; reconnecting coastal wetlands, and rebuilding coral and oyster reefs.⁷ In sum, the ESA’s text and conservation purposes, extensive case law, and the Services themselves confirm that habitat must be broadly construed to promote the survival and recovery of endangered and threatened species.

B. The Proposed Rule Unlawfully Restricts the Designation of Critical Habitat and Frustrates the Conservation Purposes of the ESA.

The Proposed Rule, which will likely result in reduced habitat protections for many endangered and threatened species, would fundamentally undermine the ESA’s overarching recovery mandates, for several reasons.

First, and most importantly, the first sentence in the Services’ proposed definition of “habitat” threatens to exclude the designation of unoccupied areas as critical habitat, even though designation of such areas is expressly authorized by the text of the ESA and may be essential for a species’ survival and recovery. *See* 16 U.S.C. § 1532(5)(A)(ii). The Services’ proposed definition of “habitat” would likely exclude areas that are currently marginal or degraded and require some degree of restoration from even being considered as “habitat” in the first instance, and thus would exclude these areas from being eligible for designation as “critical habitat” under the ESA, regardless of their importance for species’ survival and recovery.

² U.S. Fish & Wildlife Serv., “Habitat,” (last updated Sept. 9, 2011), <https://www.fws.gov/habitat/>.

³ National Marine Fisheries Serv., “Threats to Habitat,” (last updated June 19, 2017), <https://www.fisheries.noaa.gov/insight/threats-habitat>.

⁴ U.S. Fish & Wildlife Serv., “Partners,” (last updated Jan. 29, 2020), <https://www.fws.gov/partners/>.

⁵ *Id.*

⁶ Nat’l Marine Fisheries Serv., Office of Habitat Conservation, <https://www.fisheries.noaa.gov/about/office-habitat-conservation>.

⁷ *Id.*

Although the Proposed Rule claims that the definition “is written so as to include unoccupied habitat,” 85 Fed. Reg. at 47,334, the language of the proposal risks excluding “unoccupied habitat” in many, if not most, situations. In particular, the use of the present tense of “depend upon” to “carry out” one or more life processes in the first sentence logically excludes “physical places” that a species may have *previously* depended upon, including its full historical habitat range. It also logically excludes “physical places” that the species may *subsequently* depend upon following planned or potential habitat restoration efforts, or due to reasonably foreseeable changes in the location, quality, or extent of habitat caused by climate change or other factors.

The second sentence of the proposed definition only confirms this apparent limitation because it contains the “existing attributes” limitation, suggesting that unoccupied areas that could be made suitable through restoration efforts, but which do not currently contain such attributes, could not be considered habitat or, as a result, critical habitat. Furthermore, the second sentence must be read in conjunction with, and is limited by, the “depend upon” and “carry out” language in the first sentence.

For example, a listed salmonid species would not currently “depend upon” a stretch of river that it could no longer reach due to the construction of a dam, even if enabling the species to migrate to that area through fish ladders or other mechanisms could be considered essential to its survival and recovery. Similarly, degraded areas might not *currently* contain sufficient “*existing* attributes” necessary to support a species, even if those sites had planned restoration activities that could provide for such attributes and would support an expansion or re-introduction of the species into that area. Indeed, paradoxically, the Services’ misguided definition may even encourage damage to or alteration of important species habitat in an effort to justify *eliminating* the ESA’s protection for that habitat.

In this regard, the “alternative” definition offered by the Services may be even more restrictive than the proposed version, and therefore likewise is directly contrary to the ESA. In particular, the reference in the first sentence to “physical places” that species currently “use” to carry out one or more life processes would exclude a species’ full historical range or areas that could be restored into suitable habitat, where a species is not currently present or using such areas. 85 Fed. Reg. at 47,334. In addition, the “use” limitation may go even farther than the proposed definition in precluding the Services’ ability to designate areas where the species is not currently *physically* present, but which nevertheless are important for species’ *current* survival in other areas, such as the feeder streams at issue in the *Bear Valley Mutual Water Company* case.

These inherent limitations in the alternative definition are further reinforced by the second sentence limiting “habitat” to areas “where the necessary attributes to support the species *presently* exist.” 85 Fed. Reg. at 47,334. Similar to the proposed definition, this would unlawfully restrict the Services’ ability to designate habitat that would require restoration or other changes to provide such attributes that a species may depend upon for its future survival or recovery.

Furthermore, because both occupied and unoccupied “critical habitat” are necessarily subsets of “habitat,” *Weyerhaeuser*, 139 S. Ct. at 368, any regulatory definition of “habitat” must be broader than both the occupied and unoccupied critical habitat under consideration in the case law discussed in Part I.A above. Yet, instead, the Services’ proposed definition of “habitat” is even *narrower* than the ESA’s *statutory* definition of “critical habitat” and, as discussed above, potentially does not even permit currently unoccupied critical habitat to qualify as “habitat.” This interpretation is both impermissible and nonsensical. *See Chevron*, 467 U.S. at 842-43 (court must reject agency regulations that are contrary to clear Congressional intent).

The Proposed Rule also conflicts with the need to protect species from the significant dangers posed by climate change, which are occurring now and likely to become increasingly more prevalent in the foreseeable future. As FWS itself has stated, it currently “faces what portends to be the greatest challenge to fish and wildlife conservation in its history: The earth’s climate is changing at an accelerating rate that has the potential to cause abrupt changes in ecosystems and contribute to widespread species extinctions,” resulting in “profound impacts on our nation’s wildlife and habitats.”⁸ For example:

In aquatic environments, evidence is growing that higher water temperatures resulting from climate change are negatively impacting cold- and cool-water fish populations across the country. Warmer winters are changing some birds’ migratory patterns. Sooty terns, which nest in the Dry Tortugas off Key West, Florida, are showing up earlier and earlier. Roseate spoonbills, which generally stay in Florida, the Gulf Coast and points south, are now regularly spotted in South Carolina. Record warm seawater is linked to coral reef bleaching in the Florida Keys and Puerto Rico.⁹

Similarly, as FWS has found regarding the Pacific Southwest Region of California, Nevada, and the Klamath Basin:

Climate change brings physical changes that include increasing temperatures, rising sea levels, shifts in ocean currents, altered precipitation patterns and increased flood frequency. These physical effects lead to biological impacts such as changes in the distribution of plant and animals, new species invasions, disease outbreaks, disrupted food webs, and ultimately, increased pressure on fish and wildlife populations.¹⁰

Yet, the Services’ proposed definitions would restrict their ability to designate unoccupied critical habitat for a species that may be forced to move to a new area or higher elevation due to climate change, or to return to a restored ecosystem that may provide essential refuge from such threats. This is contrary to the ESA’s recovery purposes as well as the

⁸ U.S. Fish & Wildlife Serv., “Wildlife, Habitats and Our Changing Climate” (last updated Oct. 13, 2017), <https://www.fws.gov/southeast/our-changing-climate/>.

⁹ *Id.*

¹⁰ U.S. Fish & Wildlife Serv., “Climate Change in the Pacific Southwest” (last updated Sept. 18, 2018), <https://www.fws.gov/cno/climate.html>.

applicable case law. The Ninth Circuit, for example, has expressly rejected the assertion that “FWS can only designate habitat that contains essential features at the time the species is listed, not habitat that may become critical in the future because of climate change or other potential factors.” *Alaska Oil & Gas Ass’n*, 815 F.3d at 558.

For all of these reasons, the Proposed Rule is contrary to the plain language and primary purposes of the ESA and must be withdrawn.

II. The Services Have Failed to Justify the Proposed Rule Under the APA.

The Proposed Rule also arbitrarily stakes its entire justification on the Supreme Court’s opinion in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 139 S. Ct. 361 (2018). *See* 85 Fed. Reg. at 47,334 (“Given this holding in the Supreme Court’s opinion in *Weyerhaeuser*, we are proposing to add a regulatory definition of ‘habitat.’”). However, that decision was exceedingly narrow and did not—and, in light of the ESA’s plain terms, could not—compel the Services to put forward the unduly restrictive definition of “habitat” they now propose. Because the Services have provided no independent justification or explanation for the Proposed Rule, and the Rule contradicts the FWS’s existing approach to defining “habitat” on an individual species basis and tailored to their specific life histories, the Services have acted in a manner that is arbitrary and capricious in violation of the APA, 5 U.S.C. § 706(2)(A). *See FCC v. Fox*, 556 U.S. at 515-16 (agency “must display awareness that it is changing position” and must provide “reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy”). In addition, the Services have failed to consider the broader implications of the Proposed Rule for administration of the ESA, which likewise is contrary to the APA. *See State Farm*, 463 U.S. at 43 (agency’s failure to “consider an important aspect of the problem” is arbitrary and capricious).

In *Weyerhaeuser*, the Supreme Court held only that an area cannot be designated as “critical habitat” for a listed species unless it is also “habitat for that species.” *Weyerhaeuser*, 139 S. Ct. at 368. In so holding, the Court offered no guidance on what it means for an area to qualify as “habitat,” except to say that habitat is necessarily “a larger category” than “critical habitat.” *Id.* at 368-69. The Court noted that no lower court had squarely ruled on whether the critical habitat unit at issue in that case qualified as “habitat” for the dusky gopher frog, and accordingly it remanded the matter to allow a lower court to address that question in the first instance. *Id.* at 368-70. Notably, FWS maintained before the Court that the unit at issue was in fact habitat for the dusky gopher frog and supported that conclusion by pointing to the agency’s longstanding practice of approaching habitat on a species-by-species basis, including areas necessary for a species’ survival and recovery. *See* Brief for the Federal Respondents, 2018 WL 3238924, *25-28.

The Services’ new proposed definitions of “habitat” conflict with this longstanding, recovery-focused approach to defining habitat. The Services have failed even to acknowledge this change in position, let alone provide any reasoned justification for doing so in light of the ESA’s broad conservation purposes. While it may be possible for the Services to adopt a definition of ‘habitat’ that is not inconsistent with the ESA and which allows for the kind of

case-by-case application that FWS has historically engaged in, the Proposed Rule meets neither test. As such, the Proposed Rule is arbitrary and capricious and in violation of the APA. *FCC v. Fox*, 556 U.S. at 515-16.

The Services have also failed to consider that their proposed limitations on the definition of “habitat,” and the resulting restrictions on the type and extent critical habitat designated under Section 4, could have serious implications for how the Services implement and carry out their duties under other sections of the ESA, again undermining the ESA’s core purposes. For example, by reducing the amount and type of critical habitat that can be designated in the first instance, the Proposed Rule would make it less likely that a federal agency action or permit approval will adversely affect critical habitat and thus trigger the need for reasonable and prudent alternatives under Section 7. 16 U.S.C. § 1536. The proposed definition also could impact listing decisions under Section 4, given that the first factor considered by the Services in determining whether to list a species as endangered or threatened is “the present or threatened destruction, modification, or curtailment of [the species’] *habitat* or range.” *Id.* § 1533(a)(1)(A) (emphasis added). The definition also could hamper the Services’ recovery planning efforts by restricting the amount of “habitat” that the Services may acquire and restore to enable species to return to their historic range. Yet nowhere in the Proposed Rule do the Services even consider any of these potential implications of the new proposed definition of “habitat.”

For all of these reasons, the Proposed Rule is arbitrary and capricious and contrary to the requirements of the APA and the ESA and must be withdrawn.

III. The Services Cannot Categorically Exclude the Proposed Rule from Environmental Review under NEPA.

A. Statutory Background.

NEPA “is our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a).¹¹ Congress enacted NEPA in 1969 to “establish a national policy for the environment ... and to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C. § 4321. NEPA has two fundamental purposes: (1) to guarantee that agencies take a “hard look” at the consequences of their actions before the actions occur by ensuring that “the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts;” and (2) to ensure that “the relevant information will be made available to the larger audience that may

¹¹ On July 16, 2020, the Council on Environmental Quality (“CEQ”) finalized an update to its 1978 regulations implementing NEPA, which takes effect on September 14, 2020. 85 Fed. Reg. 43,304 (July 16, 2020). According to this rule, for NEPA reviews that have already begun “before the final rule’s effective date, agencies may choose whether to apply the revised regulations or proceed under the 1978 regulations and their existing agency NEPA procedures. Agencies should clearly indicate to interested and affected parties which procedures it is applying for each proposed action.” *Id.* at 43,340. Here, the Services’ Proposed Rule cites only the language of the 1978 regulations. *See* 85 Fed. Reg. at 47,336.

also play a role in both the decision making process and the implementation of that decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989).

To achieve these purposes, NEPA requires the preparation of a detailed environmental impact statement (“EIS”) for any “major federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). NEPA’s implementing regulations broadly define such actions to include “new or revised agency rules, regulations, plans, policies, or procedures.” 40 C.F.R. § 1508.18. In taking a “hard look,” NEPA requires federal agencies to consider the direct, indirect, and cumulative impacts of their proposed actions. *Diné Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 837 (10th Cir. 2019); 40 C.F.R. §§ 1508.7, 1508.8(a)–(b).

Only in “certain narrow instances” is an agency excused from preparing a preliminary environmental assessment or an EIS by invoking a categorical exclusion. *See Coal. of Concerned Citizens to Make Art Smart v. Fed. Transit Admin.*, 843 F.3d 886, 902 (10th Cir. 2016) (citing 40 C.F.R. § 1508.4). Agencies may invoke a categorical exclusion only for “a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of [NEPA] regulations.” 40 C.F.R. § 1508.4; *see also id.* § 1507.3(b)(2)(ii). When adopting such procedures, an agency “shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect,” *id.* § 1508.4, in which case an environmental assessment or EIS is required.

B. The Proposed Rule Does Not Qualify for a Categorical Exclusion from NEPA.

In its Proposed Rule, the Services state that they “anticipate” that the categorical exclusion in 43 C.F.R. § 46.210(i) “applies to the proposed regulation changes.” 85 Fed. Reg. at 47,336. As noted above, that categorical exclusion only covers “[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.” 43 C.F.R. § 46.210(i). The Services also cite a similar categorical exclusion in NMFS’ NEPA procedures for “preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature.” 85 Fed. Reg. at 47,336. At the same time, the Services also claim that they are “continuing to consider the extent to which this proposed regulation may have a significant impact on the human environment,” and that any such NEPA analysis will be completed “before finalizing this regulation.” *Id.*

However, the suggestion that the Proposed Rule is subject to a categorical exclusion under NEPA, or that the Services may complete an environmental analysis at a later date, is contrary to the requirements of NEPA and its implementing regulations. The new proposed definition of “habitat” is not a regulation “of an administrative, financial, legal, technical, or procedural nature.”¹² Instead, this substantive proposal would significantly affect the frequency, extent, location and type of critical habitat for endangered and threatened species. It therefore

¹² Indeed, the Office of Information and Regulatory Affairs determined that the Proposed Rule was a “significant regulatory action” under Executive Order 12866. *See* 85 Fed. Reg. at 47,335.

indisputably qualifies as a “major federal action significantly affecting the quality of the ... environment.” 42 U.S.C. § 4332(2)(C).

Among the factors an agency must consider in determining whether an action may significantly affect the environment, thus warranting the preparation of an EIS, is “[t]he degree to which the action may adversely affect an endangered or threatened species or its [critical] habitat” under the ESA. 40 C.F.R. § 1508.27(b)(9). And, as the Ninth Circuit has stated, the presence of just “one of these factors may be sufficient to require the preparation of an EIS in appropriate circumstances.” *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 865 (9th Cir. 2005). Similarly, even if the Proposed Rule could properly be categorized as an administrative or technical change (which it cannot), “extraordinary circumstances,” including significant impacts on listed species and critical habitat and violations of the ESA, preclude the application of a categorical exclusion from NEPA in this case. *See* 43 C.F.R. § 46.215(h)-(i).

As discussed above, the Proposed Rule will have significant, adverse environmental impacts on endangered and threatened species and their habitat in several ways. In particular, the proposed definition of “habitat” will severely restrict the Services’ ability to designate critical habitat for endangered and threatened species by imposing new conditions that limit the frequency, extent, location, and type of habitat that may be designated. This poses significant threats to species: (1) that are now limited to just a small fraction of their historic range, (2) whose habitat has been degraded and would require restoration efforts to provide the attributes necessary to support the species’ survival and later recovery, and (3) that may need to move to new areas due to climate change or other natural and human-caused factors. The reduction in areas considered “habitat” means that fewer areas will be protected as “critical habitat,” which will reduce species’ ability to survive and recover and no longer need the protections of the ESA.

Because of these significant environmental impacts on imperiled species and their habitat, the Proposed Rule does not qualify for a categorical exclusion from NEPA. Moreover, as the Ninth Circuit has frequently stated in NEPA cases, it is “not appropriate to defer consideration” of impacts to a future date “when meaningful consideration can be given now.” *See Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9th Cir. 2002). Thus, if the Services desire to proceed with this rulemaking, they must first prepare and circulate a draft EIS for public review and comment prior to finalization of the proposal.

CONCLUSION

The Proposed Rule is yet another attempt by the Services to chip away at the ESA's essential protections for endangered and threatened species and their habitat. The Services must abandon this proposal and instead focus on addressing the threats posed by habitat degradation and climate change in order to fulfill the ESA's purposes of affording imperiled species the "highest of priorities" and providing for their recovery. *Hill*, 437 U.S. at 174, 194.

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