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Via Regulations.gov Portal

U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, Virginia 22041-3803

National Marine Fisheries Service
Office of Protected Resources
1315 East-West Highway
Silver Spring, Maryland 20910

Re: Comments of the American Petroleum Institute and the Independent Petroleum Association of America on the U.S. Fish and Wildlife Service's and National Marine Fisheries Service's Proposal to Define "Habitat" in the Regulations Implementing the Endangered Species Act.
Docket No. FWS-HQ-ES-2020-0047.

Dear Sir/Madam:

This letter provides comments from the American Petroleum Institute ("API") and the Independent Petroleum Association of America ("IPAA") (collectively, "the Associations") in response to the U.S. Fish and Wildlife Service's ("FWS's") and National Marine Fisheries Service's ("NMFS's") (collectively "the Services") proposal to define "habitat" in the Services' regulations implementing the Endangered Species Act ("ESA" or "the Act").[1] The Associations appreciate the opportunity to submit comments on this important effort to develop a regulatory definition to an undefined statutory term, and to do so in a way that can help ensure that the Services' critical habitat designations are clear, transparent, and consistent with the ESA's requirements.

As further explained in the detailed comments that follow, the Associations support the Services' proposal to define for the first time "habitat" under the ESA, and we further support the Services' proposal to do so within the ESA's implementing regulations and through a notice-and-comment rulemaking process. We concur with the principles that guided the Services' effort to define "habitat," we support key aspects of both definitions proposed by the Services, and we believe both definitions, but particularly the alternative definition, can provide much needed clarity.

[1] 85 Fed. Reg. 47,333 (August 5, 2020)/ Docket No. FWS-HQ-ES-2020-0047.

The Services' proposed and alternate definitions both reflect an understanding of the text and structure of the ESA, the role of critical habitat in conservation, and the need for a clear and consistent definition of "habitat" that can help shape and improve the Services' critical habitat designation procedures. The proposed definitions[2] are informed by both ecological expertise and a common understanding of what "habitat" means. And most importantly, the proposed definitions reflect Congress's intent that, under the ESA, "habitat" must, at a minimum, be currently capable of supporting the survival of the species. In other words, habitat must be habitable.

Notwithstanding the Associations overall support for the Services' proposal to limit the definition of "habitat" to areas currently containing attributes necessary for the long-term survival of the species, in the detailed comments that follow, we provide recommendations that we believe can make the Services' final definition of "habitat" clearer and more consistent with the text and structure of the ESA. As noted in Section IV below, these recommendations are consistent with the Services' interpretation and incorporate aspects of both the Services' proposed and alternate definitions. We respectfully offer these suggested refinements based on our longstanding engagement in several legal and regulatory proceedings regarding the proper scope of critical habitat under the ESA.

I. THE ASSOCIATIONS' INTERESTS

API is a nationwide, non-profit trade association that represents all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly eight percent of the U.S. economy. API's more than 600 member companies include large integrated companies, as well as exploration and production, refining, marketing, pipeline and marine businesses, and service and supply firms. API was formed in 1919 as a standards-setting organization, and API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

IPAA is a national trade association representing the thousands of independent crude oil and natural gas explorers and producers in the United States. It also operates in close cooperation with forty-four unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies that provide services and supplies to the domestic industry. IPAA is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy developed in an environmentally responsible manner is essential to the national economy.

As relevant here, the Associations' members explore for and develop essential energy resources on federal, state, and private oil and natural gas leases across the nation, both on and offshore. Responsibly developing these resources and safely transporting them to consumers requires the construction and operation of pipelines, utility lines, offshore platforms, and other infrastructure. These and other actions can often occur in or near critical habitat for threatened or endangered species, and many of these actions can require federal authorizations that trigger consultation obligations under ESA Section 7. The Associations members' ability to responsibly explore for,

[2] Unless otherwise stated, the phrase "proposed definitions" refers to both the Services' proposed and alternate definitions of "habitat."

develop, and transport oil and natural gas resources is therefore directly impacted by the listing of species under the Act, and as relevant here, the designation of critical habitat.

Because of the significant extent to which our members' activities are regulated under the ESA, the Associations have, for many years and in a myriad of regulatory and legal proceedings, advocated for prudent and reasonable improvements to the Act and its implementing regulations that would decrease regulatory ambiguity, increase certainty in capital investment in new oil and natural gas infrastructure, enhance the speed and efficiency of the consultation process, and result in a more equitable and reasonable application of the law and its regulations. While the Associations' interest in the fair and protective implementation of the ESA is widespread, our experience and advocacy with respect to critical habitat designations is particularly relevant here.

In 2014, when the Services proposed sweeping revisions to their critical habitat regulations, the Associations provided detailed comments in response to the proposed revisions.[3] After the Services finalized those regulatory revisions in 2016, the API joined with a coalition of industries to challenge those rules.[4] The action settled with the Services agreeing to review and reconsider the 2016 rules. As part of that review and reconsideration, the Services in 2018 proposed extensive new revisions to the ESA's implementation regulations, including important new revisions regarding the designation of critical habitat.[5] And once again, the Associations submitted comprehensive comments in response to the Services' proposals.

The Associations also joined this same coalition in filing an *amici curiae* brief in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*,[6] which involved a challenge to FWS's designation of over 1,500 acres of private land in Louisiana as critical habitat for the dusky gopher frog, even though the land is unoccupied by the frog, cannot without significant alteration be occupied by the frog, and does not play any supporting role as sustaining habitat for the frog. As the Associations and their coalition partners explained in their *amicus curiae* brief to the U.S. Supreme Court ("Supreme Court" or "the Court"), the ESA limits designations of critical habitat "to areas that actually constitute 'habitat' . . . *at the time of the designation*." A unanimous Supreme Court agreed that "'critical habitat' must also be 'habitat,'"[7] and when the Court remanded the action back to the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") to interpret the term "habitat," we supported FWS's decision to undertake this rulemaking to define the term "habitat."[8]

API and its cross-industry coalition further supported this effort to supply a regulatory definition to the statutory term "habitat" in April 2019, when we provided the Services our analysis and recommendations for defining "habitat" under the ESA.[9] We are pleased to see that the Services considered key aspects of those comments, and we are pleased provide these additional

[3] 81 Fed. Reg. 7,414 (Feb. 11, 2016).
[4] *UWAG v. NMFS*, No. 17-cv-00206 (S.D. Ala.).
[5] 83 Fed. Reg. 35,193, 35,178, 35,174 (July 25, 2018).
[6] "*Weyerhaeuser*" 139 S. Ct. 361 (2018).
[7] *Weyerhaeuser* at 368.
[8] Letter from David Gunter, Counsel for Defendants-Appellees, to Lyle W. Cayce, Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Feb. 25, 2019), *Markle Interests, LLC v. U.S. Fish & Wildlife Service*, Nos. 14-31008 & 14-31021 (5th Cir.).
[9] See April 8, 2019 comment letter in Docket Nos. DOI-2017-0003-0009; NOAA-NMFS-2017-0067.

considerations and recommendations for promulgating a clear and lawful regulatory interpretation of "habitat."

II. BACKGROUND

Congress enacted the ESA to provide "a program for the conservation" of endangered and threatened species, and to conserve "ecosystems upon which [they] depend."[10] In furtherance of that mandate, ESA Section 4 requires the Services to identify species at risk of extinction or likely to become so, "promulgate regulations listing those species determined to be 'threatened' or 'endangered' . . . and designate their 'critical habitat.'"[11] The listing of a species triggers a wide range of statutorily required regulatory actions and prohibitions, including: (1) the Services' duty develop and implement recovery plans;[12] (2) federal agencies' obligation to initiate Section 7 consultation;[13] (3) the broadly applicable prohibition on the take, import, export, possession, sale, and transport of the species;[14] and (4) the Services' duty to designate critical habitat "to the maximum extent prudent and determinable."[15]

"A critical-habitat designation does not directly limit the rights of private landowners. It instead 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."[16] It does so primarily through Section 7 of the Act.[17]

Under ESA Section 7, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse modification" of that critical habitat without receiving a special exemption.[18] If a federal agency believes that its proposed action may adversely affect critical habitat, "it must engage in formal consultation with [the Services]," which "provide the agency with a written statement"[19] explaining "how the agency action affects the species or its critical habitat, [20] and outlining "any 'reasonable and prudent alternatives' to "avoid that consequence."[21] The agency must then "either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee."[22]

At base, this means that under ESA Section 7, agencies must "ensure that none of their activities, including the granting of licenses and permits," adversely modifies or destroys critical habitat.[23] As

[10] 16 U.S.C. § 1531(b).
[11] *Bennett v. Spear*, 520 U.S. 154, 157-158 (1997).
[12] 16 U.S.C. § 1533(f).
[13] 16 U.S.C. § 1536(a)(2).
[14] 16 U.S.C. §§ 1538(a), 1533(d).
[15] 16. U.S. C. § 1533(a)(3)(A)(i).
[16] *Weyerhaeuser* at 366-367.
[17] 16 U.S.C. § 1536(a)(2).
[18] 16 U.S.C. § 1536(a)(2).
[19] *Bennett*, 520 U.S. at 158.
[20] 16 U.S.C. § 1536(a)(3), (b)(3)-(4).
[21] *Bennett*, 520 U.S. at 158.
[22] *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 652 (2007) (*NAHB*).
[23] *Sweet Home*, 515 U.S. at 692.

the U.S. Supreme Court has observed, this requirement "cover[s], in effect, almost anything that an agency might do."[24]

As enacted in 1973, the ESA contained only a single reference to "critical habitat," and given that the role of critical habitat is most pronounced in the context of Section 7 consultation, it is not surprising that ESA Section 7 contained this singular reference.[25] This meant that the 1973 Act "d[id] not define 'critical habitat,'"[26] or instruct how it was to be designated.

In 1978, Congress eventually supplied a definition of "critical habitat," and it did so largely in response to the Supreme Court decision in *TVA v. Hill*, which held that the ESA required a major hydroelectric project (Tellico Dam) to be halted at "whatever the cost" because it would "result in total destruction of the snail darter's habitat."[27]

As ultimately enacted through the 1978 ESA amendments, the Act now requires the Services "by regulation," and "to the maximum extent prudent and determinable," to "designate any habitat of [the listed] species which is then considered to be critical habitat."[28] "Critical habitat" was, in turn, defined as:

> (i) the specific areas within the geographical area occupied by the species . . . 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 . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.[29]

While the ESA has contained this definition of "critical habitat" since 1978, Congress has never provided a statutory definition of the term "habitat." Similarly, although the Services implemented the Act for the majority of the ensuing decades in a manner consistent with the proposition that "habitat" must be habitable (*i.e.*, currently capable of supporting the survival of the species), heretofore, they have never proposed to adopt at regulatory definition of "habitat."

FWS's 2012 designation of critical habitat for the dusky gopher frog[30] reveals why definition became necessary. FWS included within the dusky gopher frog critical habitat designation a 1,544 acre area known as Unit 1. Unit 1 had not contained any frogs since at least 1968, was 50 miles from the closest frog population, contained only one of the three physical/biological features that

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[24] *NAHB*, 551 U.S. at 664.
[25] See Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 34 J. ENVTL. L. 1, 12 (2016).
[26] *Tennessee Valley Auth. v. Hill* ("*TVA v. Hill*"), 437 U.S. 153, 160 n.9 (1978).
[27] *TVA v. Hill*, 437 U.S. 162, 184.
[28] 16 U.S.C. § 1533(a)(3)(A).
[29] 16 U.S.C. § 1532(5)(A).
[30] 77 Fed. Reg. 35,118 (June 12, 2012).

FWS deemed essential to the frogs' survival, and in fact, was deemed by FWS, as "unsuitable as habitat" for the frogs.[31]

Impacted landowners challenged the dusky gopher frog critical habitat designation, and those challenges culminated in the Supreme Court's decision in *Weyerhaeuser*, which confirmed that an area is eligible for designation as critical habitat under the ESA *only* if that area is actually *habitat* for the species concerned.[32] As the Supreme Court observed, "[e]ven if an area otherwise meets the statutory definition of unoccupied critical habitat because the Secretary finds the area essential for the conservation of the species, Section 4(a)(3)(A)(i) does not authorize the Secretary to designate the area as critical habitat *unless it is also habitat for the species.*"[33]

The Court explained that this modest and common-sense limitation on the types of areas that can be designated as critical habitat is reflected in the plain language of the statute; "According to the ordinary understanding of how adjectives work, 'critical habitat' must also be 'habitat.'"[34] "Only the 'habitat' of the endangered species is eligible for designation as critical habitat."[35]

After holding that "critical habitat" is a subset of "habitat," the Supreme Court remanded the case back to the Fifth Circuit to determine whether the areas designated as critical habitat for the dusky gopher frog are "habitat," because the Fifth Circuit "had no occasion to interpret the term 'habitat.'"[36] The Services' present effort to promulgate a regulatory definition of "habitat" logically follows that decision, incorporates the Supreme Court's case law in *Weyerhaeuser* and elsewhere, and proffers a proposed definition of "habitat" that is guided by the text, structure, and history of the ESA; and informed by both the ecological literature and common sense.

III. THE ASSOCIATIONS SUPPORT THE SERVICES' PROPOSAL TO DEFINE "HABITAT" BASED ON HABITABILITY

The Services' proposal recognizes that the most fundamental criterion of "habitat" is that it be habitable. And the Services further recognize that, in order to be habitable to a species, an area must currently provide conditions necessary to support the long-term survival of the species. The Associations support both of these aspects of the Services' proposed interpretation, and in this section, explain why the Services possess the requisite authority to interpret the Act in this way. This section also explains that the ESA actually precludes the Services from more expansively defining "habitat" to include uninhabitable areas, and that such expansive and atextual interpretation of "habitat" would not further, but would in fact undermine, conservation.

[31] 77 Fed. Reg. 35,118, 129.
[32] *Weyerhaeuser* at 368.
[33] *Weyerhaeuser* at 368(emphasis added).
[34] *Weyerhaeuser* at 368.
[35] *Weyerhaeuser* at 368.
[36] *Weyerhaeuser* at 369.

a. The Services have authority to promulgate a reasonable interpretation of the statutory term "habitat"

The Administrative Procedure Act ("APA") governs the manner under which federal agency actions are promulgated and reviewed.[37] For those statutes, like the ESA, that do not contain their own standards for reviewing regulations promulgated pursuant to the statute, the APA provides that "[t]he reviewing court shall … hold unlawful and set aside agency action … found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[38]

When viewed through this analytical lens, the Services' proposed interpretation of "habitat" is plainly permissible. The ESA expressly vests the Secretaries of Interior and Commerce with responsibility for implementing and administering the Act,[39] and those responsibilities have been duly delegated to the Services.[40] Included within an agency's statutory authority to implement and administer a governing statute such as the ESA is the authority to promulgate regulations interpreting the governing statute, so long as those regulatory interpretations remain "limited to the authority delegated by Congress."[41]

The framework through which a given agency interpretation is determined to be "limited to the authority delegated by Congress" or unlawful is best explained in the seminal case *Chevron U.S.A., Inc. v. Natural Resources Defense Council ("Chevron").*[42] Under *Chevron*, in the context of a statutory interpretation, a court reviewing an agency interpretation of a statute must do so through a two-step process. First, the court must examine whether Congress has spoken on an issue in a manner that directs or prescribes the outcome or interpretation Congress intended.[43] If Congress's intent can be discerned from the text and structure of the statute itself, then the court will uphold only those interpretations that are in accord with the statute and Congress's discernable intent. If the intended meaning and/or scope of the statute is ambiguous, however; then courts will generally defer to the agency's construction of the statute so long as that interpretation is reasonable.[44]

In *Weyerhaueser*, the Supreme Court held critical habitat is a subset of habitat, but that the term "habitat" was not defined in the ESA.[45] The Court did not, however, conclude, that the text and structure of the ESA precluded it from discerning Congress's meaning.[46] Instead, the Court remanded the case back to the Fifth Circuit because the Fifth Circuit "had no occasion to interpret the term 'habitat.'"[47]

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[37] 5 U.S.C. § 551 *et seq*.
[38] 5 U.S.C. § 706.
[39] 16 U.S.C. § 1532(15).
[40] 50 C.F.R. § 401.01(b).
[41] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).
[42] 467 U.S. 837, 844-45 (1984).
[43] *Chevron* at 861-62.
[44] *Chevron* at 843, 865.
[45] *See Weyerhaeuser* at 368.
[46] *See SAS Institute Inc. v. Iancu*, No. 16-969, slip op. at 11-12 (U.S. Apr. 24, 2018) (quoting *Chevron*, 467 U.S. at 843 n.9)
[47] *Weyerhaeuser* at 369.

Indeed, the Associations believe that Congress's intended meaning for the term "habitat" is eminently discernable by "employing traditional tools of statutory construction"[48] that examine the text and structure of the Act. When one reads the term "habitat" within the context of the statute as a whole and consistent with the fundamental canon of statutory construction "that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning,"[49] Congress's intended meaning of "habitat" is clear and obvious. As the Services' proposed interpretation acknowledges, Congress intended "habitat" to mean areas habitable to a species because they provide conditions necessary to support the long-term survival of the species. Further, while it is conceivable that there may be minor aspects of the term "habitat" that can be credibly subject to differing interpretations, any interpretation of "habitat" to mean uninhabitable areas is unambiguously foreclosed by the text and structure of the Act.[50]

Although the Associations remain steadfast in their belief that the Services' proposed interpretation and definitions reflect Congress's readily ascertainable intent that "habitat" could include only those areas that species can presently depend upon for survival, even if one were to examine the Services' proposed interpretation under *Chevron* Step 2, the outcome is the same. The Services' proposed interpretation remains reasonable and lawful; and contrary interpretations of "habitat" to include "non-habitat" remain impermissible.

"An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress,"[51] but if the Services were to yield to those calling for an interpretation of "habitat" that includes areas uninhabitable to the species, their definition would cease to be reasonable and it would be afforded no deference by a reviewing court. Those calling for an expansive definition of "habitat" are doing so because they want the Services to wield more expansive jurisdiction.[52] Recognizing that critical habitat is a

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[48] *SAS Institute*, slip op. at 11-12 (quoting *Chevron*, 467 U.S. at 843 n.9).

[49] *Perrin v. U.S.*, 444 U.S. 37, 42, 100 S. Ct. 311, 314 (1979).

[50] *See, e.g., SAS Institute*, slip op. at 12 (rejecting plea for deference to purportedly ambiguous statute because "after applying traditional tools of interpretation," the Court's "duty [wa]s to give effect to the [statutory] text"); *Digital Realty Trust, Inc. v. Somers*, No. 16-1276, slip op. at 18-19 (Feb. 21, 2018) ("Because Congress has directly spoken to the precise question at issue, we do not accord deference [under *Chevron*] to the contrary view advanced by the SEC['s]" regulation."); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) ("We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation."); *Coventry Health Care v. Nevils*, 137 S. Ct. 1190, 1198 n.3 (2017) ("Because the statute alone resolves this dispute, we need not consider whether *Chevron* deference attaches to OPM's 2015 rule."); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1979 (2016) ("Even assuming, arguendo, that the preamble to the agency's rulemaking could be owed *Chevron* deference, we do not defer to the agency when the statute is unambiguous."); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773 n.5 (2016) ("Because we think FERC's authority clear, we need not address the Government's alternative contention that FERC's interpretation of the statute is entitled to deference under *Chevron*."); *Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015) ("Because it makes scant sense, the BIA's interpretation, we hold, is owed no deference under the doctrine described in *Chevron*.")

[51] *United States v. Riverside Bayview*, 474 U.S. 121, 131.

[52] See e.g. Jason C. Rylander, *et al.*, *Defining Habitat to Promote Conservation Under the Endangered Species Act* Environmental Law Reporter, (July 2020); see also https://www.nwf.org/Latest-News/Press-Releases/2020/07-31-20-USFWS-Habitat-Definition; see also https://thehill.com/policy/energy-environment/509990-latest-trump-proposal-on-endangered-species-could-limit-future; see also https://biologicaldiversity.org/w/news/press-releases/trump-administration-proposes-new-limits-protecting-endangered-species-habitat-2020-07-31/.

subset of habitat, they believe that the more broadly the Services define "habitat," the more expansively the Services can designate critical habitat. And if the Services define "habitat" to include areas where species are incapable of surviving, the statutory restraints that Congress enacted in Section 4 would be rendered meaningless, and the Services' ability to designate critical habitat would be effectively limitless.[53] But the law does not allow agencies to shed statutory obligations through regulatory interpretations. Their role is to "apply the text of the statute, not … improve upon it."[54] Agencies may not "extend the scope of the statute beyond the point Congress indicated it would stop."[55] And those agency interpretations that seek to expand agency jurisdiction are intensely scrutinized by courts.

As the U.S. Supreme Court explained in *Solid Waste Agency of Northern Cook County. v. Army Corps of Engineers*, an examination of the scope of federal jurisdiction under the Clean Water Act ("CWA"), "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication from Congress that it intended that result.[56] And the Court further noted, "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment on a traditional state power."[57] Indeed, Chief Justice Roberts' concurrence in *U.S. v. Rapanos*, the latest Court decision on the scope of the CWA, reflects the important role of jurisdictional restraint in agency interpretations and court review of the same:

> Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer. Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority.
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> The proposed rulemaking went nowhere. Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.[58]

Chief Justice Roberts' concurrence provides clear guidance that applies as much in the context of the ESA as it did in the context of the CWA: the courts will generally defer to an agency interpretation that reflects a plausible reading of the text and structure of the statute, earnest consideration of its legislative history, and a reasonably restrained jurisdictional objective. The Services' proposal to define "habitat" as areas presently capable of supporting the survival of species heeds this admonition and should therefore be entitled to deference. On the other hand, a

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[53] *Markle Interests v. U.S. Fish and Wildlife Serv.*, 848 F. 3d. 635, 651-52 (5th Cir. 2017).
[54] *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014).
[55] *FDA v. Brown & Williamson*, 529 U.S. 120, 121 (2000).
[56] *Riverside Bayview*, 531 US 159, 172 (2001) (citations omitted).
[57] *Riverside Bayview* at 173.
[58] 547 US 715, 758 (2006).

boundless interpretation of "habitat" to include uninhabitable areas would be beyond the "clearly limiting terms Congress employed," and therefore beyond the reach of the Services' authority.

b. An expansive interpretation of "habitat" to include uninhabitable areas would not improve, and would likely undermine, the conservation and recovery of threatened and endangered species

The ESA was created to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate" to achieve those goals.[59] Congress defined the terms "conserve," "conserving," and "conservation" to mean "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 Act are no longer necessary."[60] The Services' authority to designate critical habitat therefore represents just one tool of many that can be used in furtherance of conservation. And, relative to other authorities that Congress provided through the ESA, the power to designate critical habitat contributes, at best, marginal conservation value.

In fact, several studies indicate that the designation of critical habitat confers no conservation benefit on listed species.[61] Notably, FWS reached the same conclusion as early as 1997, when it "seriously question[ed]" the "utility" of designating critical habitat.[62] FWS's initial questions eventually matured into conclusions when in 2004 it declared that "[i]n 30 years of implementing the Act, we have found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources."[63]

NMFS is also seemingly cognizant of the limited utility of critical habitat, as evidenced by NMFS's 2014 designation of critical habitat for loggerhead turtles.[64] "Loggerheads are circumglobal, occurring throughout the temperate and tropical regions of the Atlantic, Pacific, and Indian Oceans . . . [and] are the most abundant species of sea turtle found in U.S. coastal waters."[65] Loggerheads have been protected under the ESA as threatened species since 1978, and have also benefitted from

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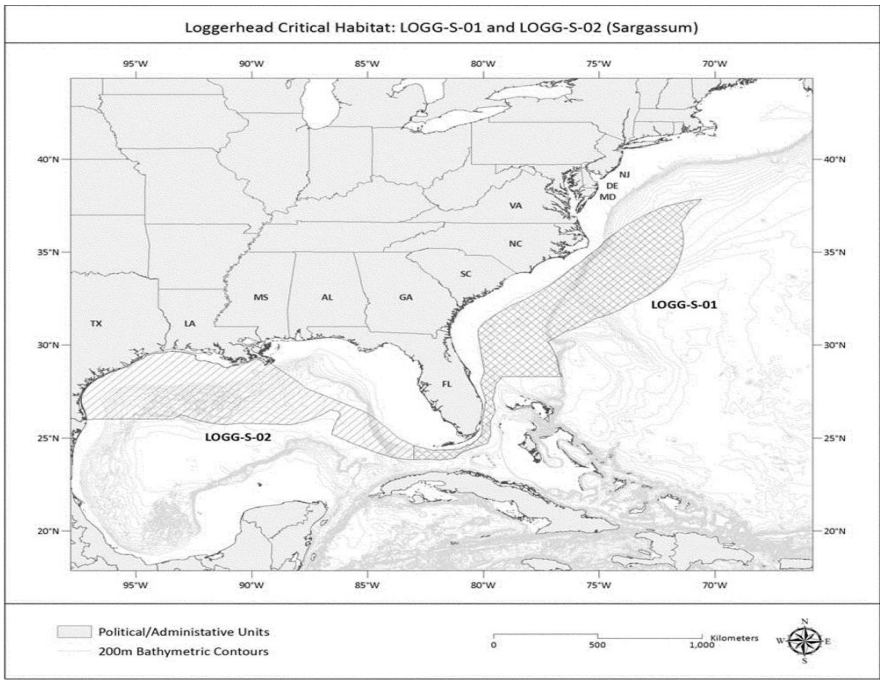
[59] 16 U.S.C. § 1531(b).
[60] 16 U.S.C. § 1533(3) (emphasis added).
[61] *See, e.g.*, Timothy D. Male & Michael J. Bean, *Measuring Progress in US Endangered Species Conservation*, 8 ECOLOGY LETTERS 986, 988 (2005) ("The designation of critical habitat was not correlated with improved status"); J. Alan Clark et al., *Improving U.S. Endangered Species Act Recovery Plans: Key Findings and Recommendations of the SCB Recovery Plan Project*, 16 CONSERVATION BIOLOGY 1510, 1515 (Dec. 2002) ("the status trends of species with designated critical habitat [are] not significantly different from those for species with no such designation").
[62] 62 Fed. Reg. 39129, 39131 (July 22, 1997).
[63] 69 Fed. Reg. 59996, 59996 (Oct. 6, 2004); see 64 Fed. Reg. 31871, 31872 (June 14, 1999); See also News Release, U.S. Department of the Interior, Endangered Species Act "Broken" – Flood of Litigation Over Critical Habitat Hinders Species Conservation (May 28, 2003), *available at* https://www.doi.gov/sites/doi.gov/files/archive/news/archive/03_News_Releases/030528a.htm ("Designating critical habitat for species already on the endangered species list provides little conservation benefit to species").
[64] 79 Fed. Reg. 39,856 (July 10, 2014).
[65] NMFS Loggerhead Species Page. http://www.nmfs.noaa.gov/pr/species/turtles/loggerhead.htm.

extensive state and private conservation efforts.[66] As a result of these efforts, loggerhead nesting and abundance has increased, and continued to increase for decades.

Notwithstanding these existing protections and the species' large and growing population, in 2014, NMFS designated over 317,000 square miles of critical habitat for the loggerhead's Northwest Atlantic DPS.[67]



This critical habitat designation – roughly the size of Texas and Alabama combined – is one of the largest areas ever designated by the Services, and yet NMFS could scarcely identify any conservation benefit to this historic designation. In its analysis of the designation, NMFS concluded, in numerous places and in numerous contexts, that designation of critical habitat "is not expected to change the level or types of conservation efforts undertaken."[68] NMFS further explained,

> This analysis finds that the impacts of critical habitat designation will most likely be limited to incremental administrative effort to consider potential adverse modification as part of future section 7 consultations.[69]

The sole benefit identified by NMFS was that "because there is value in highlighting critical habitat, including for planning and educational purposes, designation of critical habitat does contribute to

[66] https://www.fws.gov/northflorida/seaturtles/turtle%20factsheets/loggerhead-sea-turtle.htm.
[67] 79 Fed. Reg. 39,856 (July 10, 2014).
[68] Economic Analysis of Critical Habitat Designation of Marine Habitat for the Northwest Atlantic Ocean Distinct Population Segment of the Loggerhead Sea Turtle; Draft Report (July 11, 2013), at 7-1.
[69] *Id*. at ES-2.

the conservation of the species."[70] That is an incredibly modest benefit, and it comes at a high cost to the Associations' members and others operating within the 317,000 square mile designation.

While the Services are proposing to define "habitat" in accord with the expressed and discernable intent of Congress, and are therefore not defining habitat to include non-habitat that may facilitate the designation of larger areas as critical habitat, it remains worthwhile to note that larger critical habitat designations do not translate to larger conservation benefits. Costs on impacted industries may well increase with the size of a critical habitat designation, but, regardless of whether large or small, critical habitat designations provide "little additional protection to most listed species . ."[71]

1. Limiting the definition of "habitat" to habitable areas does not prohibit the Services from designating valuable habitat as critical habitat

Regardless whether a critical habitat designation is an effective conservation tool, it is important to recognize that the Services would not lose the authority to designate critical habitat if "habitat" is defined to exclude uninhabitable areas. Indeed, the Services' proposed interpretation would not affect the designation of critical habitat in areas where listed species currently live or other unoccupied but presently habitable areas. As Congress recognized, if critical habitat can succeed in conferring any conservation benefit at all, it will be in those:

> 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 (I) essential to the conservation of the species and (II) which may require special management considerations or protection.[72]

And to the extent these "specific areas" change or expand, Congress provided the Services authority to change or expand critical habitat designations as well. Indeed, a critical habitat designation is not a fixed construct. The Services "may, from time-to-time thereafter as appropriate, revise such designation,"[73] and any person may petition the Services to do so.[74] Thus, while the Services' proposed interpretation of "habitat" would preclude an area that is uninhabitable at the time of listing from being designated as critical habitat, it does not preclude the Services from designating that area in the future if the area becomes occupied and/or necessary to support the long-term survival of the species.

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[70] 79 Fed. Reg. at 39,858.

[71] 69 Fed. Reg. 59996, 59996 (Oct. 6, 2004); see 64 Fed. Reg. 31871, 31872 (June 14, 1999); See also News Release, U.S. Department of the Interior, Endangered Species Act "Broken" – Flood of Litigation Over Critical Habitat Hinders Species Conservation (May 28, 2003), *available at* https://www.doi.gov/sites/doi.gov/files/archive/news/archive/03_News_Releases/030528a.htm ("Designating critical habitat for species already on the endangered species list provides little conservation benefit to species").

[72] 16 U.S.C. § 1532(5)(A)(i).

[73] 16 U.S.C. § 1533(a)(3)(A)(ii).

[74] 16 U.S.C. § 1533(b)(3)(D).

2. The ESA provides the Services other mechanisms to address uninhabitable areas

Congress may have prohibited the Services from designating unoccupied and uninhabitable areas as critical habitat, but it did not ignore those uninhabitable areas that must necessarily fall outside the definition of "habitat." Nor did Congress withhold all the ESA's protections from uninhabitable areas. ESA Section 9 prohibits the illegal take of a species regardless of where it is found, and the Section 9 take prohibitions include "significant habitat modification or degradation where it actually kills or injures wildlife."[75]

Congress also provided mechanisms to identify and improve presently uninhabitable areas so that they can one day contain features capable of supporting the long-term survival of species. Under ESA Section 5, the Services can "acquire by purchase, donation, or otherwise, lands, waters, or interest therein," "to conserve fish, wildlife, and plants."[76] Section 5 is not limited to "habitat" and therefore is broader than Section 4(a)(3). As described by the Supreme Court in *Sweet Home*, ESA Section 5 is the tool Congress intended to address land "that is not yet but may in the future become habitat for an endangered or threatened species."[77]

The ESA also requires the Services to develop and implement recovery plans for listed species,[78] that describe the "site-specific management actions" necessary to conserve the species.[79] Although recovery plans do not impose mandatory obligations, they are demonstrably effective in protecting and conserving listed species. A 2011 study examined different types of resource allocations that are most effective in conserving listed species and identified a relationship between conservation benefits and recovery planning/implementation of recovery plans.[80] This relationship between recovery planning and conservation was based in large part on the ESA Section 4(f) requirement that recovery plans describe any habitat-specific management actions necessary to conserve the species.[81] The identification of specific management action and metrics for success is not just important for the Services in planning and allocating resources, it is also a valuable tool in coordinating the efforts of the Services' conservation partners.

Indeed, Congress never expected that the Services would fulfill their conservation mandates by acting alone. That is why Congress provided authority under ESA Section 6 for:

> [E]ncouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the

[75] 50 C.F.R. § 17.3; see *Sweet Home*, 515 U.S. at 696-707.
[76] 16 U.S.C. § 1534(a)(2).
[77] *Sweet Home*, 515 U.S. at 703; see Richard A. Epstein, *Babbitt v Sweet Home Chapters of Oregon*: The Law and Economics of Habitat Preservation, 5 SUP. CT. ECON. REV. 1, 25 (1997) ("acquisition of land that is not presently usable by habitat could only be accomplished under [Section 5], since no habitat is either modified or destroyed").
[78] 16 U.S.C. § 1533(f)(1).
[79] 16 U.S.C. § 1533(f)(1)(B)(i).
[80] Madeleine C. Bottrill et al., *Does Recovery Planning Improve the Status of Threatened Species?*, 144 BIOLOGICAL CONSERVATION 1595 (2011).
[81] 16 U.S.C. § 1533(f)(1)(B).

> Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.[82]

This provision authorizes the Services to "provide financial assistance to any State" with a "conservation progra[m]" and enter "cooperative agreement[s]" that fund up to 90% of states' conservation efforts.[83] Section 6 also allows the Services to enter agreements with states to "administ[er] and manag[e]" "area[s] established for the conservation" of species.[84] When the House of Representatives first drafted ESA Section 6, it believed that these provisions would account for 29% of the ESA's costs. This means that Congress believed that the largest single expense that the Services would incur in implementing the Act would be for federal acquisitions and State grants.[85]

The ESA also creates strong incentives for private parties to conserve habitat by requiring the development and implementation of habitat conservation plans ("HCPs") in order to receive permits authorizing the incidental taking of listed species.[86] The Associations' members, in partnership with the Services and other state and local agencies, utilize these HCPs, and also undertake other voluntary conservations efforts such as protecting habitat under conservation easements, engaging in wildlife study, conservation and recovery efforts, and developing candidate conservation agreements with assurances ("CCAAs") and safe harbor agreements for the purpose of obtaining incidental take coverage under Section 10 of the ESA.

These public-private partnerships are essential to the ESA's goal of protecting and conserving listed species and their habitat, not just because private parties can often provide conservation funding far beyond what the Services could ever bring to bear for any one species, but because partnerships with private parties create opportunities to implement conservation measures on private land that the Services could not accomplish alone.

This is important because many consider habitat fragmentation and loss to be the primary threats to endangered and threatened species,[87] and nearly 75% of listed species rely on habitat that is located, in whole or in part, on private land.[88] Effective conservation therefore requires FWS to succeed in protecting species and habitat on private land.

The Associations believe that public-private partnerships are vital to effective conservation, and are proud that our industry has taken a leading role in the voluntary conservation of species. As Congress intended, these and other voluntary habitat conservation measures are already helping the

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[82] *Id*. § 1531(a)(5).
[83] 16 U.S.C. § 1535(d).
[84] 16 U.S.C. § 1535(b).
[85] H.R. Rep. No. 93-412, at 20, LEG. HIST. 159.
[86] 16 U.S.C. § 1539(a)(2)(A).
[87] See Jonathan Adler in *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform*: "Both environmentalist groups and development interests wage legal wars over the listing and delisting of species as a proxy for fights over policy and regulatory development."; David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 BIOSCIENCE 607, 609 (1998).
[88] Adler, *supra*.

Services protect and recover species at levels that far exceed that which could be achieved through the designation of critical habitat alone.

3. Defining "habitat" to include uninhabitable areas would hinder conservation

As noted above, voluntary conservation succeeds where critical habitat designations fail because it can leverage the funding and resources that the Services cannot provide and because it incentivizes landowners to protect and improve habitat on private land. The Services recognized this fact in their final policy regarding how existing conservation plans and programs should be considered in determining whether to designate critical habitat,[89] and they also recognized that, "the designation of critical habitat is not only less powerful of a protection than an HCP, but also can adversely affect [local and private] partnerships . . . by imposing duplicative regulatory burdens . . ."[90]

Indeed, when conservation initiatives are voluntarily funded and conducted on private land, the private parties often have an expectation that their public partners will adopt a reasonable, science-based approach in identifying habitat in need of protection. Those expectations of reason and scientific rigor would not be furthered if the Services were to adopt a definition of habitat that includes areas in which the species could not currently survive. When landowners fear (rationally or not) that the FWS will examine their land using an unscientific definition of "habitat" under which any area, if sufficiently altered, can be deemed critical habitat, those landowners may be less inclined to allow access for surveys or studies that could inform an effective recovery strategy.

Defining "habitat" to include uninhabitable areas would stymie the advancement and dissemination of important ecological and conservation knowledge in other ways as well. For one, as discussed elsewhere, there is no scientific or ecological basis for defining "habitat" to include uninhabitable areas. In fact, even though the scientific community is already laboring under multiple different interpretations of "habitat," none of those various interpretations suggest that habitat includes areas where the species cannot survive.[91]

Biologists and others with an interest in wildlife conservation recognize that "habitat" must describe places where species can be found so that they can be studied and protected. Identifying the essential features of habitat in turn allows us to understand the manner in which species use those features so that we can identify ways to protect and improve habitat. Indeed, understanding what is, or is not, habitat for a species is among the most fundamental pursuits of ecologists, field biologists, and all those with an interest in protecting species and their habitats. Defining "habitat" to include uninhabitable areas is therefore entirely at odds with the ecological and conservation principles that we use to protect species. If the Services were to define "habitat" to include uninhabitable areas they would be contributing to a proliferation of "habitat" definitions that is already undermining our

[89] Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, Notice of Final Policy, 81 Fed. Reg. 7226, 7228 (Feb. 11, 2016).
[90] *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. Civ. S-05-0629 WBS-GGH, 2006 WL 3190518, at *31 (E.D. Cal. Nov. 2, 2006).
[91] See David Anthony Kirk et al., *Our Use, Misuse, and Abandonment of a Concept, Whither Habitat?*, 8 ECOLOGY & EVOLUTION 4197, 4198 (2018), https://doi.org/10.1002/ece3.3812; see also Linnea S. Hall et al., *The Habitat Concept and a Plea for Standard Terminology*, 25 WILDLIFE SOC'Y BULLETIN 173 (1997).

ability to prioritize conservation resources and to effectively communicate with stakeholders necessary for conservation.[92]

Indeed, ecologists are already sounding the alarm about misusing the term "habitat" such that it becomes unmoored to essential premise that "habitat" must refer to:

> the resources and conditions present in an area that produce occupancy—including survival and reproduction—by a given organism. Habitat is organism-specific; it relates the presence of a species, population, or individual (animal or plant) to an area's physical and biological characteristics. Habitat implies more than vegetation or vegetation structure; it is the sum of the specific resources that are needed by organisms. Wherever an organism is provided with resources that allow it to survive, that is habitat.[93]

As ecologists caution, definitions of "habitat" that depart from this premise perpetuate the misuse of the term and:

> can lead to (1) misinterpretation of scientific findings; (2) inefficient use of conservation resources; (3) ineffective identification and prioritization of protected areas; (4) limited comparability among studies; and (5) miscommunication of science-based findings.[94]

Correct usage, on the other hand, "would improve communication with scientists and nonscientists, thereby benefiting conservation efforts, and ecology as a science."[95]

c. <u>The Services' proposed interpretation adheres to the text, structure, and legislative history of the ESA, and is consistent with the ordinary meaning of the word "habitat"</u>

The text and structure of the ESA plainly show that the term "habitat" means those areas containing physical and biological features that a species needs for long-term survival. This most minimal criteria that "habitat" be habitable is further reflected in the legislative history of the Act, common usage and understanding of the term "habitat," and the Services' own prior interpretations.

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[92] See David Anthony Kirk et al., *Our Use, Misuse, and Abandonment of a Concept, Whither Habitat?*, 8 ECOLOGY & EVOLUTION 4197, 4198 (2018), https://doi.org/10.1002/ece3.3812.

[93] Linnea S. Hall, et al., *The Habitat Concept and a Plea for Standard Terminology*, 25(1) Wildlife Soc'y Bulletin 173, 175 (1997).

[94] See David Anthony Kirk et al., *Our Use, Misuse, and Abandonment of a Concept, Whither Habitat?*, 8 ECOLOGY & EVOLUTION 4197, 4198 (2018), https://doi.org/10.1002/ece3.3812.

[95] See David Anthony Kirk et al., *Our Use, Misuse, and Abandonment of a Concept, Whither Habitat?*, 8 ECOLOGY & EVOLUTION 4197, 4198 (2018), https://doi.org/10.1002/ece3.3812.

1. <u>The text and structure of the Act show that only those areas capable of supporting the long-term survival of a species may be considered "habitat"</u>

When the Services list a species, they must also "designate any *habitat of such species* which is then considered to be critical habitat."[96] As the Supreme Court made clear in *Weyerhaeuser*, this provision means that:

> Only the 'habitat' of the endangered species is eligible for designation as critical habitat. Even if an area otherwise meets the statutory definition of unoccupied critical habitat because the Secretary finds the area essential for the conservation of the species, Section 4(a)(3)(A)(i) does not authorize the Secretary to designate the area as *critical* habitat unless it is also *habitat* for the species.[97]

In addition to describing the manner in which the term "habitat" shapes the scope of the Services' authority to designate critical habitat, the Supreme Court in *Weyerhaeuser* provided a framework for using the statutorily defined term "critical habitat" to better discern Congress's intended meaning for the undefined term "habitat:"

> According to the ordinary understanding of how adjectives work, 'critical habitat' must also be 'habitat.' Adjectives modify nouns — they pick out a subset of a category that possesses a certain quality. It follows that 'critical habitat' is the subset of 'habitat' that is 'critical' to the conservation of an endangered species.[98]

Based on this framework, the Services correctly noted that the definition of "habitat" must include unoccupied areas because the statutorily defined term "critical habitat," which is a subset of "habitat," can include unoccupied areas determined to be "essential for the conservation of the species."[99] The Services also recognized that although "habitat" cannot be defined based on occupancy alone, other aspects of the ESA's definition of "critical habitat" and its legislative history permit one to discern that, regardless of whether occupied or not, in order to be "habitat," an area must be capable of supporting the long-term survival of a species.

Consider again the two types of areas that the Services may designate as "critical habitat:"

- <u>Occupied Areas</u>: "the specific areas within the geographical area occupied by the species... 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

[96] 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added).
[97] *Weyerhaeuser* at 368.
[98] *Weyerhaeuser* at 368.
[99] 16 U.S.C. § 1532(5)(A).

- Unoccupied Areas: "specific areas outside the geographical area occupied by the species... upon a determination by the Secretary that such areas are essential for the conservation of the species."[100]

The provision governing "occupied areas" presumes that an area is habitable to the species because it is actually inhabited (occupied) by the species. And because "occupied areas" are habitable to species, we can infer from Congress's definition of "occupied areas" that habitable areas have "physical or biological features."

Indeed, it is the presence of "physical or biological features" that defines what makes the area "habitat." The clauses that follow the phrase "physical or biological features, (*e.g.*, "(I) essential to the conservation of the species and (II) which may require special management considerations or protection") define "what makes habitat 'critical,' not what makes it "habitat.'"[101] Thus, the ESA's description of (habitable) "occupied areas" also describes what constitutes habitat; it is the life-sustaining physical and biological features that cause an area to be occupied by the species.

In contrast, the Act's provision addressing "unoccupied areas" does not reference "physical or biological features," but it is "more demanding" than the provision governing "occupied areas."[102] Instead of requiring the Services to demonstrate the presence "*physical and biological features*" that are essential to the species and in need of special management, it requires the Services to demonstrate that the entire unoccupied *area* is essential for the species.[103] It therefore logically follows that, for an entire unoccupied area to be "essential for the conservation of the species, it must, at a minimum, contain those "physical or biological features" that are necessary to satisfy the Act's less demanding provision for designating "occupied areas." Stated differently, if the ESA's less demanding standard for designating "occupied areas" requires the presence of "physical or biological features," then the Act's "more demanding" standard for designating "unoccupied areas" must also require the presence of "physical or biological features."

The structure of the Act thus dictates that the ESA's prerequisite that areas contain "physical or biological features" applies to both occupied and unoccupied areas. Importantly, this prerequisite that an areas contain "physical or biological features" is the *only* criterion shared between the ESA's provisions for "occupied areas" and "unoccupied areas.," and it is therefore the only characteristic that links the two distinct types of habitat (*i.e.*, occupied habitat and unoccupied habitat) under a single definition of "critical habitat." We know this *common characteristic* does not describe what makes these types of habitat become "critical habitat" because the ESA has *different standards* for designating occupied and unoccupied habitat as critical habitat. These "physical or biological features" must therefore describe the only other characteristic common to both occupied and occupied areas – that they both can be habitat.

Of course, the presence of *any* "physical or biological features" is hardly sufficient to distinguish a species' habitat from any other area. Sea ice is a physical feature, but it does not help describe the

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[100] 16 U.S.C. § 1532(5)(A).

[101] *Weyerhaeuser* at 368.

[102] *Home Builders Ass'n v. U.S. Fish & Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010).

[103] *See Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("it is not enough that the area's features be essential to conservation, the area itself must be essential").

habitat of tree frogs. As such, in order to have any meaning at all, the "physical or biological features" must have some relationship to the species. At a minimum, those "physical or biological features" must therefore describe the conditions, attributes, and characteristics that are necessary for the species' basic life requirements, and therefore make the area suitable for, and habitable to, the species.

As detailed in the next subsection, such an interpretation is fully in accord with the ecological literature and common usage. It is also in accord with the Services' 2016 critical habitat regulations, which define "physical or biological features" as:

> the features that support the life-history needs of the species, including but not limited to water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features.[104]

The 2016 critical habitat regulations go on to explain that the term "life-history" refers to what "the species needs throughout its different life stages to survive and thrive."[105]

As such, although the ESA provides an express definition only for the term "critical habitat," the language Congress used for its "critical habitat" definition allows us to discern those aspects of the definition that describe "habitat." An area is "habitat" if it contains "physical or biological features" - not just any "physical or biological" features, but those that the species needs to support its long-term survival and essential life functions.

Congress's use of various terms throughout the Act provide us an additional means of discerning the distinct meaning Congress intended for "habitat." For instance, we know a species' "habitat" is different than a species' "range" because the Act's standards for listing species require the Services to consider "the present or threatened destruction, modification, or curtailment of [the species'] *habitat or range*."[106] Because Congress required consideration of potential impacts to either "habitat" or "range," we can discern that Congress assigned different meaning to the terms.

The Services interpret the term "range" to be "*the general geographical area within which the species is currently found*, including those areas used throughout all or part of the species' life cycle, even if not used on a regular basis."[107] Thus, one distinction that we can discern between the Act's use of the terms "habitat" and "range" is that "habitat" refers to a specific area within a species' overall range.

The ESA also tells us that critical habitat is also a subset of range. In order to better describe the conservation status of a listed species, ESA Section 4(c) requires the Secretary to specify "over

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[104] 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). The Services' 2018 proposed revisions to the 2016 regulations solicited feedback on whether the definition of "physical or biological features" should be modified, but did not propose any specific changes.

[105] 81 Fed. Reg. at 7421-22. Although the Associations raised concerns with aspects of this definition, and in particular, the vague phrase "life-history needs," we believe that the Services' definition of "physical or biological features" is overall helpful in describing those habitat conditions that serve a species' essential biological needs.

[106] 16 U.S.C. § 1533(a)(1)(A)

[107] 79 Fed. Reg. 37,578, 37,583 (July 1, 2014) (Final SPR Policy) (emphasis added).

what portion of its range it is endangered or threatened, and specify any critical habitat *within such range*."[108]

As such, both habitat and critical habitat are specific areas within, and therefore subsets of, range. But as we know from *Weyerhaeuser*, critical habitat is also a subset of habitat.[109] The proper definition of "habitat" must therefore be bounded on one side by the Act's use of the term "range" and one the other side by the Act's definition of "critical habitat." Stated differently, in order to give meaning to the words Congress chose to use in the ESA, "habitat" must be defined distinctly from both "range" and "critical habitat."

"Habitat" must be therefore be defined as an area more specific and narrow than "the general geographical area within which the species is currently found, including those areas used throughout all or part of the species' life cycle, even if not used on a regular basis,"[110] because that describes "range." "Habitat" must also be defined as an area more expansive than "the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection;" and "specific areas outside the geographical area occupied by the species . . . that . . . are essential for the conservation of the species,"[111] because that is the Act's definition of critical habitat.

ESA Section 3(5)(C) then tells us precisely where within the boundaries of both "range" and "critical habitat" the proper definition of "habitat" must rest. ESA Section 3(5)(C) provides that, "[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which *can be occupied* by the [listed] species."[112] Congress's use of the "can be occupied" shows that that larger universe of "habitat" from which the Services can select specific areas to designate as "critical habitat" must at least be capable of being occupied by the species; that is to say "habitable."

"Habitat" is therefore an area that is "habitable" to a populations of a species because it has the capacity necessary to support the species needs, but which does not encompass the entire "general geographical area within which the species is currently found" and is not so narrow so as to be limited to those areas essential for the conservation of the species as a whole. Consistent with what we discerned from the Act's definition of "critical habitat," habitat is therefore confirmed to be an area that currently contains physical and biological features necessary to support the long-term survival of the species.

The Services' proposed interpretation of "habitat" is in accord with this description and is lawful because it fits within the definitional boundaries Congress provided. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"[113] And the Services appropriately recognize that the

[108] 16 U.S.C. § 1533(c)(1) (emphasis added).
[109] *Weyerhaeuser* at 368.
[110] 79 Fed. Reg. 37,578, 37,583 (July 1, 2014).
[111] 16 U.S.C. § 1532(5)(A).
[112] 16 U.S.C. § 1532(5)(C) (emphasis added).
[113] *NAHB*, 551 U.S. at 666.

ESA's "[s]urrounding provisions" and "structure"[114] direct that the definition of "habitat" be limited to areas that are actually habitable; that is, areas containing the physical or biological features necessary for the long-term survival of the species.

2. The legislative history of the Act provides further evidence that Congress intended "habitat" to mean areas that species depend upon for survival

In addition to our ability to discern the plain meaning of the term" habitat" from the text and structure of the Act, the ESA's legislative history provides further confirmation that Congress used the term "habitat" to describe those areas that species actually depend upon for survival. As enacted in 1973, the ESA did not contain a definition of critical habitat or specify how it was to be designated.[115] The only reference to critical habitat in the 1973 ESA was the Section 7 prohibition on federal agencies taking action that "jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical."[116]

In 1978, the Services promulgated regulations that defined "critical habitat" as:

> any air, land, or water area . . . and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. . . . Critical habitat may represent *any portion of the present habitat* of a listed species and *may include additional areas for reasonable population expansion.*[117]

As such, even in their earliest effort to define "critical habitat" the Services recognized that "critical habitat" included only portions of occupied (and obviously habitable) habitat, and certain unoccupied areas that have features necessary to sustain the species should populations expand. Shortly thereafter, the Supreme Court issued its decision in *TVA v. Hill*, which enjoined construction of the nearly completed Tellico Dam project in order to protect the endangered snail darter and prevent the destruction of its critical habitat.[118] In response to the *TVA v. Hill* decision and a concern that the Services could issue critical habitat designations "as far as the eye can see and the mind can conceive,"[119] Congress used the Services' new regulatory definition as a starting point for a new definition of "critical habitat" that Congress intended to rein in the scope of critical habitat designations.

The history surrounding these 1978 amendments plainly demonstrates Congress's intention that critical habitat designations be limited to areas that are presently capable of being inhabited by the species, and that unoccupied areas should only be designated sparingly based on a far higher

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[114] *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017).
[115] ESA of 1973, Pub. L. No. 93-205 § 7, 87 Stat. 884, 892.
[116] ESA of 1973, Pub. L. No. 93-205 § 7, 87 Stat. 884, 892.
[117] 43 Fed. Reg. 870, 874-75 (Jan. 4, 1978) (emphasis added).
[118] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").
[119] See Legislative History of the Endangered Species Act at 823 (reprinting House Consideration and Passage of H.R. 14104, with amendments, Oct. 14, 1978).

demonstration of the *essentiality of such areas*. For example, as amended, House Bill 14104 defined unoccupied critical habitat as:

> specific areas *periodically inhabited by the species* which are outside the geographic area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act (*other than any marginal habitat* the species may be inhabiting because of pioneering efforts or population stress), upon a determination by the Secretary at the time it is listed that such areas are essential for the conservation of the species.[120]

As such, under House Bill 14104, even unoccupied habitat must be necessary to the survival of the species to be considered for a critical habitat designation. Congress's expectation that "habitat" would only include areas that species depend upon for survival was also displayed by the House Committee on Merchant Marine and Fisheries, which noted that efforts to define critical habitat were driven by the concern that "the existing regulatory definition could conceivably lead to the designation of *virtually all of the habitat* of a listed species as its critical habitat."[121] Instead, the Committee directed the Secretary to "be exceedingly circumspect in the designation of critical habitat outside the presently occupied area of the species."[122]

The U.S. Senate displayed a similar expectation that "habitat" must be capable of supporting the survival of species in its corresponding Senate Bill 2899, which limited designations to:

> specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this act, *into which the species can be expected to expand naturally* upon a determination by the Secretary at the time it is listed, that such areas are essential for the conservation of the species.[123]

Here again, the most salient procurers to the 1978 ESA amendments display Congress's expectation that critical habitat designations be limited to occupied areas (which are necessarily habitable) and areas "into which the species can be expected to expand naturally (which must also necessarily be habitable to the species). In explaining the limited but important role of critical habitat, Senator Garn further demonstrated Congress's expectation that the habitability of an area would be an absolute prerequisite to its consideration as critical habitat:

> When a Federal land manager begins consideration of a project, or an application for a permit, it is essential that he know, not only of the existence of an endangered species, but also of *the extent and nature of the habitat that is critical to the continued existence of that species*. Unless he knows the location of *the specific sites on which the endangered species depends*, he may irrevocably commit Federal

[120] 124 Cong. Rec. 38,154 (1978) (emphasis added).
[121] H.R. Rep. No. 95-1625, at 25 (1978) (emphasis added).
[122] H.R. Rep. No. 95-1625 at 18 (emphasis added).
[123] 124 Cong. Rec. 21,355 (1978) (emphasis added).

> resources, or permit the commitment of private resources to the detriment of the species in question.[124]

The final bill passed by Congress included "[a]n extremely narrow definition of critical habitat, virtually identical to the definition passed by the House."[125] Those new directives to limit critical habitat designations to "specific areas" that contain "the physical or biological features . . . essential to the conservation of the species" *and* that "may require special management considerations or protections,"[126] are still in effect today. As such, from the Services' earliest efforts to define "critical habitat" to the House and Senate proceedings that altered the Services' regulatory definition into the statutory definition that remains in the Act today, the legislative history of the 1978 ESA amendments plainly displays Congress's expectation that the "habitat" within which critical habitat can be designated encompasses areas currently sustaining or currently capable of sustaining species.

3. Common usage and general understanding of the term "habitat" confirm Congress intended it to mean areas actually habitable to species

Congress's intent that "habitat" be defined as areas that species depend upon for survival is also exhibited by the common usage and general understanding of the term. As the Supreme Court explained in *Weyerhaeuser*, "the statutory definition of 'critical habitat' tells us what makes habitat 'critical,' not what makes it 'habitat.'"[127] But the absence of a statutory definition of "habitat" does not render the term too nebulous to define.

For one, as discussed above, the text and structure of the Act allow us to discern the meaning of "habitat." For another, "habitat" is not a particularly obscure, vague, or opaque term. It has an "ordinary, contemporary, common meaning."[128] And, "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[129] Consequently, as evidenced below, the "ordinary, contemporary, common meaning" of "habitat" clearly and unquestionably excludes uninhabitable areas.[130]

Dictionaries from the time of the 1978 ESA amendments[131] through the present define "habitat" consistent with the premise that "habitat" must be presently capable of supporting the long-term survival of the species:

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[124] 124 Cong. Rec. 21,575 (1978) (emphasis added).
[125] 124 Cong. Rec. 38,665.
[126] 16 U.S.C. § 1532(5)(A).
[127] *Weyerhaeuser* at 368-369.
[128] See also *Octane Fitness v. ICON Health & Fitness*, 134 S. Ct. 1749, 1756 (2014).
[129] *Perrin v. U.S.*, 444 U.S. 37, 42, 100 S. Ct. 311, 314 (1979); see also Antonin Scalia & Bryan A. Garner, READING LAW 140 (2012), ("Words are to be given the meaning that proper grammar and usage would assign them.").
[130] *Sweet Home*, 515 U.S. at 687.
[131] *See Sweet Home*, 515 U.S. at 697 (consulting WEBSTER'S THIRD in interpreting the ESA).

- "Habitat" is "the place where a plant or animal species naturally lives and grows" or "the kind of site or region with respect to physical features . . . naturally or normally preferred by a biological species."[132]

- "Habitat" is the "area or type of environment in which an organism or biological population normally lives or occurs."[133]

- "Habitat" is "the kind of place that is natural for the life and growth of an organism."[134]

- "Habitat" is "the place or environment where a plant or animal naturally or normally lives and grows," or, as a secondary definition, "the place where something is commonly found."[135]

Each of these definitions reflect that the "ordinary, contemporary, common meaning" of the term "habitat" is limited to those areas where species live or which contain the features necessary for the species' survival. Moreover, this "common understanding" is fully in accord with ecological literature:

- "Habitat" "denotes a rather specific kind of living space" containing "physical and biologic factors which provide at least minimal conditions for one organism to live."[136]

- "Habitat" refers to "the resources and conditions present in an area that produce occupancy—including survival and reproduction—by a given organism. Habitat is organism-specific; it relates the presence of a species, population, or individual (animal or plant) to an area's physical and biological characteristics. Habitat implies more than vegetation or vegetation structure; it is the sum of the specific resources that are needed by organisms. Wherever an organism is provided with resources that allow it to survive, that is habitat."[137]

- "Habitat" is "[t]he place where an animal or plant normally lives, often characterized by a dominant plant form or physical characteristic (*e.g*. soil habitat, forest habitat)."[138]

- "Habitat refers to areas that can be used by a particular organism to support survival and/or reproduction."[139]

- "Habitat is a core concept in wildlife ecology. The term habitat has been used in both an organism-specific context (*e.g*., elk habitat) and also in a land-based context (*e.g*., riparian

[132] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976).
[133] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981).
[134] RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987).
[135] Merriam-Webster Dictionary (11th ed. 2016).
[136] Rexford Daubenmire, PLANT COMMUNITIES: A TEXTBOOK OF PLANT SYNECOLOGY 4 n.* (1968).
[137] Linnea S. Hall, et al., *The Habitat Concept and a Plea for Standard Terminology*, 25(1) Wildlife Soc'y Bulletin 173, 175 (1997).
[138] John M. Frywell, et al., *Wildlife Ecology, Conservation, & Mgmt.* 427 (3d ed. 2014).
[139] J. Stamps, Encyclopedia of Ecology (2008), pages 1807-1810.

habitat). More commonly, wildlife ecologists define habitat as the area where an animal lives, including all resources (both biotic and abiotic) that affect survival and reproduction."[140]

Thus, in addition to conforming to a common understanding of the term "habitat," the Services' proposal to define "habitat" as areas capable of supporting the occupancy of the species is in accord with the use of the term in ecological literature. This is important because overall consistency with basic ecological conceptions of habitat ensure that the Services' biologists and the biologists at the Services' federal, state, tribal, local, and private partners are all able to examine "habitat" and threats thereto based on a commonly recognized use of the term in ecological literature.

The Services and their public and private conservation partners are also likely accustomed to defining "habitat" as areas capable of supporting the occupancy of the species because such a definition is consistent with the interpretations historically used by the Services and other agencies.

- The Services' 2016 Habitat Conservation Planning Handbook defines "habitat" as "the location where a particular taxon of plant or animal lives and its surroundings," including "the presence of a group of particular environmental conditions surrounding an organism…."[141]

- The U.S. Forest Service defined "habitat" roughly contemporaneously with the Services' 1978 ESA amendments as the "natural environment" or "locality where the organism may generally be found, and where all essentials for its development and existence are present."[142]

- The U.S. Forest Service Manual has also similarly defined "Wildlife habitat" as a place where the physical and biological elements of ecosystems provide a suitable environment for the food, cover, and space resources needed for plant and animal livelihood."[143]

International conventions are likewise in accord with the Services' proposal to define "habitat" as areas that species depend upon for survival.

- Under the Convention on the Conservation of Migratory Species of Wild Animals, "habitat" "means any area in the range of a migratory species which contains suitable living conditions for that species."[144]

- The Convention on Biological Diversity defines "habitat" as "the place or type of site where an organism or population naturally occurs."[145]

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[140] J.L. Rachlow, Encyclopedia of Ecology, Volume 1, 2019, Pages 509-516.
[141] *Habitat Conservation Planning Handbook* Glossary G-14 (Dec. 21, 2016).
[142] Charles Schwarz, et al., USDA Forest Service, Wildland Planning Glossary 91 (1976).
[143] FSM 2670.5; https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm91_048436.pdf.
[144] Art. I, § 1(g) (1979).
[145] Convention on Biological Diversity, art. 2 (1992).

As the forgoing examples demonstrate, although the various current and previously accepted definitions of the term "habitat" differ to some degree, all are based on the most irreducible minimum criterion that habitat must be habitable. Necessarily, the Services' proposal differs in varying degrees from these definitions, but it was clearly informed by the "ordinary, contemporary, common meaning" of "habitat" and the usage of the term in ecological literature. And most importantly, the proposed definition is in harmony with the widely recognized and self-evident notion that in order to be "habitat" for a species, an area must be capable of supporting the long-term survival of the species.

d. <u>The Services' proposed interpretation recognizes that habitability must be determined based on conditions present when critical habitat is designated</u>

As explained above, the text, structure, and legislative history of the Act, as well as the "ordinary, contemporary, common meaning" of the term "habitat," compel the Services to define "habitat" as limited to areas that are habitable to the species; that is, capable of supporting the long-term survival of the species. Here, the Associations offer support for the Services' recognition of the related and equally self-evident proposition that the habitability of an area must be assessed at the time critical habitat is designated.

Once again, it is the text and structure of the Act that guides this temporal element of the Services' proposed definition of "habitat." Congress repeatedly used present tense terms to underscore the requirement that designated critical habitat must meet all of the statutory elements for designation – including that the area is *actually* habitat for the species – at the time of designation. The definition of critical habitat in ESA Section 3 specifies that an area designated as occupied critical habitat must be an area on which physical or biological features essential to the species "*are* found."[146] Similarly, unoccupied lands may be designated as critical only if the Secretary finds that such areas "*are* essential" for the conservation of the species.[147]

As the Associations discuss in Subsection III.c.1 above, while ESA Section 3 provides different standards for designating occupied and unoccupied habitat as critical habitat, both standards are predicated on the habitability of the areas, and the habitability of those areas is predicated on the presence of "physical or biological features." Thus, even though these provisions of ESA Section 3 focus on the designation of critical habitat, the Act's designation standards require the Services to, among other things, determine whether an area is capable of supporting the species' survival. And Congress's use of temporal language in Section 3 means that a determination of habitability must be made at the time critical habitat is designated.

The ESA Section 4 procedures for designating critical habitat likewise require that designations be based on present conditions. Section 4 directs the Secretary, "concurrently" with the listing of a species, to designate habitat "*then* considered to be critical."[148] Because "critical habitat" is a subset of "habitat,"[149] here again, Congress's use of temporal language reflects a directive to the Services

[146] 16 U.S.C. § 1532(5)(A)(i) (emphasis added).
[147] 16 U.S.C. § 1532(5)(A)(ii) (emphasis added).
[148] 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added).
[149] See *Weyerhaeuser* at 368.

that they must assess the habitability of an area based on conditions present at the time critical habitat is designated.

One of the oft-cited arguments against interpreting ESA Section 4 to assess the habitability of an area based on conditions present at the time critical habitat is designated is that it precludes the Services from designating as critical habitat areas that are presently uninhabitable but which may one day develop into important habitat. Once again, the Act itself demonstrates that the Services are not so precluded.[150] Recognizing that current conditions in an area may change such that it becomes necessary for the survival of the species, Congress allowed that, following the initial designation of critical habitat, the Services "may, from time-to-time thereafter as appropriate, revise such designation."[151]

Even if Congress had declined to include a mechanism for the Services to revise critical habitat designation "from time-to-time," the Services could not ignore the Act's temporal limits on the Services' assessments of habitability, or the significant body of jurisprudence confirming the ESA's emphasis on present-day circumstances.[152] Nor could the Services ignore that the Act requires critical habitat designations be based on the "best scientific data available."[153] As the Supreme Court explained, Congress imposed this requirement "to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise."[154]

Such a haphazard and speculative implementation of the Act would almost certainly occur if the Services defined "habitat," not based on conditions present at the time critical habitat is designated, but on conditions that may one day develop. For instance, with respect to the dusky gopher frog at issue in *Weyerhaeuser*, the Associations believe it was speculative to assume that the presently-uninhabitable Unit 1 would become habitable if only the as-yet unwilling landowners would:

- chop down the "closed-canopy" "loblolly" trees and plant "open-canopied" "longleaf" pines;

- burn Unit 1 with "frequent fires" to "support a diverse ground cover of herbaceous plants," despite "acknowledge[d]" "landowner concern" and "negative impacts" of such fires;

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[150] See https://www.nwf.org/Latest-News/Press-Releases/2020/07-31-20-USFWS-Habitat-Definition; see also https://thehill.com/policy/energy-environment/509990-latest-trump-proposal-on-endangered-species-could-limit-future; see also https://biologicaldiversity.org/w/news/press-releases/trump-administration-proposes-new-limits-protecting-endangered-species-habitat-2020-07-31/.

[151] 16 U.S.C. § 1533(a)(3)(A)(ii).

[152] *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 268 F. Supp. 2d 1197, 1215, 1216-17 (E.D. Cal. 2003) (invalidating designation of areas that are "'likely to develop' essential habitat components, but do not contain them now," as occupied critical habitat); *Cape Hatteras Access Pres. All.*, 344 F. Supp. 2d at 122–23 (vacating critical habitat designation that included areas FWS determined to be "occupied" by the species, but on which primary constituent elements were not found); *Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011) (vacating designation of critical habitat where record did not support determination that area was "occupied" at the time of listing).

[153] 16 U.S.C. § 1533(b)(2).

[154] *Bennett*, 520 U.S. at 176.

- terminate century-long, "on-going timber management of the site, which precludes burning or planting longleaf pine trees";

- allow "60 percent" or "100 percent" of Unit 1 to be "managed" as "refuge for the frog," at a cost of "$20.4 million" or "$33.9 million" in "lost development value"; and

- agree "voluntar[ily]" to "frog translocations."[155]

Indeed, "there is no evidence" that these "substantial alterations" "will, or are likely to, occur."[156] Unfounded speculation about future conditions is not science, much less "best available science." Absent a definition of "habitat" that follows the text and structure of the Act and reasonably limits determinations of habitability based on conditions present at the time critical habitat is designated, the Services will invite even more of the speculative projections of possible future conditions that the ESA prohibits. If the Services want the flexibility to take action in response to conditions that may only arise in the future, they are fully aware that they "may, from time-to-time thereafter as appropriate, revise such designation[s]."[157]

e. <u>The Services' interpretation recognizes that an area is habitable to a species, and therefore "habitat" for the species, when its existing attributes make the area capable of supporting the long-term survival of the species</u>

The Services' interpretation recognizes that, regardless whether an area is occupied by a species, in order to be "habitat," the area must have the current capacity to support the long-term survival of the species. Those aspects of an area that give it the capacity to support a species are characterized as "attributes" in the Services' proposed definitions.[158]

The Associations view these "attributes" as analogous to the "physical or biological features" in the ESA's definition of critical habitat for occupied areas.[159] As discussed in Subsection III.c.1 above, while other aspects of the Act's definition of critical habitat (*e.g.*, the essentiality of the role of these features to the overall "conservation of the species" or that "they may require special management considerations or protections") define "what makes habitat 'critical,'"[160] the "physical or biological features" make an area "habitat." But regardless whether the Services' definition of "habitat" refers to "physical or biological features" or "existing attributes," those phrases should be interpreted to mean those existing conditions that serve a species' essential biological needs and support its long-term survival.

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[155] 77 Fed. Reg. 35123-24, 35126, 35129, 35141, JA121, 123, 132, 145, 189.
[156] *Markle Interests v. US Fish and Wildlife Serv*., 827 F. 3d 452, dissent at 480 (5th Cir. 2016).
[157] 16 U.S.C. § 1533(a)(3)(A)(ii).
[158] 85 Fed. Reg. at 47,334.
[159] 16 U.S.C. § 1532(5)(A)(i). The proposed rule explains that the Services used the phrase "existing attributes" in lieu of "physical or biological features" to avoid confusion with the ESA's definitions of critical habitat.
[160] *Weyerhaeuser* at 368.

1. The mere presence of a physical/biological feature or attribute does not make an area habitat

Importantly, an area does not become "habitat" for a species based solely on the presence of a single physical/biological feature or attribute, particularly if the species' long-term survival depends on multiple physical/biological features or attributes. In order for an area to be habitable to a species, and therefore "habitat" for the species, it must currently contain all physical/biological features or attributes necessary for the species' survival.

For example, in the dusky gopher frog critical habitat designation at issue in *Weyerhaeuser*, FWS determined that the frog needed three features/attributes to survive: (1) ephemeral ponds; (2) upland open-canopy forest containing holes and burrows in which the frog could live; and, (3) open-canopy forests connecting the ponds to the holes/burrows.[161] While the ephemeral pond is a physical feature/attribute that is necessary to the long-term survival of the frog, it is not habitat for the frog unless the pond is adjacent to an open-canopy forest and the requisite holes/burrows. The ephemeral pond, isolated from the forest and burrows, is insufficient to support the frog's survival. Without proximate forests and burrows, the ephemeral pond is uninhabitable to the frog, and therefore not habitat for the frog.

Thus, the determination of whether a particular area is habitat for a species cannot rest on whether the area supplies one specific feature/attribute necessary to support one specific life function of the species. Rather, the analysis should consider the overall suitability of the area to determine, not just the presence of each necessary physical/biological feature or attribute, but that those features or attributes are present in a manner that supports the essential biological needs of the species.

In addition, the determination of whether an unoccupied area is habitat for a species is contingent, not just on the presence of the features or attributes necessary to support the long-term survival of the species, but also on the accessibility of that unoccupied area to the species. Congress limited the Services' authority to designate as critical habitat only those unoccupied areas "into which the species can be expected to expand naturally."[162] This statutory limitation also applies here, and it precludes defining "habitat" to include unoccupied areas that existing populations cannot reach based on distance or other barriers that prohibit the natural movement of the species.

Areas that are remote from or inaccessible to existing populations of species are not capable of supporting those species even if those areas contain all the requisite features or attributes. If the species does not have the ability to reach an area (for whatever reason), the species cannot occupy that area. And if an area is incapable of being occupied by a species, it is not habitat.

2. Defining "habitat" for species with varying habitat requirements

For some species, the determination of whether an area is habitat will necessarily depend on the species' life cycle, life stage, or, as termed in the Services' proposal,[163] "life process." Regardless of the precise terminology employed, from a biological perspective, these terms all generally refer

[161] *Weyerhaeuser* at 366.
[162] 124 Cong. Rec. 21,355 (1978).
[163] 85 Fed. Reg. at 47,334.

to the series of developmental stages through which a species progresses to reach maturity.[164] For instance, one court described salmonoid life stages as "adults spawning in fresh water, to fry emergence from gravel, to downstream migration as smolts rear, and then to the species' salt-water life history."[165] Butterflies also provide a familiar example of these life stages (egg, larva, chrysalis, adult).

These stages are relevant to the definition of "habitat" because a species' habitat needs may fundamentally change depending upon the species' life stage/process. An area that provides all the physical or biological features necessary to a species during one life stage/process may be entirely uninhabitable to the species during a subsequent life stage/process.

While the varying habitat needs of certain species would appear to complicate the definition of "habitat," as the Services recognize, it need not. Indeed, regardless whether a species would occupy an area at every life stage/process or at only certain life stages/processes, in order to be "habitat," the area must contain the physical and biological features necessary to support long-term survival of the listed species throughout its relevant life stages/processes in that area.

When a species' different life stages/processes occur in different geographic areas, each geographic area need only contain the features or attributes necessary to support the life stage/process of the species while in that geographic area. However, to be habitat that serves only part of a species' life stage/process, the area should be currently accessible to the species. A remote or isolated area that has the features or attributes necessary to support a species throughout its life stages/process, but is not accessible to the species during the relevant life stage/process, is not habitat.

Although "habitat" can include each of the geographically separate areas that the species uses for its different life stages/processes, "habitat" does not necessarily include each area through which the species passes in order to the reach the specific areas it needs for different life stages/processes. In order to be habitat, the "corridor area" must also have the features/attributes necessary to support the species' survival on a long-term basis or, as applicable, for the duration of the species' life cycle/process. Areas with features or attributes sufficient only for the temporary survival of the species, or which only allow the species to be present in the area temporarily or intermittently, are not habitat for the species.

Consider, for example, a frog that is living in a freshwater pond but must soon disperse to a geographically separated breeding habitat. As an amphibian, the frog is capable of surviving in several types of ecosystems, including terrestrial, fossorial, arboreal, or freshwater aquatic ecosystems. The frog cannot however survive more than temporarily on barren or paved areas. The frog's habitat in this example would include its current pond, its geographically separate breeding area, and the dispersal corridors through ecosystems that have the features/attributes necessary for the frog's survival (*e.g.*, terrestrial, fossorial, arboreal, or freshwater aquatic ecosystems). The frog's habitat would not include dispersal corridors across barren or paved areas, even if the frog actually traverses them on its way to the breeding area, because those areas do not have features

[164] *United States v. Lykes Bros. S. S. Co., Inc.*, 511 F.2d 218, 220 n. 2 (5th Cir. 1975) (testimony regarding life cycle discussing stages from birth through death).
[165] *Consol. Salmonid Cases*, 713 F. Supp. 2d 1116, 1132 (E.D. Cal. 2010).

sufficient to support the frog more than temporarily. If the frog survives dispersal through these landscapes, it does so despite the absence of features or attributes it needs to survive, not because those landscapes are suitable for the frog's survival.

3. Defining "habitat" when the presence of necessary features or attributes varies

Much like certain species have different habitat needs at different times, habitat and the features/attributes present thereon can also vary seasonally, from year-to-year, or episodically in response to weather conditions or otherwise. And much like the varying habitat needs of certain species, the variable presence of physical or biological features/attributes can be accommodated in the Services' definition of "habitat."

The Associations believe that features or attributes may be deemed present when they occur on with a regularity or frequency sufficient to sustain the species. Not only must these features or attributes be present in an area on a regular or frequent basis, in order to be "habitat" for a species, the features or attributes must be present when the species is present in the area so that the features/attributes actually function to sustain the species' relevant life stages/processes. In other words, the presence of features or attributes necessary for each particular life stage of the species must be present for each of the species' particular life stage that occur in that area.

The regularly occurring or frequently present features/attributes that meet this criteria include, for instance, various Colorado River side channels and backwaters that are used by fish when flooded with snowmelt but become dry and uninhabitable as the spring runoff subsides. These regular and predictable features similarly include riverine sandbars and alluvial deposits that are used by the least tern for nesting and feeding.[166] The presence of these sandbars and deposits within a river varies temporally and spatially because of periodic inundations from the flooded river. Indeed, the same inundations that cause the presence and precise location of sandbars and deposits to fluctuate also strip them of encroaching vegetation encroachment thereby creating the habitat features needed by the least tern.

f. The Services' proposed interpretation recognizes that a mere presence of a species in an area does not make that area "habitat" for the species

While a species' occupancy in an area is a strong indicator that the area is necessary to, and therefore, habitat for, the species, occupancy is not singularly determinative of habitability. As discussed at length above, "habitat" must be determined based on the presence of features or attributes necessary for the long-term survival of a species. Species can be temporarily present in areas that lack these necessary features or attributes.

For instance, many species migrate through areas lacking the features or attributes that the species requires for long-term survival. The presence of the species in these areas is temporary, and therefore their long-term survival is not impacted. Individual species or groups of species may also make exploratory excursions through uninhabitable areas in search of food, breeding opportunities, or new habitat. Territorial and solitary species like wolverines are particularly known for these

[166] https://www.audubon.org/field-guide/bird/least-tern.

types of long excursions because they are necessary to provide space from other solitary and territorial wolverines. The areas in which the species ultimately reside will logically contain the features/attributes necessary for their long-term survival and therefore fit the proposed definition of "habitat" but the expanses of unsuitable areas through which they pass in order to find their new homes are certainly not "habitat."

Individual species or groups of species may be intermittently or temporarily present in areas that lack the features/attributes necessary for their long-term survival simply because those areas are within the range of the species. But, as discussed in Subsection III.c.1 above, the areas that constitute the range of a species are very different and much more encompassing that the areas that constitute the habitat of a species. While "range" can be interpreted to include intermittent occupancy areas that lack the features necessary for long-term survival of species, habitat cannot. Range represents the overall distribution of the species within which there may be multiple areas that can be considered habitat, but also many uninhabitable areas in which individual species or groups of species may be intermittently or temporarily present. Habitat, on the other hand, cannot include these uninhabitable areas.

As such, the temporary or intermittent presence of individual species or groups of species in an area may be sufficient to demonstrate that area is within the range of the species, but it does not demonstrate that the area is habitat for the species. Once again, an area is habitat for a species only if: (1) it currently has the features/attributes necessary for long-term survival of the species (not just adequate for stopping over or passing through); and (2) is accessible to the species in a manner that makes them likely to be used by the species for long-term survival.

IV. RECOMMENDED EDITS TO PROPOSED DEFINITION OF HABITAT

As noted throughout these comments, the Associations support the Services' interpretation of "habitat" as described in the preamble and embodied in the proposed definitions, because the Services appropriately define "habitat" based on the presence of attributes necessary to support the long-term survival of a species through each life stage or process that occurs in the area. In furtherance of that support, and in response to the Services' request for feedback, we offer the following recommendations.

- Clarify the applicability of the definition – The Associations believe that the Services' final rule should explicitly state that the Services' definition of "habitat" applies only with respect to the identification of areas for designation of critical habitat under ESA Section 4, and consequently, also identifying those critical habitat areas, the potential effects to which are evaluated under ESA Section 7. The Services should further make clear that the definition of "habitat" does not change the types of actions that can constitute "take" under ESA Section 9, the measures implemented under ESA Section 10, or the avoidance, minimization, or offsetting measures that can apply through Section 7 consultation. Overall, we believe the most effective way to highlight the highly circumscribed role of the definition of "habitat" is to explain the Supreme Court's decision in *Weyerhaeuser* and the corresponding need to clarify the relationship between "critical habitat" and "habitat" under ESA Section 4(a)(3)(A)(i).

- Clarify that the definition of "habitat" does not impose regulatory consequences - While the identification of an area as habitat is a necessary prerequisite to potential designation of some or all of the area as critical habitat, the Services should make clear that their identification of an area as habitat will not impose regulatory consequences for landowners, project proponents, and other potentially affected parties. Until specific areas of habitat are designated as critical habitat,[167] those areas are not subject to the ESA.

- "Physical places" – The Associations support the use of this phrase because it indicates that habitat must be specific location with the attributes and conditions necessary for the species' survival and because it further shows that the Services' are not defining "habitat" to mean "habitat type," ecosystem, ecotype, or range.

- "Individuals of a species" – The Associations believe that this phrase indicates that is it not necessary for the entire species to use or depend on an area in order for it to be habitat for the species. We are concerned, however, that the reference to "individuals" may lead to an unintended insinuation that a species' use or dependence of an area can be established by the presence of a single vagrant individual or a group that is too small to reasonably establish occupancy or survive through successive generations. As such, we recommend that the Services' refrain from using the phrase "individuals of a species" in their final definition of "habitat."

- "Depend Upon" v. "Use" – The Associations request that the Services make clear that, in order for a specific area to be habitat for as species, the species must "depend upon" the specific area's attributes and conditions.[168] We believe "use" is too vague a term that could imply that even negligible reliance on a physical place (*e.g.*, capable of use by one a vagrant, or use that is temporary or intermittent) is sufficient to demonstrate that the area is habitat. A species can "use" a wide variety of areas with attributes that are insufficient to meet the basic biological needs of the species. Habitats are the areas that can satisfy the species biological needs and support its long-term survival, or, as appropriate, its life stages/processes. Habitats are necessary to species. Species do not merely "use" habitats, they "depend upon" them for their survival. As such, the Associations recommend the Services' definition of habitat include the phrase "depend upon" rather than "use."[169]

- "Attributes" – In the context of the Services' definitions, it is clear "attributes" are the characteristics of a physical place that support and sustain a species, and therefore the characteristics that make the physical place habitat for the species. Outside the context of the proposed definitions, however, the term "attributes" may be unnecessarily vague and therefore subject to misinterpretation. As noted in Subsection III.c.1 above, we interpret the term "attributes" to be analogous to the phrase "physical or biological features" used in the

[167] 16 U.S.C. § 1533(a)(3)(i) (The Secretary shall "designate any habitat of such [listed] species which is then considered to be critical habitat").

[168] The Associations further believe that the Services' determination that a species "depends upon" a feature must be based on data and observation; not speculation or surmise.

[169] This relationship is in accord with ESA Section 2 goal that the Act will "provide a means whereby the ecosystems upon which endangered species and threatened species *depend* may be conserved . . . " 16 U.S.C. § 1531(b).

ESA's critical habitat definition. We believe the phrase "physical or biological features" more fully describes the characteristics that make the physical place habitat for the species, and is more consistent with ecological terminology.[170] While the preamble to the Services' proposal indicates that the Services are concerned that use of the phrase "physical or biological features" would create confusion with the Act's definition of critical habitat, but it need not be so. In the context of critical habitat, "physical or biological features" are those which are essential to the conservation and recovery of the species overall. The essentiality of the features to the species overall conservation and recovery is "what makes habitat 'critical,'" the features themselves, however, are what makes an area 'habitat.'"[171]

- "Present existence" of attributes/features – The Associations discuss the importance of the temporal element of the definition in great detail throughout these comments, and need not repeat that discussion here. Suffice it to say, in order to be lawful, in accord with the Act, and consistent with both common and scientific usage, the Services' definition of "habitat" must be based on attributes/features that exist and are present at the time critical habitat is designated.

- National Endangered Species Act Reform Coalition's ("NESARC's") Proposed Interpretation – Although the Associations continue to support the Services' proposed alternate interpretation of "habitat" under the ESA with a change from "use" to "depend upon", we believe that the aforementioned principles are also embodied in the definition of "habitat" that NESARC proposed in comments submitted in this docket.

- National Environmental Policy Act ("NEPA") – The Associations agree that the Services' interpretation of the term "habitat" under the ESA is an action that falls within the Services' categorical exclusion for "Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature."[172]

[170] See David Anthony Kirk et al., *Our Use, Misuse, and Abandonment of a Concept, Whither Habitat?*, 8 ECOLOGY & EVOLUTION 4197, 4198 (2018), https://doi.org/10.1002/ece3.3812 ("physical and biological characteristics."

[171] *Weyerhaeuser* at 368.

[172] Department of Interior exclusion at 43 CFR 46.210(i); NOAA exclusion at Categorical Exclusion G7, at CM Appendix E (applicable to "preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature.").

V. CONCLUSION

The Associations appreciate the opportunity to provide these comments. We support the Services' proposal to define for the first time "habitat" under the ESA, and we further support the Services' proposal to do so within the ESA's implementing regulations and through a notice-and-comment rulemaking process. And while the Associations offer recommendations to further clarify the Services' definition of "habitat," we fully concur with the principles that guided the Services' interpretation.

Thank you in advance for your consideration of our comments. Please do not hesitate to reach out to us if we can be of further assistance on this important issue.

Amy Emmert
Senior Policy Advisor
American Petroleum Institute
200 Massachusetts Ave NW, Suite 1100
Washington, DC 20001
Tel: (202) 682-8372
Email: emmerta@api.org

Dan Naatz
Senior Vice President of Government Relations and Political Affairs
Independent Petroleum Association of America
1201 15th Street NW, Suite 300
Washington, DC 20005
Tel: (202) 857-4722
Email: dnaatz@ipaa.org