

September 4, 2020

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

The undersigned ocean advocacy organizations are writing to oppose the definitions of “habitat” under the Endangered Species Act proposed by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service published in the Federal Register on August 5, 2020.¹ In response to the Supreme Court’s ruling in Weyerhaeuser Company v. US Fish & Wildlife Service² that critical habitat must be a subcategory of “habitat,” the Services noticed a proposed rule with two alternative narrow definitions of habitat. Both proposed definitions are at odds with every factor relevant for consideration when promulgating a regulation, which include, but are not limited to, the Congressional intent and plain language of the Endangered Species Act; the documented agency practice of considering designation of critical habitat that requires restoration; the present and predicted impacts of climate change on listed species’ ranges and habitat needs; the scientific evidence of a present and growing biodiversity crisis; and the public health emergency caused by transmission of a zoonotic disease, the likelihood of which increases as habitat is degraded. At a time when compounding environmental stressors are threatening the biological systems that sustain human life, and compounding deregulatory attacks are undermining the ability of federal agencies to carry out their statutory mandates, further weakening the strongest biodiversity safeguard of the United States is unacceptable.

I. The proposed definitions of “habitat” contradict the Congressional intent of the ESA

The Services have proposed a definition of “habitat” that not only disregards but also contradicts the Congressional intent of the Endangered Species Act, in both its original 1973 enactment and its subsequent amendments. The legislative history of the Act shows that Congress contemplated “essential” habitat as potentially including presently uninhabitable, unoccupied habitat and did not intend the Act to only allow for the designation and protection of pristine habitat. Rather, Congress recognized that the very forces necessitating passage of the Act had already degraded vast portions of species’ habitats across the U.S. and rendered them in need of active restoration. When passing the Endangered Species Act of 1973, Congress deemed it “essential that the habitat of endangered or threatened wildlife be protected from further encroachment” and authorized the Secretary to acquire land for the purposes of species conservation.³ The Senate stated that “most endangered species are threatened primarily by the destruction of their natural habitats,” and accordingly authorized the Secretary to acquire any property the Secretary finds necessary for the protection and *restoration* of a species.⁴ Congress clearly contemplated designation of habitat that would require active manipulation and management to support a listed

¹ 85 Fed. Reg. 47335 (Aug. 5, 2020).

² 139 S. Ct. 361 (Nov. 27, 2018)

³ 119 Cong. Rec. 25, 669 (1973), reprinted in A Legislative History of the ESA at 376

⁴ *Id.* (emphasis added)

species when such habitat was essential to the species' recovery. Congress further elevated the importance of critical habitat in the 1978 amendments to the Endangered Species Act by mandating the Secretary to consider both occupied and *unoccupied* habitat for potential critical designation and included in the definition of critical habitat, "habitat outside the geographical area occupied by the species at the time it is listed if [the Secretary] determines that such areas are essential for the conservation of the species."⁵ Importantly, Congress did not require the Secretary to determine that habitat is critical to the survival of a species, but rather critical to its conservation.⁶ The Services' proposed definition of "habitat" would thwart this Congressional purpose by precluding consideration of habitat that may indeed be essential to the conservation of the species but not contain all attributes necessary for supporting a species at the time of listing.

II. The proposed definitions of "habitat" fail to account for established agency practice of considering designation of critical habitat that requires restoration or that could become essential to the conservation of a listed species as a result of climate change

Proposed and final critical habitat designations for multiple ESA-listed marine species, including those described below, show that agencies have repeatedly considered climate change as a relevant factor in designating and modifying critical habitat and have acknowledged the need to consider unoccupied critical habitat that may become essential to the conservation of a species due to climate change. The Services' proposed definitions of "habitat" would severely limit the depth and comprehensiveness of critical habitat designations by preventing agencies from considering designation of habitat that does not currently contain attributes necessary for supporting an individual of a listed species but could be restored to meet that requirement.

1. Northwest Atlantic Ocean Loggerhead Sea Turtles

The scientific analysis for designation of critical habitat for Northwest Atlantic Ocean Loggerhead sea turtles demonstrates the limiting and harmful effects that the Services' proposed definitions would have on agencies' abilities to account for climate change in the habitat designation process.⁷ Loggerhead sea turtles are wide-ranging and depend on a number of different habitats identified in the rule. The scientific analysis supporting the final rule considers the potential effects of climate change on turtle nesting habitat even in locations with relatively low population and nesting density, due to those locations' potential to promote "important genetic diversity and adaptive potential for the DPS, especially as our climate changes."⁸ The agency also defended its inclusion of climate change in management considerations against a commenter who "strongly urged NMFS to avoid any management considerations of global warming effects on Sargassum habitat."⁹ The agency acknowledged the need to "consider global

⁵ H. Rpt. 95-1804, to accompany S. 2899 as reported by the Committee on Conference, Congressional Record, Oct. 15, 1978, U.S.C.C.A.N. 9484, 9485 (emphasis added).

⁶ 16 USC 1532(3) (The terms "conserve", "conserving", and "conservation" 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.)

⁷ Final Rule - 79 FR 39855 (7/10/2014); Proposed Rule - 78 FR 43006 (July 18, 2013).

⁸ <https://www.federalregister.gov/d/2014-15748/p-103>

⁹ See Final Rule, response to Comment 31.

climate change, which could have significant impacts on a variety of oceanographic features,” “may also increase the frequency and magnitude of storm events, which could then lead to increased disruption of Sargassum consolidation” and therefore “may indeed affect Sargassum habitat.”¹⁰ This reasoning illustrates the agency precedent of accounting for the potential effects of climate change in critical habitat designation. Presently, agencies can account for the fact that an area may be a place of breeding in the foreseeable future because present breeding areas are becoming inhospitable due to climate change or sea level rise. Under the Services’ proposed definitions, only existing attributes of an area could be examined, not the foreseeable changes from climate change. As a result, habitat needed to replace areas with existing attributes would not be included.

2. North Atlantic Right Whales

The final rule designating critical habitat for the endangered North Atlantic right whale provides another example of how the proposed “habitat” definitions would circumscribe agency considerations of critical habitat.¹¹ In the final rule, the agency analyzed whether designation of a migratory corridor along the Atlantic would protect an important function of the whale and discussed whether whale sightings are sufficient to support identification of a corridor. Although NMFS determined that identification of physical and biological features associated with migration was not possible at the time of the final rule, the agency gave careful consideration to the possibility.¹² The agency also noted at multiple points throughout the final rule that special management considerations or protection may be required to protect the essential features of North Atlantic right whale critical habitat due to future climate change impacts.¹³ The agency was able to perform this evaluation and analysis because there is no regulatory requirement that an area have “existing attributes” to support the species. Both of the Services’ proposed definitions would seem to eliminate consideration of these corridors.

3. Atlantic Salmon

NMFS’s scientific analysis of critical habitat for the expansive critical habitat designation for Atlantic salmon includes habitat that has been and may continue to be degraded, which the Services’ proposed definitions would not allow, even though the degraded habitat may be found essential to the conservation of a listed species.¹⁴ The proposed rule for designating critical habitat for Atlantic salmon specified that forestry practices and development have degraded and will likely continue to degrade Atlantic salmon habitat.¹⁵ Thus, although areas considered for critical habitat designation had the attributes needed to support species activities at the time of the listing, the agency acknowledged that continued degradation could eliminate such attributes in the future. The final rule stated, “In designating critical habitat for Atlantic salmon, the emphasis is twofold: (1) Assuring that critical habitat essential for a recovered population is protected so that when marine conditions improve, sufficient habitat is available to support

¹⁰ <https://www.federalregister.gov/d/2014-15748/p-161>

¹¹ Proposed Rule: 80 FR 9314 (2/20/2015); Final Rule - 81 FR 4837 (1/27/16).

¹² Final Rule, Comment 20 and response and associated material, 81 FR 4845

¹³ *Id.* Comments 12 and 47 and response,

¹⁴ Proposed Rule – 73 FR 51747 (9/1/08); Final Rule – 74 FR 29300 (June 19, 2009), as amended FR 74 FR 39903 (8/10/9).

¹⁵ Proposed Rule, 73 FR at 51756 and 51757.

recovery; and (2) enacting appropriate management measures to enhance and improve critical habitat areas that are not fully functional because the features have been degraded from anthropogenic causes.”¹⁶ The Services’ proposed definitions would preclude both accounting for projected changes in habitat functionality due to degradation, and designating critical habitat that is not presently fully functional due to anthropogenic degradation and therefore requires management and restoration.

4. Western Snowy Plover

Critical habitat for the Western Snowy Plover (WSP), a migratory shorebird that nests adjacent to tidal waters of the Pacific Ocean, was expanded in 2012 because “sea level rise and hydraulic changes associated with climate change are having and will continue to have significant effects on Pacific Coast WSP and its habitat over the next several decades.”¹⁷ The proposed definition of habitat will not align with and will stunt the agency's efforts to mitigate the current and future impacts of climate change on WSP habitat on the Pacific Coast. The WSP recovery plan’s strategy is twofold: “1) achieve well-distributed increases in numbers and productivity of breeding adult birds, and 2) providing for long-term protection of breeding plovers and their habitat.”¹⁸ Without the ability to re-designate critical habitat designations that align with current and future predictions about sea level rise impacts to the critical habitat, the agency will fail both goals to recover WSP because the availability of nesting habitat is critical to the success of the species.¹⁹

5. Additional considerations of climate change in critical habitat designation

Additional species whose critical habitat designations would be reduced in scope and depth by the Services’ proposed definitions include the Hawaiian monk seal,²⁰ Lower Columbia River coho salmon and Puget Sound steelhead,²¹ Southern Resident killer whale,²² humpback whales,²³ Atlantic sturgeon,²⁴ and black abalone.²⁵ For all of these species, NMFS acknowledged climate change as an important factor to consider in designating critical habitat and developing recovery plans. Regarding the Hawaiian monk seal, NMFS stated that although it did not yet have the scientific information necessary to predict the impacts of climate change on monk seal critical habitat with certainty, it “recognize[d] that processes associated with global climate change may alter the availability of coastal habitat” and “recognize[d] the need to manage for this threat and as impacts from these forces are better understood, activities that exacerbate impacts to the essential features will be further scrutinized and associated management efforts may be

¹⁶ <https://www.federalregister.gov/d/E9-14268/p-216>

¹⁷ <https://www.federalregister.gov/documents/2012/06/19/2012-13886/endangered-and-threatened-wildlife-and-plants-revised-designation-of-critical-habitat-for-the>

¹⁸ <https://www.fws.gov/arcata/es/birds/wsp/plover.html>

¹⁹ https://inr.oregonstate.edu/sites/inr.oregonstate.edu/files/2018_snpl_report.pdf

²⁰ <https://www.federalregister.gov/documents/2015/08/21/2015-20617/endangered-and-threatened-species-final-rulemaking-to-revise-critical-habitat-for-hawaiian-monk>

²¹ <https://www.federalregister.gov/d/2016-03409/p-58>

²² 84 Fed. Reg. 49,214 (Sep. 19, 2019)

²³ 84 Fed. Reg. 54,354 (Oct. 9, 2019).

²⁴ 82 Fed. Reg. 39,160 (Aug. 17, 2017).

²⁵ <https://www.federalregister.gov/d/2011-27376/p-49>

pursued.”²⁶ The Hawaiian monk seal recovery plan also “recognizes the threat of habitat loss to Hawaiian monk seal habitat and provides recommendations to assist in conserving habitat throughout the species' range,” such as “exploring habitat restoration in the low lying areas of the NWHI.”²⁷ Under the proposed definitions of critical habitat, agencies would be precluded from considering designating critical habitat that required restoration in order to be able to support an individual of a listed species.

III. The proposed definitions ignore scientific evidence that climate change will make unoccupied critical habitat more important in the future, especially for ocean species

As climate change alters, degrades, and circumscribes occupied habitat, designating unoccupied habitat is an increasingly important means of conserving climate-threatened species. Defining “habitat” as “areas with *existing* attributes that have the capacity to support individuals of the species,” and noting that “critical habitat” is necessarily a narrower subset of “habitat,”²⁸ renders this tool useless by precluding designation of critical habitat that would require restoration to support a listed species. As the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) stated in its 2019 global biodiversity assessment, marine ecosystems have experienced large historical losses of extent and condition and are continuing to rapidly decline, with only three percent of the ocean described as free from human pressure in 2014.²⁹ The IPBES also noted that climate change impacts on marine ecosystems will produce unprecedented geographic shifts in species range and distribution, as, for example, temperatures change, food sources migrate, waters acidify, and ice recedes.³⁰ The Intergovernmental Panel on Climate Change’s Special Report on the Ocean and Cryosphere in a Changing Climate likewise states that climate change has altered the availability of suitable habitat for multiple marine species, which has in turn altered those species’ ranges and the composition and functioning of ecosystems they inhabit.³¹ Limiting the scope of areas that can be designated as critical habitat for endangered or threatened species means reducing available protections for ocean ecosystems precisely as the need for those protections reaches unprecedented levels. The Services’ proposed definitions of “habitat” would set an impossibly high bar for designation of critical habitat right as almost all ocean habitat is losing the ability to meet such a bar.

IV. The proposed definitions disregard the reliance of huge swaths of the world’s population on healthy, resilient ocean ecosystems

The IPCC Report underscores the importance of functioning ocean ecosystems for human health and flourishing and identifies enforcement of environmental laws as essential to preventing

²⁶ <https://www.federalregister.gov/d/2015-20617/p-179>

²⁷ <https://www.federalregister.gov/d/2015-20617/p-181>

²⁸ 85 Fed. Reg. 47335 (Aug. 5, 2020) (emphasis added).

²⁹ IPBES (2019): Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. S. Díaz et al. (eds.). IPBES secretariat, Bonn, Germany, at 24.

³⁰ IPBES (2019) at 39,

³¹ IPCC, 2019: Summary for Policymakers. In: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate [H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegria, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)]. In press

habitat degradation and fostering resilience in changing ocean-climate interactions. As the authors state unequivocally, “[a]ll people on Earth depend directly or indirectly on the ocean and cryosphere.”³² From coastal communities facing sea level rise, to inland communities facing more frequent and severe extreme weather events, fishing communities facing shifting and diminishing fish stocks, and tribal nations facing the loss of natural elements essential to their cultural practices and identities, no one is insulated from the impacts of changing ocean-climate interactions. The ocean and cryosphere regulate the very air we breathe and provide ecosystem services too valuable to go without, including food and water supply, transportation, health, trade, and energy.³³ Protecting ocean habitat is essential for preserving the functionality of ocean ecosystems and the continuation of these vital services. The loss of ocean habitat also limits our scientific progress and increases human vulnerability to both existing and new pathogens. As the IPBES stated prior to the COVID-19 pandemic, “[z]oonotic diseases are significant threats to human health,” and “[e]merging infectious diseases [] can be exacerbated by human activities such as land clearing and habitat fragmentation.”³⁴ However, the report also stated that nature is often the source of medicines and antibiotics, meaning that its destruction comes at the double cost of increased risk and reduced treatment options. The Services’ proposal to limit critical habitat designation is a proposal to dedicate government time and resources to reducing habitat protections at a moment when the entire world is paying the price for habitat destruction.

For the reasons explained above, we oppose the Services' proposed definitions of "habitat" due to the harmful and unprecedented effect they would have on agencies' abilities to conserve and recover listed species. Climate change has been a consistent factor of agency consideration in designating critical habitat for coastal and marine species, and the impact of climate change on ocean ecosystems is only increasing. We ask the government to end its proposed attack on our most effective extinction prevention law and to instead attend to the urgent needs of our public and our ocean; neither is served by undercutting the very laws meant to protect them.

Signed,

Animal Welfare Institute
Azul
Clean Water Action
Conservation Law Foundation
Conservation Voters of South Carolina
EarthEcho International
Endangered Species Coalition
Environment America
Environmental Investigation Agency - US
Friends of the Earth
Friends of the San Juans
Gotham Whale
GreenLatinos
Greenpeace USA

Hands Across the Sand
Healthy Gulf
Hispanic Access Foundation
Inland Ocean Coalition
International Fund for Animal Welfare
International Marine Mammal Project of
Earth Island Institute
League of Conservation Voters
Maine Conservation Voters
Mission Blue
Pacific Environment
National Aquarium
National Audubon Society

³² IPCC (2019).

³³ *Id.*

³⁴ IPBES (2019) at 22.

National Ocean Protection Coalition
New England Aquarium
Ocean Conservation Research
Oceana
Oceanic Preservation Society
Oregon Shores Conservation Coalition
Public Employees for Environmental
Responsibility
Save the Manatee Club
Seattle Aquarium
Seven Circles Foundation
Shedd Aquarium
Sierra Club
Surfrider Foundation
The Center for Biological Diversity
The Ocean Project
Whale Scout
Wild Orca
WILDCOAST