November 29, 2021

Public Comment Processing
Attn: FWS-HQ-ES-2020-47
United States Fish and Wildlife Service
MS: PRB(3W)
5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: Docket No. FWS-HQ-ES-2020-0047 – Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat
Submitted via Federal eRulemaking Portal *https://www.regulations.gov/*

Dear Ms. Fahey and Ms. Somma:

The California Farm Bureau appreciates the opportunity to provide comments on the United States Fish and Wildlife Service and the National Marine Fisheries Service (Services) proposed rule which seeks to rescind the final rule titled "Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat" that was published on December 16, 2020 and became effective on January 15, 2021. The proposed recission, if finalized, would remove the regulatory definition of "habitat" established by that rule.

I. About California Farm Bureau

California Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing approximately 32,000 agricultural, associate, and collegiate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers, ranchers and foresters engaged in production agriculture to provide a reliable, safe, and affordable supply of food and fiber through responsible stewardship of our natural resources.

II. Background

Unfortunately, battles over everything from spotted owls to delta smelt have reshaped California's rural communities and sadly, have created tremendous industries of conflict with little to show in the way of improvements for species. California Farm Bureau believes there is widespread acknowledgement that the Endangered Species Act (Act) can be improved to work better for both species and people by promoting collaborative and voluntary conservation, reducing conflict, and increasing regulatory certainty.

California Farm Bureau previously submitted comments in support of the Services' September 2020 proposed changes. The United States Supreme Court's 2-18 ruling in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv*., 139 S. Ct. 361 (2018) considered the critical habitat designation of private land in Louisiana for the dusky gopher frog despite acknowledgement by the U.S. Fish and Wildlife Service the land could never be inhabited by the species without significant changes to the land. In our view, Weyerhaeuser rightly affirmed that land must be logically habitable by a species to be designated critical habitat and thus overturned the designation of critical habitat.

California Farm Bureau also submitted comments in support of the Services' September 2018 proposed changes to implementing regulations governing designation of critical habitat. Those changes made modifications to the regulatory requirements that must be met for areas outside the geographical area occupied at the time of the listing to be considered "essential to the conservation on the species" which is the standard that an unoccupied area must meet to be considered "critical habitat". However, these changes did not attempt to define "habitat". These comments expressed our appreciation of the Service's intent to provide transparency, clarity, and consistency for stakeholders by seeking to define "habitat".

At that time, the ESA did not specifically define "habitat" nor had the Services previously defined the term in implementing regulations. *Weyerhaeuser* stated that to designate an area as critical habitat, the Service must first show that the area serves as habitat. To function as habitat, qualifying land must possess at least a minimum of the requisite elements, features, or attributes necessary for the land to function as habitat. If it does not, then it is not habitat and therefore cannot also be critical habitat. Critical habitat is a subset of the larger category of habitat in general. Whether occupied or unoccupied, land eligible for critical habitat designation should at least possess the qualities necessary to actually support and sustain the listed species. This was the central conclusion of U.S. Supreme Court decision in *Weyerhaeuser*.

III. General Comments

California Farm Bureau opposes the proposed recission of the definition of "habitat". Recently promulgated by the Services, this definition provides transparency, clarity, and consistency by defining a term that the U.S. Supreme Court explicitly stated was a necessary component of critical habitat designation. We are disappointed that instead of retaining a regulatorily defined term, the Services are proposing to revert to prior practice of assessing habitat on a case-by-case basis, if deemed necessary in an agency-determined, context. This leaves farmers, ranchers and foresters, project proponents and numerous other stakeholders with no established guidance. We urge the Services to reconsider the proposal and instead pursue efforts to better refine the definition of "habitat" as needed to implement the ESA

transparently, clearly, and consistently. California Farm Bureau offers the following specific comments for the Services' consideration:

A Definition of "Habitat" is Necessary to Determine Critical Habitat Designation

The rationale for recission states that the Services had deliberately avoided using terminology from the statutory definition of "critical habitat" because they wanted to make clear that "habitat" is logically and necessarily broader than "critical habitat" and that in doing so, the terminology is now unclear, confusing, and has no established meaning in the statute or in prior regulations or practices.

While we agree that lack of clarity and guidance can have significant repercussions for a wide range of actions and stakeholders, we do not agree that the current definition of "habitat" as published by the Services in the December 16, 2020 final rule is unclear, confusing, and without established meaning. The definition of "habitat", as adopted in that final rule, states: *"For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one of more life processes of a species."* Previously anticipating this concern, California Farm Bureau's September 3, 2020 written comments to the Service stated that should the Service choose to define "habitat" for the purposes of implementing section 4 of the ESA, that the Service should also clarify that the definition of "habitat" only applies to the identification of areas for designation as critical habitat.

We additionally suggested that the Service include a statement in the definition of habitat to reflect that the definition of "habitat" only applies to the designation of critical habitat. The current definition of "habitat" adopted in that final rule makes clear that it is specifically intended "for the purposes of designating critical habitat only." Given the economic, regulatory, and other implications associated with a designation of critical habitat, it is imperative that landowners, project proponents, local and state governments, and other stakeholders have a regulatory basis by which to determine what areas may be "habitat" to qualify for designation of critical habitat. While California Farm Bureau believes that the existing definition could possibly be further improved upon, we do not support a complete recission of the definition.

The Definition of Habitat Does Not Constrain the Service's Abilities

The Service states that the definition and the preamble of the final rule inappropriately constrains the Services' ability to designate areas that meet the definition of "critical habitat" under the Act. Additionally, the Service also finds significant tension between the definition of "habitat" as defined for the purposes of designating critical habitat and the broad definition of "conservation." The proposed rule additionally reasons that while partially in response to the Supreme Court's Weyerhaeuser decision, that the Court's decision did not require the Services to adopt a regulatory definition for "habitat" and after reconsideration

has determined that any concerns that may arise, on a case-by-case basis and on the basis of the best scientific data available, in future designations as to whether unoccupied areas are habitat for a particular species can be addressed.

The Services are concluding that the exclusion of areas that require restoration are, by default, that only areas in an optimal state qualify for consideration as habitat. As the proposed rule states, the "quality of habitat varies along a continuum, and species, and individuals within a species, often use habitats with variable quality over the course of their life histories." The definition of habitat is inclusive of areas that may require restoration but, per the preamble of the final rule, it also excludes areas that do not currently or periodically contain the requisite resources and conditions, even if such areas could meet this requirement in the future after restoration activities or other changes occur.

The ability of any area to support a species is the threshold required for inclusion as habitat. This both includes and excludes areas depending on the degree of restoration required to meet the threshold.

The Final Rule Explains and Clarifies the Definition's Terminology

The rationale for recission states that the Service's attempt to codify a single, one-size-fits-all definition of "habitat" under the Act resulted in the use of overly vague terminology in the definition even though the Service provided a detailed explanation in the 2020 proposed rule as to how the definition was developed.

Per the 2020 proposed rule, "In developing this particular definition of habitat, we reviewed many definitions of habitat from the ecological literature; however, no pre-existing definition was adequate to address the particular regulatory framework that we are implementing. Therefore, we incorporated useful concepts from the literature to the extent appropriate and added concepts based on our decades of expertise so as to define the term 'habitat' in a manner that would be sufficiently broad to fully encompass both the occupied an unoccupied prongs of the definition of critical habitat in the Act."

Further, the 2020 Final Rule explained that the final definition stemmed from scientific literature and possessed a clear relationship with the Act's definition of critical habitat.

The Definition of Habitat is Limited to Critical Habitat and is Clear and Consistent

The rationale for recission states that retention of the current definition of "habitat" would be confusing and could appear to conflict, or create inconsistencies with, other Federal agency statutory authorities or programs.

Weyerhaeuser held that only that habitat of a listed species is eligible for designation as critical habitat. Regardless of whether an area is occupied or unoccupied for consideration as

critical habitat, the area must always first be "habitat" before it can be designated as "critical habitat." Additionally, the retention of the definition does not create an additional step in the process of designating critical habitat for any species as the Services still must assess and confirm that an area is "habitat" before they can proceed to designating an area occupied or unoccupied critical habitat.

Additionally, we believe the Service's concern regarding unintended consequences to be unfounded. As discussed above, both the premise and use of the definition of "habitat" for the purposes of designating critical habitat were made clear in both the definition and the explanation included in the 2020 final rule. The Service included explicit language in the definition of habitat to avoid any error in application.

The Definition of Habitat Should Not Be Limited to a Case-by-Case Determination

The rationale for recission states that although adoption of the regulation was in part intended to be a response to *Weyerhaeuser*, the Court's decision did not require that the service adopt a regulatory definition for "habitat."

The approach discussed above where the Service intends to address concerns on a case-by-case basis and on the basis of best scientific data available, in our view, does not provide transparency, clarity or consistency. This again leaves farmers, ranchers, and foresters, and the broader regulated community, without an applicable definition, interpretation, or guidance.

IV. Conclusion

California Farm Bureau appreciates the opportunity to provide comments in response to the Services' proposed recission. The definition of "habitat" as it relates to the designation of critical habitat has direct impacts on California's valuable and productive agricultural lands. For this reason, we request that you take our analysis into full consideration. Should the Services reconsider this proposal and instead seek refinements to the definition, California Farm Bureau is available to offer insights and input as needed. Please contact Erin Huston at ehuston@cfbf.com (916-849-3746) with additional questions

Sincerely,

JAMIE JOHANSSON
President