



## FWS Proposed Definition of “Habitat” to Ensure Unoccupied Critical Habitat is Actually Habitat

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On August 5, 2020, the U.S. Fish and Wildlife Service (FWS) published [a proposed and an alternative definition of “habitat”](#) to provide regulatory certainty when designating unoccupied areas as critical habitat under the Endangered Species Act (ESA). The proposed and alternative definitions are open for public comment until September 4, 2020.

Defining the term habitat would provide a regulatory standard to help ensure that unoccupied areas designated as critical habitat are actual habitat for the species. For unoccupied areas, the FWS would consider any questions raised as to whether the area is habitat in the context of the new regulatory requirements at 50 C.F.R. § 424.12(b)(2) and document the determination of whether the area is habitat. Thus, defining habitat and documenting unoccupied habitat determinations should help avoid overbroad critical habitat designations.

The FWS noted that although many of the habitat definitions in ecological literature did not appear to consider unoccupied areas, the proposed and alternative definitions would include unoccupied areas consistent with the ESA’s definition of critical habitat.

### Background

The FWS’ proposal to define habitat responds to the issues raised in *Weyerhaeuser Co. v. United States Fish and Wildlife Service, et al.*, 139 S. Ct. 361 (2018). *Weyerhaeuser* involved the designation of an unoccupied area as critical habitat for the dusky gopher frog that lacked an open canopy forest, necessary to the frog’s survival. (More on that decision [here](#)). The property owners argued that the area was not habitat and therefore, could not be critical habitat. The U.S. Supreme Court clarified that only habitat can be designated as critical habitat, noting that the term habitat is not defined in the ESA or its implementing regulations.

### FWS’ Proposed Definition of Habitat

*The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species.*

## FWS' Alternative Definition of Habitat

*The physical places that individuals of a species use to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist.*

The alternative definition would more directly address the issue in *Weyerhaeuser*, by explicitly excluding areas lacking features necessary to the species' survival. The FWS explained that unlike the second sentence of the proposed definition, the second sentence of the alternative definition: (1) expressly limits unoccupied habitat to areas "where the necessary attributes to support a species currently exist;" and (2) explicitly excludes lands that have no present capacity to support individuals of a species. The FWS seeks specific comments on the second sentence of the alternative definition among other aspects of both definitions.

For more information or questions about the proposed rule, please contact [Bret Sumner](#) and [Nicole Blevins](#).