EARTHJUSTICE

September 3, 2020

Via Federal eRulemaking Portal
www.regulations.gov
Docket FWS–HQ–ES–2020-0047

Re: Comments on Proposed Endangered Species Act Regulation to Define "Habitat," 85 Fed. Reg. 47,333 (Aug. 5, 2020)

To Whom It May Concern:

Earthjustice submits these comments on behalf of Center for Biological Diversity, Conservation Council for Hawai'i, Defenders of Wildlife, Environmental Protection Information Center, Humane Society Legislative Fund, Humane Society of the United States, National Parks Conservation Association, Oregon Wild, Sierra Club, and WildEarth Guardians (collectively, "Organizations") in response to the U.S. Fish and Wildlife Service's ("FWS's") and National Marine Fisheries Service's ("NMFS's") (collectively, "the Services") request for input on their proposal to add a definition of ''habitat'' to the regulations implementing section 4 of the Endangered Species Act ("ESA"). *See* 85 Fed. Reg. 47,333 (Aug. 5, 2020). The Organizations each work to protect and preserve the environment, including the preservation of threatened and endangered species and their designated critical habitat. We submit these comments to ensure the ESA's continued effectiveness and protections for species and habitat are not undermined.

As discussed below, we strongly oppose adoption of either the proposed or alternate definitions of "habitat" set forth in the Federal Register notice, which are contrary to the plain language of the statute and would undermine achievement of the ESA's stated purposes "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). We submit that the lack of a regulatory definition of "habitat" has not prevented the effective implementation of the ESA since its enactment nearly five decades ago, so there is no need to promulgate one now. Should the Services nonetheless feel the need to define "habitat," they must do so in a manner consistent with the letter and spirit of the ESA. The alternate definitions the Services propose fall far short of that mark.

I. BACKGROUND

When Congress enacted the ESA, it understood that habitat protection was key to saving species from extinction and allowing for their eventual recovery:

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> Man can threaten the existence of species of plants and animals in any of a number of ways. … The most significant of those has proven also to be the most difficult to control: the destruction of critical habitat. ...
> There are certain areas which are critical which can and should be set aside. It is the intent of this legislation to see that our ability to do so, at least within this country, is maintained.

H.R. Rep. No. 412, 93d Cong., 1st Sess. 5 (1973). Consistent with that understanding, Congress identified as the first of the ESA's purposes "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b).

Section 4 of the ESA, 16 U.S.C. § 1533, requires the listing of species as endangered or threatened when they meet the statutory listing criteria. Further evidencing Congress's understanding of habitat's vital role in species conservation, the first listing criterion is "the present or threatened destruction, modification, or curtailment of [the species'] habitat or range." *Id.* § 1533(a)(1)(A).

An "examination of the language, history, and structure [of the ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978). Once a species is listed, various safeguards apply to prevent activities that will cause harm to members of the species or that will jeopardize the survival and recovery of the species.

ESA Section 7 prohibits agency actions that are "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary...to be critical." *Id.* § 1536(a)(2). The ESA defines "critical habitat" to include both:

> (i) the 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; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed … upon a determination by the Secretary that such areas are essential for the conservation of the species.

Id. § 1532(5)(A).

The ESA establishes an interagency consultation process to assist federal agencies in complying with their duty to avoid jeopardy to listed species or destruction or adverse modification of critical habitat. *See generally id.* § 1536; 50 C.F.R. §§ 402.13, 402.14. Because critical habitat must be designated outside of a species' currently inhabited range under certain circumstances, the "adverse modification" analysis provides habitat protection even in situations where the "jeopardy" analysis does not apply. *See Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441 (5th Cir. 2001); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1069-71 (9th Cir. 2004).

In 1976, Congress reiterated the distinct importance of critical habitat and the prohibition on adverse modification:

> It is the Committee's view that classifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species' continued existence. Once a habitat is so designated, the Act requires that proposed federal actions not adversely affect the habitat. If the protection of endangered and threatened species depends in large measure on the preservation of the species' habitat, then the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.

H.R. Rep. No. 887, 94th Cong., 2d Sess. 3 (1976).

For the ESA's first five years, the Services were authorized, but not obliged, to designate critical habitat. Congress amended the ESA in 1978 to require that, at the time a species is listed as endangered or threatened, the Services generally must also "concurrently … designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3). In making critical habitat designation mandatory, Congress reaffirmed that "[t]he loss of habitat for many species is universally cited as the major cause for the extinction of species worldwide." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455.

II. NO NEED FOR REGULATORY DEFINITION OF "HABITAT"

As a threshold matter, we note that there is absolutely no need for the Services to promulgate, for the first time in nearly fifty years of administering the ESA, a definition of "habitat." In the Federal Register notice, the Services state that the U.S. Supreme Court's decision in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361 (2018), prompted them to propose this definition. *See* 85 Fed. Reg. at 47,334. Nowhere in *Weyerhaeuser*, however, did the Supreme Court indicate that a regulatory definition of "habitat" was required.

In the many decades since the ESA was promulgated, the lack of a regulatory definition of "habitat" has not prevented the Services from implementing ESA section 4. What constitutes a species' habitat should be consistent with the text and purpose of the ESA and guided by "the best scientific data available." 16 U.S.C. § 1533(b)(2); *see also id*. § 1533(b)(1)(A). As the saying goes, "If it ain't broke, don't fix it."

III. THE PROPOSED DEFINITIONS FAIL TO PROVIDE ANY CLARITY

Should the Services nonetheless believe that a regulatory definition is necessary "in order provide transparency, clarity, and consistency for stakeholders," those purposes are ill-served by a definition that cobbles together a string of terms that are completely undefined elsewhere in the ESA's implementing regulations, in the large body of case law regarding ESA section 4 that the federal courts have developed over the decades, or in the biological literature. 85 Fed. Reg. at 47,334; *see also id*. (seeking comment on the decision to "refrain[] from using within this proposed regulatory definition of 'habitat' terms of art from other definitions in the Act"). What do terms like "depend upon," "use," "life processes," "attributes," or "capacity to support" mean? *Id.* Far from providing "transparency, clarity, and consistency," the vague wording of either proposed definition would spawn years of contentious litigation.

IV. THE PROPOSED DEFINITIONS WOULD VIOLATE THE ESA'S EXPRESS STATUTORY LANGUAGE

Both definitions the Services propose appear to limit "habitat"—and, thus, areas eligible to be designated as "critical habitat"—to only geographic areas that, in their current state, are capable of supporting individuals of the listed species in question. *See Weyerhauser*, 139 S. Ct. at 369 n.2 ("an area is eligible for designation as critical habitat under Section 4(a)(3)(A)(i) only if it is habitat for the species"). As the Services note, "the second sentence of the alternative definition … expressly limits unoccupied habitat for a species to areas 'where the necessary attributes to support the species presently exist,' and ***explicitly excludes areas that have no present capacity to support individuals of the species***." 85 Fed. Reg. at 47,334 (emphasis added). While the first proposed definition lacks this explicit language, its reference to "***existing*** attributes" and its use of the present tense in the phrase "areas with existing attributes that ***have*** the capacity to support individuals of the species" indicate that it likewise excludes unoccupied areas where—due to habitat alteration/degradation, the presence of predators, or other factors—individuals of the species could not currently survive. *Id.* (emphasis added).

The ESA's plain language makes clear that Congress did not intend to limit the unoccupied habitat that may be designated as "critical" to only areas that already have all the attributes necessary to support individuals of a listed species. When it promulgated its definition of

"critical habitat," Congress specified that only areas "occupied by the species" at the time of listing must have "those physical or biological features" that are "essential to the conservation of the species" in order to qualify as critical habitat. 16 U.S.C. § 1532(5)(A)(i). In contrast, Congress did not similarly require that unoccupied areas have any existing physical or biological features to qualify as critical habitat, requiring only that designated unoccupied areas be "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii).

"[W]here Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (citation omitted). This canon of statutory interpretation applies with particular force where, as here, Congress enacted the provisions with disparate language at the same time. *See Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 (2009). There is no question that Congress did not intend that, to qualify as "critical habitat," unoccupied habitat must have any "***existing*** attributes" that are essential to species conservation, much less that unoccupied habitat would need to possess the present "capacity to support individuals of the species." 85 Fed. Reg. at 47,334 (emphasis added).

That the ESA defines unoccupied critical habitat solely in terms of what is essential for species conservation confirms that Congress—which understood that habitat destruction was "the major cause for the extinction of species worldwide"—did not intend to preclude designation of unoccupied areas that are currently too degraded for individuals of an imperiled species to survive there, but that can (and must) be restored to play an essential role in that species' conservation. H.R. Rep. No. 1625, 95th Cong., 2d Sess. 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 9455. The ESA defines "conservation" as "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 chapter are no longer necessary." 16 U.S.C. § 1532(3) (emphasis added).[1] The overly narrow proposed definitions of "habitat" would preclude the Services from designating and protecting unoccupied areas that are essential for species conservation, contravening clear congressional intent.[2]

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[1] Congress expressly listed "habitat acquisition and maintenance" among the methods and procedures required to further species conservation. *Id.* The ESA's legislative history affirms that Congress understood the need to acquire and restore "habitats [that] have been cut in size, polluted, or otherwise altered so that they are unsuitable environments for natural populations of fish and wildlife." 119 Cong. Rec. 25,669 (1973).

[2] Among other things, the proposed definitions fail to account for the impacts of climate change by giving species only enough habitat to eke out an existence in today's climate, as opposed to protecting the areas they will need to recover and thrive in the long term. The ESA's plain

V. THE PROPOSED DEFINITIONS ARE ILLOGICALLY NARROWER THAN THE RECENTLY PROMULGATED DEFINITION OF "CRITICAL HABITAT"

In the Federal Register notice, the Services observe that, "under the text and logic of the statute, the definition of 'habitat' must inherently be broader than the statutory definition of 'critical habitat.'" 85 Fed. Reg. at 47,334. Logic likewise dictates that the definition of "habitat" must be broader than the regulatory definition of "critical habitat" that the Services promulgated only a year ago. *See* 84 Fed. Reg. 45,020, 45,053 (Aug. 27, 2019).[3] Neither of the proposed definitions of "habitat" passes that logical test.

As discussed above, the statutory definition of "critical habitat" does not require that unoccupied areas have the present capacity to support individuals of a listed species. Neither does the Services' recently revised regulatory definition of "critical habitat," which says that, "for an unoccupied area to be considered essential," it need contain only "***one or more of those physical or biological features essential to the conservation of the species***." 50 C.F.R. § 424.12(b)(2) (emphasis added). By requiring that all of the features necessary for individuals of the species to survive be present for unoccupied areas to qualify as "habitat," the proposed definitions illogically establish a more demanding standard for unoccupied areas to be deemed "habitat" than "critical habitat."

VI. BOTH PROPOSED DEFINITIONS WOULD REVERSE DECADES OF AGENCY PRACTICE DESIGNATING CRITICAL HABITAT IN UNOCCUPIED AREAS THAT CANNOT PRESENTLY SUPPORT INDIVIDUALS OF THE SPECIES, BUT ARE NONETHELESS ESSENTIAL FOR CONSERVATION

The Services' proposal to narrowly limit the definition of "habitat" to only areas that currently can support individuals of an imperiled species represents a 180-degree reversal of past agency practice. For decades, the Services have designated critical habitat in unoccupied areas that were not, at the time, habitable for the listed species, but were nonetheless deemed essential for

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language provides no support for excluding from the definition of "habitat"—and thus precluding the designation of critical habitat in—currently unoccupied areas that the best available science identifies as essential to species conservation in the future, when imperiled species will need to move to or otherwise utilize new areas in response to climate change.

[3] Nothing in this comment letter is meant to suggest that we agree with this definition, which is itself unlawfully narrow and—along with the Services' other recent ESA rulemaking—is currently being challenged in court. *See* Second Amended Complaint, *Center for Biological Diversity, et al. v. Bernhardt, et al.*, Case No. 4:19-cv-05206-JST (N.D. Cal. June 4, 2020).

that species' conservation. By excluding such areas from "habitat," the Services would preclude the designation as "critical habitat" of these and similar unoccupied areas in the future. *See* 85 Fed. Reg. at 47,334 ("an area must logically be 'habitat' in order for that area to meet the narrower category of 'critical habitat'").[4]

For example, in 1975, FWS identified the palila, a critically endangered Hawaiian bird (*Loxioides bailleui*), as one of ten "high priority species" whose "critical habitat" should be determined "as rapidly as possible." 40 Fed. Reg. 21,499, 21,501 (May 16, 1975). When FWS finalized the palila's critical habitat in 1977, it designated unoccupied areas decimated by feral grazing animals that required "eradication of the sheep and goats … to achieve the regeneration of the forest and restoration of the Palila." *Palila v. Hawai'i Dep't of Land and Natural Resources*, 639 F.2d 495, 496 (9th Cir. 1981); *see also* 42 Fed. Reg. 47,840, 47,842 (Sept. 22, 1977).

Four decades later, in 2016, FWS designated critical habitat for seventeen listed plant species that historically occurred on the island of Maui but are no longer found there, including Hawai'i's endangered state flower, the yellow hibiscus (*Hibiscus brackenridgei*). *See* 81 Fed. Reg. 17,790 (Mar. 30, 2016). Because "there are no areas of lowland dry habitat that remain in pristine condition or are unaffected to some degree by … deleterious agents," FWS concluded that it was "essential to [these species'] conservation" to designate unoccupied and severely degraded critical habitat. *Id.* at 17,845; *see also id.* ("the lowland dry ecosystem is one of the most negatively affected native habitats on the island of Maui"). Even though the area was "affected by invasive plants and other disturbances," FWS determined that it has "the capability to be functionally restored to support the physical and biological features and provide essential habitat for the 17 species for which it is designated critical habitat." *Id.*

Also on Maui, FWS designated severely degraded areas as critical habitat for two critically endangered Hawaiian forest birds, the 'ākohekohe (crested honeycreeper, *Palmeria dolei*) and kiwikiu (Maui parrotbill, *Pseudonestor xanthophrys*). These species currently occupy "less than 5 percent of the estimated historical ranges," which, due to mosquito-borne diseases at lower elevations, is "almost all habitat that is currently suitable." *Id.* at 17,866. "To ensure the potential for population increase," which the birds' recovery plans identify as "essential to the conservation of both bird species," FWS recognized that "additional habitat must be restored." *Id.*; *see also id.* at 17,816 ("The recovery plan recognizes that to ensure the potential for

[4] While the Services state that they are "proposing prospective standards only," the new "habitat" definition would apply to any revision of a previously finalized critical habitat designation. *Id.* at 47,335. Moreover, even if existing designations were never modified (an unlikely situation), the new "habitat" definition would, in the future, preclude critical habitat designations of then-uninhabitable areas for similarly situated species, resulting in inconsistent implementation of the ESA.

population increase, additional unoccupied but potentially suitable habitat will require restoration. These areas include koa forest and grazed areas that have potential for reforestation upslope from current populations … ."). To allow for the species' continued survival and eventual recovery, FWS designated those unoccupied, degraded areas as critical habitat. *See id.* at 17,816.

On Guam, the accidental introduction of the brown tree snake decimated native wildlife, including the Guam Micronesian kingfisher (*Halcyon cinnamomina cinnamomina*), which is extinct in the wild. *See* 69 Fed. Reg. 62,944, 62,945 (Oct. 28, 2004). When FWS designated critical habitat for the kingfisher, it knew that reintroducing the species into the wild would require eradicating brown tree snakes and other nonnative predators. *Id.* at 62,953, 62,958. Notwithstanding the fact that Guam Micronesian kingfishers could not then survive anywhere on Guam, FWS designated unoccupied habitat to ensure areas would be protected for the species' eventual reintroduction. *Id.* at 62,950-51. As FWS emphasized in designating this habitat, "[w]hile efforts to control the brown treesnake continue …, it is vital that habitat for Guam's native wildlife be safeguarded for the future." *Id.* at 62,960. Furthermore, based on the best available science, FWS designated not only areas with relatively intact native forest, but also "non-forested areas interspersed with forested areas because of their potential for reforestation." *Id.* at 62,949; *see also id.* at 62,959 (peer reviewers supported designation of "degraded areas with restoration potential").

As a final example (among many others), when FWS designated critical habitat for the endangered New Mexico meadow jumping mouse (*Zapus hudsonius luteus*), it determined that conserving the species "requires increasing the number and distribution of populations of the jumping mouse to allow for the restoration of new populations and expansion of current populations into areas that were historically occupied … ." 81 Fed. Reg. 14,264, 14,296 (Mar. 16, 2016). To accomplish that, FWS concluded that it was essential to designate unoccupied areas that were too degraded to be "suitable habitat," but could be restored to allow for the species' recovery. *Id.* at 14,301; *see also id.* at 14,296 (designating unoccupied units that are "highly restorable and essential for the conservation of the species"), 14,300 (unoccupied "areas need habitat protection to allow restoration of the necessary herbaceous vegetation for possible future reintroductions"). FWS explained that "[t]he areas that are unoccupied at the time of listing are not required to contain the [primary constituent elements] essential to conservation of the subspecies." *Id.* at 14,279. Rather, to be eligible for designation, FWS maintained that unoccupied areas needed only to "have ***the potential to be restored*** to suitable habitat." *Id.* (emphasis added).

VII. THE SERVICES FAIL TO ADDRESS THE IMPLICATIONS OF THE PROPOSED DEFINITIONS FOR THE LISTING PROCESS

Not only will the new proposed definition of habitat undercut designations of critical habitat as discussed above, it will also play a similar confounding role when listing species as threatened or endangered. The Services act as if the proposed definitions of "habitat" would apply to only the designation of critical habitat. *See* 85 Fed. Reg. 47,334 ("We are proposing a regulatory definition of 'habitat,' as that term is used in the context of critical habitat designations under the Act"). But neither the proposed definitions nor the proposed amendment inserting those definitions at 50 C.F.R. § 424.02 contain language so limiting their application. *See id.* at 47,337.[5]

As noted above, ESA section 4 requires listing species as endangered or threatened when they meet statutory listing criteria, which include "the present or threatened destruction, modification, or curtailment of its ***habitat*** or range." 16 U.S.C. § 1533(a)(1)(A) (emphasis added); *see also* 50 C.F.R. § 424.11(c)(1). Applying either of the proposed definitions to this listing criterion could produce distorted results contrary to the text and purpose of the Act. In the context of a threats analysis, "destruction, modification, or curtailment of…habitat" plainly mandates consideration of areas that do not presently have the capacity to support individuals of a species, but once did. Both of the proposed definitions would exclude such areas from being considered "habitat." The Services entirely fail to address the implications of the proposed "habitat" definition for the listing process.

VIII. PROMULGATION OF EITHER PROPOSED DEFINITION IS NOT EXEMPT FROM ENVIRONMENTAL REVIEW PURSUANT TO THE NATIONAL ENVIRONMENTAL POLICY ACT

In their Federal Register notice, the Services state that they expect to conclude that promulgating their definition of "habitat" falls under a categorical exclusion to the requirement to prepare a National Environmental Policy Act ("NEPA") analysis. *See* 85 Fed. Reg. at 47,336. We strongly disagree with that preliminary conclusion.

NEPA requires all agencies of the federal government to prepare a "detailed statement" that discusses the environmental effects of, and reasonable alternatives to, all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). A "major

[5] The definitions at 50 C.F.R. § 424.02, where the proposed "habitat" definition would be added, apply generally to 50 C.F.R. part 424, including listing and delisting determinations, as well as consideration of citizen petitions, in addition to critical habitat designations. *See* 50 C.F.R. § 424.01(a) (scope of Part 424).

federal action" for which an environmental impact statement ("EIS") may be required includes "new or revised agency rules [and] regulations." 40 C.F.R. § 1508.18(a).[6] The environmental effects that must be considered in an EIS include "indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," as well as direct effects. 40 C.F.R. § 1508.8; *see also* 85 Fed. Reg. at 43,365-66, 43,375 (new 40 C.F.R. §§ 1502.15, 1502.16, 1508.1(g)). The purpose of an EIS is to inform the decision-makers and the public of the significant environmental impacts of the proposed action, means to mitigate those impacts, and reasonable alternatives that will have lesser environmental effects. 40 C.F.R. § 1502.1; *see also* 85 Fed. Reg. at 43,363 (new 40 C.F.R. § 1502.1).

NEPA requires federal agencies, including the Services, to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 40 U.S.C. § 4332(E). This requires an agency to "[r]igorously explore and objectively evaluate all reasonable alternatives," 40 C.F.R. § 1502.14(a), as well as describe the "underlying purpose and need to which the Agency is responding in proposing the alternatives, including the proposed action." *Id.* § 1502.13; *see also* 85 Fed. Reg. at 43,363, 43,365 (new 40 C.F.R. §§ 1502.1, 1502.13, 1502.14). The consideration of alternatives is described as the "heart" of the NEPA analysis. 40 C.F.R. § 1502.14.

NEPA also requires that the Services use high quality, accurate scientific information and ensure the scientific integrity of the analysis in an EIS. *See* 40 C.F.R. § 1500.1(b); 40 C.F.R. § 1502.24; 85 Fed. Reg. at 43,358, 43,367 (new 40 C.F.R. §§ 1500.1(a), 1502.23).

The regulations promulgated by the Council on Environmental Quality ("CEQ")—the federal agency responsible for overseeing implementation of NEPA—authorize agencies to specify categories of actions "[w]hich normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4))." 40 C.F.R. § 1507.3(b)(2)(ii); *see also* 85 Fed. Reg. at 43,374 (new 40 C.F.R. § 1507.3(e)(2)(ii)). The CEQ regulations define "categorical exclusion" as "a category of actions which do not individually or cumulatively have a significant effect on the human environment," and they require that all federal agencies establish those categories by rule. 40 C.F.R. § 1508.4; *see also* 85 Fed. Reg. at 43,360, 43,374 (new 40 C.F.R. §§ 1501.4(a), 1508.1(d)). The CEQ regulations also require that agency regulations establishing categorical exclusions "provide for extraordinary circumstances

[6] This letter cites the NEPA regulations that are currently in effect. Unless delayed (*e.g.*, by congressional review or court injunction), new NEPA regulations will take effect on September 14, 2020. *See* 85 Fed. Reg. 43,304, 43,304 (July 16, 2020). Those new regulations likewise define "Major Federal action" to include an agency's adoption of rules and regulations. *Id.* at 43,375 (new 40 C.F.R. § 1508.1(q)(3)(i)).

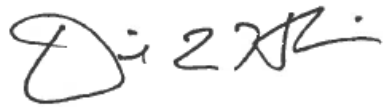
in which a normally excluded action may have a significant environmental effect." 40 C.F.R. § 1508.4; *see also* 85 Fed. Reg. at 43,360 (new 40 C.F.R. § 1501.4(b)).

FWS has defined a categorical exclusion as "[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case." 43 C.F.R. § 46.210(i). NMFS similarly defined categorical exclusions in NOAA Administrative Order 216-6A and Companion Manual, Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities (Jan. 13, 2017), Appendix E.

As discussed above, adoption of either proposed definition of "habitat" would remove important protections for unoccupied habitat that is essential for the conservation of endangered and threatened species. This would significantly and adversely affect imperiled species and the ecosystems on which they depend, precluding the application of a categorical exclusion and necessitating preparation of an EIS.

Thank you for your consideration of these comments. Please feel free to contact me via email (dhenkin@earthjustice.org) or telephone (808-599-2436, ext. 6614) if you would like to discuss our concerns.

Sincerely,



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