



# Nevada Association of Counties

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Gary Frazer  
Assistant Director, Ecological Services Program  
Public Comments Processing  
Attn: FWS-HQ-ES-2020-0047;  
U.S. Fish & Wildlife Service  
MS: PRB(3W),  
5275 Leesburg Pike,  
Falls Church, VA 22041

**Re: Proposal to add definition of “habitat” to regulations that implement Section 4 of the Endangered Species Act of 1973 as Amended (Docket: FWS-HQ-ES-2020-0047)**

Dear Assistant Director Frazer,

As the state association representing all 17 of Nevada’s counties, the Nevada Association of Counties (NACO) appreciates the Fish and Wildlife Service’s (FWS) proposal to add a definition for “habitat” to regulations implementing the ESA, 50 C.F.R., part 424. The adoption of this definition will help add clarity to future determination of critical habitat and help guide future management decisions.

Wildlife and habitat conservation are important to counties. Local communities both value and depend on the natural resources and ecosystems that are within and around them. Modifications to regulations implementing the ESA should focus on promoting on-the-ground results and habitat restoration that recognizes efficiency as well as the importance of local government planning to conservation.

**NACO Prefers the Proposed Definition with Modifications**

Of the two proposed definitions NACO prefers FWS preferred definition. We prefer this definition over the alternative definition because the alternative definition lacks clarity and does not provide any additional limits on what could be considered habitat. The proposed definition should be modified to use terms consistent with ESA’s statutory language.

In its notice, the FWS states that the proposed and alternative definition for “habitat” must be “inherently broader than the statutory definition of critical habitat” because the statute defines “critical habitat” to include both occupied and unoccupied areas.” This is logically sound. However, NACO requests clarification as to why the proposed definition of “habitat” does not incorporate terms consistent with the definition of “critical habitat”. As FWS points out, habitat is necessarily broader than critical habitat, but NACO disagrees with the decision to omit consistent terms and replace them with terms not yet defined in statute or case law.

The ESA defines critical habitat as:

“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.”

NACO submits that the operative term in the definition for critical habitat is the term “essential.” NACO would suggest adoption of the preferred definition for habitat therefore, with following modifications:

“The ~~physical places~~ geographical area that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing ~~attributes~~ physical or biological features that have the capacity to support individuals of the species.”

This modified proposed definition eliminates the undefined terms “physical places” and “existing attributes” from the proposed definition and replaces them with terms used elsewhere in the ESA. This would eliminate any subsequent need for FWS to further define and distinguish “existing attributes,” and “physical places” from terms that have been defined through regulation and case law.

Furthermore, by requiring that habitat includes areas with “existing physical or biological features”, the FWS would create a definition that is consistent with the decision in *Weyerhauser Co. v United States Fish and Wildlife Service*, which FWS cites as the impetus for this rulemaking. In *Weyerhauser*, the court made clear that any critical habitat must first be habitat without needing any improvement or modification to become habitat. “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.”

The definition of habitat therefore, as the court points out, should imply that though individuals of a species may not occupy the area, they could survive there at the time of designation.

### **Why NACO Does Not Prefer the Alternative Definition**

It is unclear if the alternative definition put forward by FWS does more to limit habitat to areas where individuals of the species could survive than does the proposed definition. At the same time, the alternative definition lacks the clarity of the proposed definition. For instance, the alternative definition would replace “depend upon” with “use.” Does “use” narrow the scope of habitat to areas where individuals of species could currently survive?

While “where the necessary attributes to support the species presently exist” appears to create a narrower definition of habitat than the proposed definition, it is unclear whether it in fact does. For instance, the proposed definition includes the requirement for “existing” attributes or features, which implies that attributes “presently” exist and that the area does not require improvement to become habitat. Lastly, the alternative definition is redundant insofar as it states that habitat may be “unoccupied.” As the court in *Weyerhauser* repeatedly makes clear, habitat necessarily includes unoccupied areas because critical habitat includes unoccupied areas.

### **Conclusion**



We appreciate the FWS's consideration of NACO's suggested modifications to the proposed definition for "habitat." Conservation of species and habitat is both a value and a priority for Nevada's counties. We trust that you will continue to consider and value the input of Nevada's counties as this process moves forward. If you have any questions, please do not hesitate to contact me at [dstapleton@nvnaco.org](mailto:dstapleton@nvnaco.org), or by phone at (775) 883-7863.

Respectfully,

Dagny Stapleton  
Executive Director

