LSU Journal of Energy Law and Resources

Volume 9
Issue 2 *Spring 2021*

5-5-2022

Critical Decisions: The Challenge of Defining Critical Habitat Under the Endangered Species Act

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TABLE OF CONTENTS

INTRODUCTION

The Endangered Species Act (ESA) is one of the most popular and well-known pieces of legislation.[1] However, few Americans understand

how the ESA works.[2] Invocation of the ESA often conjures up thoughts of protections for beloved animals such as bald eagles, bison, and grizzly bears.[3] However, the statute represents a delicate balance between the goal of preserving biodiversity and the costs of conservation.[4] While critics often point to the low number of species that have been delisted as endangered or threatened, overall the ESA has been successful in achieving its core goal: preventing extinction of listed species.[5]

The ESA's prohibition on "taking" listed species is the most widely recognized provision of the statute, but its habitat protections are foundational to protecting listed species.[6] Habitat loss and degradation is the leading cause of species endangerment.[7] Habitat is a basic requirement of all living organisms; therefore, the protection of habitat is vital to prevent extinction and promote recovery.[8] Thus, critical habitat designations, the cornerstone of habitat protection under the ESA, play an important role in species preservation and recovery. However, the habitat

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1. Brian Czech & Paul R. Krausman, *Public Opinion on Endangered Species Conservation and Policy*, 12 SOC'Y & NAT. RESOURCES 473 (1999).

2. BRIAN SEASHOLES, REASON FOUND., FULFILLING THE PROMISE OF THE ENDANGERED SPECIES ACT: THE CASE FOR AN ENDANGERED SPECIES RESERVE PROGRAM 92 (2014) https://reason.org/wp-content/uploads/files/endangered_species_act_reform.pdf [https://perma.cc/L6DA-PED5].

3. Shannon Petersen, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 467 (1999).

4. *Id.*

5. *See Delisted Species*, U.S. Fish & Wildlife Serv., https://ecos.fws.gov/ecp/report/species-delisted [https://perma.cc/K3CJ-JC5J] (last visited Apr. 19, 2021). Of the roughly 1750 species that have been listed (formally designated under the specific procedures of the ESA) as endangered or threatened, only 11 species have gone extinct. 84 species and distinct populations have been delisted (formally having their statutory protections revoked under the specific procedures of the ESA): 63 based on recovery and 21 based on erroneous listing.

6. Section 9 (16 U.S.C. § 1538) of the ESA makes it illegal to "take" any endangered species. 16 U.S.C. § 1532(19) defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

7. Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 296 (1993).

8. NAT'L RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT 71, 73 (1995), http://nap.edu/4978 [https://perma.cc/4VMH-VAUV]. The term "habitat," as used in the ESA and scholarly literature on topic, is used throughout this Comment in its uncountable noun form rather than its specific countable form.

protections under the ESA are where conservation, economic development, and property interests collide.[9]

The most recent and prolific conflict involving critical habitat designations arose in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*.[10] A challenge to the U.S. Fish and Wildlife Service's (FWS) designation of unoccupied critical habitat ultimately made its way to the United States Supreme Court in 2018.[11] The Court's unanimous ruling, while narrow, provides a limitation on the FWS's discretion in designating unoccupied areas as critical habitat.[12] Even after *Weyerhaeuser*, many questions remain unsettled, particularly since the FWS and the petitioners in *Weyerhaeuser* reached a consent decree.[13]

Part I of this Comment will outline the background of the ESA and its legislative history. Part II will address *Weyerhaeuser*, including the procedural history, the Court's opinion, and the subsequent history. Part III will analyze the implications of the Court's ruling in *Weyerhaeuser*. It will discuss the FWS and the National Marine Fisheries Service's[14] (NMFS, and together with FWS referred to as "the Services") 2019 and 2020 published final rules that attempted to respond to *Weyerhaeuser's* holding, the limitations of agency action, and the challenges of defining "habitat." Part IV will discuss a legislative solution to the aftermath of *Weyerhaeuser*, and in the alternative, why the Services' 2019 and 2020 rules are the best intermediary solution.

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9. *See* Thomas F. Darin, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L. REV. 209, 210 (2000).

10. 139 S. Ct. 361 (2018).

11. *Id.*

12. *Id.* at 364.

13. Consent Decree, Markle Interests, LLC v. U.S. Fish & Wildlife Serv., No. 13-cv-234 (E.D. La. July 3, 2019), ECF No. 174, available at https://www.eenews.net/assets/2019/07/08/document_gw_04.pdf [https://perma.cc/8WJC-XUSL]. A consent decree is a judicially recognized and enforceable settlement. The effect of the consent decree was that the court no longer had the opportunity to rule on the remaining issues in the case.

14. U.S. Fish and Wildlife Service and National Marine Fisheries Service are jointly responsible for administering the ESA: FWS for land and freshwater species; NMFS for marine species. NMFS is also commonly referred to as National Oceanic and Atmospheric Administration (NOAA) Fisheries.

I. BACKGROUND

A. Pre-Endangered Species Act

Prior to the 1970's, the federal government played little role in wildlife management, as states retained the primary function in protecting wildlife.[15] Most state regulations were not in the preservationist mold of the modern ESA, but rather were fish and game regulations designed to protect the interests of sportsmen and trappers.[16]

At the turn of the twentieth century, Congress began to take steps toward national wildlife regulation.[17] In 1900, Congress enacted the Lacey Act, prohibiting interstate commerce of wildlife, fish, and plants that have been illegally taken, possessed, transported, or sold in violation of state or local law.[18] The federal government continued to wade into wildlife regulation when President Woodrow Wilson signed the Migratory Bird Treaty of 1916 with Canada.[19] Two years later, the Senate ratified the treaty through the Migratory Bird Treaty Act of 1918, prohibiting the taking of certain protected migratory birds and giving authority to the Secretary of the Interior to establish hunting regulations on migratory game birds.[20] Despite Missouri challenging the statute on Tenth Amendment grounds, the Supreme Court upheld the statute's constitutionality in *Missouri v. Holland*.[21] The Court upheld the Migratory Bird Treaty Act on the basis of federal treaty-making power, but notably rejected Missouri's contention that the state ownership doctrine provides that regulation of wildlife is an exclusive area of state sovereignty.[22] While the federal government continued to take marginal steps in wildlife management over the next 50 years, it was the growth of the environmental movement in the 1960's that ultimately spurred substantial legislation.[23]

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15. Petersen, *supra* note 3, at 468.

16. *Id.*

17. *Id.*

18. Lacey Act, ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 701, 3371–3378 (2018)).

19. Convention for the Protection of Migratory Birds, Gr. Brit.-U.S., Aug. 16, 1916, 39 Stat. 1702, T.S. No. 628.

20. Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–712 (2018)).

21. 252 U.S. 416, 434–35 (1920).

22. *Id.*

23. *See* Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 79 (2001); Petersen, *supra* note 3, at 471–72.

B. Passage of the Endangered Species Act

In 1970, the appetite for federal environmental legislation reached a fever pitch as Congress passed several comprehensive environmental statutes that now form the bedrock of United States environmental law.[24] The first of these statutes to be passed by Congress include the National Environmental Policy Act[25] and the Clean Air Act of 1970.[26] In 1972, Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (now, as further amended, referred to as the Clean Water Act).[27] The last of these landmark legislations was the Endangered Species Act in 1973.[28] Carried by bipartisan support for strong protections of endangered wildlife, the bill faced little opposition.[29] Remarkably, the legislation passed with a nearly unanimous vote.[30] The purpose of the ESA is three-fold: (1) to provide a means to conserve the ecosystems upon which threatened and endangered species depend; (2) to provide a program of conservation for such threatened and endangered species; and (3) to take steps to achieve the purposes of treaties which commit the United States to protecting biodiversity.[31] The Secretary of the Interior and the Secretary of Commerce, through the Services, are jointly designated to administer the ESA.[32]

The ESA designates protected species as either endangered or threatened.[33] An endangered species is defined as a "species which is in danger of extinction throughout all or a significant portion of its range,"[34] while a threatened species is defined as a "species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[35] There are two overarching principal protections for listed species: (1) the general prohibition on "taking" or trade of the species,[36] and (2) the requirement that all federal agencies ensure that their actions do not "jeopardize the continued

24. Petersen, *supra* note 3, at 471–72.
25. Pub. L. No. 91-190, 83 Stat. 852 (1970).
26. Pub. L. No. 91-604, 84 Stat. 1676.
27. Pub. L. No. 92-500, 86 Stat. 816.
28. Pub. L. No. 93-205, 87 Stat. 884.
29. Petersen, *supra* note 3, at 473–80.
30. *See* 119 CONG. REC. 30,157–68 (1973).
31. 16 U.S.C. § 1531(b) (2018); 50 C.F.R. §§ 424.01–424.21 (2020).
32. 16 U.S.C. § 1532(15); *see supra* note 14.
33. 16 U.S.C. § 1532.
34. 16 U.S.C. § 1532(6).
35. 16 U.S.C. § 1532(20).
36. 16 U.S.C. § 1538.

existence" of listed species or "result in the destruction or adverse modification" of critical habitat of the species.[37] The latter protection is achieved through Section 4's requirement of critical habitat designation at the time of listing[38] and Section 7's requirement that all federal agencies consult with the Services to ensure that agency activities are "not likely to jeopardize the continued existence" of a listed species nor "result in the destruction or adverse modification of" critical habitat.[39]

C. Tennessee Valley Authority v. Hill: *Realized Power of the ESA*

The stark power of the ESA became immediately clear in 1978 when the Supreme Court decided *Tennessee Valley Authority v. Hill*.[40] This case pitted the ESA's protection of the snail darter, a small fish, against a dam project that was nearly complete and that Congress had appropriated and spent millions of dollars to construct.[41] The Court insightfully described the paradox that the "survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress ha[d] expended more than $100 million."[42] The Court concluded that the ESA "require[d] precisely that result."[43] Importantly, at the time of the decision, the ESA did not define critical habitat, so the Court relied upon the Secretary of Interior's definition, which was much broader and more ambiguous than it is today.[44]

D. The Endangered Species Act Provisions

The Supreme Court's decision in *Tennessee Valley Authority v. Hill* created bipartisan consternation and outrage in Congress.[45] Many in Congress were concerned that the ESA was being interpreted and implemented too broadly and without providing enough flexibility to

37. 16 U.S.C. § 1536.
38. 16 U.S.C. § 1533.
39. 16 U.S.C. § 1536.
40. 437 U.S. 153 (1978).
41. *Id.* at 172.
42. *Id.*
43. *Id.* at 173.
44. *Id.* at 160 n.9 (citing 43 Fed. Reg. 874 (1978)). The definition of critical habitat was to be determined on the basis that "loss of which would appreciably decrease the likelihood of the survival and recovery" of the species rather than "essential to the conservation" of the species and allowed and could include areas for "reasonable population expansion." *Id.*
45. Petersen, *supra* note 3, at 485.

consider economic development goals.[46] Within four months of the Court's decision, Congress amended the ESA.[47] The amendment formally statutorized the definition of critical habitat in Section 3 and provided mechanisms whereby exemptions to Section 7 could be granted.[48] Lawmakers lauded the amendment as a step towards practicality and further guidance on the ESA's original intent.[49]

One of the hallmark provisions of the ESA is Section 4's requirement of designation of critical habitat for a listed species.[50] When the Services list a species as endangered or threatened, the Services must also designate the critical habitat of that species.[51] Since the passage of the 1978 Amendment, Section 3 defines critical habitat as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, 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 in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[52]

Furthermore, critical habitat shall "not include the entire geographical area which can be occupied" by the listed species, except under special circumstances determined by the Services.[53]

When an area is designated as critical habitat, it does not necessarily directly affect a private landowner's property rights.[54] However, it does

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46. *Id.*

47. *See* Endangered Species Act Amendments, Pub. L. No. 95-632, 92 Stat. 3751 (1978).

48. *Id.*

49. Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 34 UCLA J. ENVTL. L. & POL'Y 1, 14–15 (2016).

50. 16 U.S.C. § 1533(a)(3)(A)(i) (2018).

51. *Id.*

52. 16 U.S.C. § 1532(5)(A).

53. 16 U.S.C. § 1532(5)(C).

54. *Critical Habitat Under the Endangered Species Act*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/southeast/endangered-species-act/critical-

create major implications if a landowner plans to carry out activity that requires federal licensing, permitting, or funding when such activity is likely to affect the designated species or its critical habitat.[55] Section 7 of the ESA requires federal agencies to "insure that any action authorized, funded, or carried out" by such agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat."[56] This duty also extends to species proposed to be listed and critical habitat proposed for designation.[57] Thus, once an area is designated or proposed to be designated as critical habitat, any activity that will require federal agency action will trigger consultation with the Services.[58]

When there is a proposed federal agency action, the agency seeking to implement the action must submit a request to the Services to determine if there are listed species or critical habitat in the area that will be affected by the action.[59] If a listed species or critical habitat is present in the proposed action area, the action agency must prepare a biological assessment.[60] The biological assessment will evaluate the "potential effects of the action on such species and habitat" and whether formal consultation under Section 7(a)(2) is necessary.[61] If the action agency determines that the proposed action may affect listed species or critical habitat, formal consultation is required.[62] The action agency and the Services will conference to determine if the action is likely to "jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat."[63] At the end of formal consultation, the Services will draft a biological opinion detailing the likely effects of the action and whether it will jeopardize the continued existence of the species.[64] If there is a "no jeopardy" opinion, the Services will issue an incidental take statement if the action is likely to result in the taking of listed species and the action may proceed. If there is a jeopardy opinion, the biological opinion shall include, if available, "reasonable and

habitat/# critical-habitat-and-land-development-section [https://perma.cc/J6VN-SWE4] (last visited Apr. 17, 2021).

55. *Id.*
56. 16 U.S.C. § 1536(a)(2).
57. *Id.*
58. *Id.*
59. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c) (2020).
60. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c).
61. 50 C.F.R. § 402.02, 402.12(k).
62. 50 C.F.R. § 402.14.
63. 50 C.F.R. § 402.14(h).
64. 50 C.F.R. § 402.14(h)–(i).

prudent alternatives" that may be adopted to avoid violation of Section 7(a)(2) and allow the action to proceed.[65] Thus, even a jeopardy opinion may not completely obstruct a proposed action.

Jeopardy biological opinions are rare, primarily because the action agency and the Services have ample opportunity to revise and craft the proposed action to avoid jeopardy and adverse modification of critical habitat throughout the consultation process.[66] Moreover, a jeopardy opinion may not ultimately halt a proposed action if reasonable prudent alternatives are provided and adopted.[67] However, the process can be time consuming and ultimately expensive for a party seeking federal action subject to Section 7 consultation.[68] While an applicant does not pay for the consultation process itself, the action agency and applicant are responsible for coordinating with the Services in order to provide applicable information and documentation in order to complete the consultation and discuss and negotiate reasonable prudent alternatives if necessary. It is likely that initial project plans will have to be reevaluated and changed in order to comply with Section 7. Finally, any reasonable prudent alternatives proposed or conditional upon approval may not be as cost effective, profitable, or desirable as the initial proposed plan. Consequently, commercial interests often view critical habitat designations unfavorably.[69] While a critical habitat designation is not an insurmountable obstacle for a development project, it is certain to ensure a more expensive and time-consuming process.

II. *WEYERHAEUSER V. U.S FISH & WILDLIFE SERVICE*

A. Background

As evidenced by Section 4 of the ESA, the Services have wide discretion in the designation of critical habitat.[70] The extent of this

65. 16 U.S.C. § 1536(b)(3)(B) (2018); 50 C.F.R. § 402.14(h)(2).

66. Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141, 164 (2012).

67. 16 U.S.C. § 1536(b)(3)(B); 50 C.F.R. § 402.14(h)(2).

68. Generally, an action agency has 180 days to prepare a biological assessment, 90 days for formal consultation, and the Services have 45 days to prepare a biological opinion. *See* 16 U.S.C. § 1536(c)(1), 1536(b); 50 C.F.R. § 402.14.

69. *See* James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311, 335–336 (1990) (discussing opposition to critical habitat designations).

70. *See* 16 U.S.C. § 1533(b)(2) (2018).

discretion was recently challenged in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*.[71] *Weyerhaeuser* centered on the FWS proposal "to designate as unoccupied critical habitat a 1,544–acre site in St. Tammany Parish, Louisiana," dubbed Unit 1, for the dusky gopher frog.[72] The FWS had listed the dusky gopher frog as endangered in 2001.[73] At one time, the dusky gopher frog lived in longleaf pine forests throughout coastal Mississippi, Alabama, and Louisiana.[74] However, due to urban development, the population dwindled to 100 gopher frogs occupying a single pond in Mississippi at the time of listing.[75]

The dusky gopher frog breeds in ephemeral ponds and relies on upland open-canopy pine forests to allow vegetation growth where the frog can lay its eggs, feed on insects, and find holes to burrow.[76] Due to the frog's small concentration in two adjacent counties in Mississippi and the risk that a severe weather event or disease could jeopardize the dusky gopher frog population, the FWS endeavored to designate unoccupied critical habitat in 2010.[77] While the dusky gopher frog had not been seen in Unit 1 since 1965 when closed-canopy timber occupied the site, the FWS found that "the site retained five ephemeral ponds 'of remarkable quality,' and determined that an open-canopy forest could be restored on the surrounding uplands 'with reasonable effort.'"[78] The FWS subsequently designated Unit 1 as critical habitat for the dusky gopher frog.[79]

B. Procedural History

Weyerhaeuser Company, a timber company that owns and leases portions of Unit 1, and the lessors, who own the rest of Unit 1, filed suit in the United States District Court for the Eastern District of Louisiana to vacate the critical habitat designation.[80] While Weyerhaeuser's timber

71. 139 S. Ct. 361 (2018).

72. *Id.* at 366 (emphasis omitted).

73. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001).

74. *Weyerhaeuser*, 139 S. Ct. at 365.

75. *Id.*

76. *Id.*

77. Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,394 (Jun. 3, 2010).

78. *Weyerhaeuser*, 139 S. Ct. at 366 (quoting Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118, 35,133, 35,135 (June 12, 2012)).

79. Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118, 35,133, 35,135 (June 12, 2012).

80. *Weyerhaeuser*, 139 S. Ct. at 366–67.

operations were not likely to be directly impacted by the critical habitat designation, the landowners had already invested in plans to develop the area and believed that they would potentially need a Clean Water Act permit from the United States Army Corps of Engineers in order to fill wetland to develop portions of Unit 1.[81] The Center for Biological Diversity and Gulf Restoration Network intervened as defendants.[82] The plaintiffs' suit alleged that the FWS impermissibly designated Unit 1 as critical habitat for the dusky gopher frog despite the fact that Unit 1 could not constitute *habitat* for the dusky gopher frog since the frog could not survive there in the land's contemporaneous form.[83] The plaintiffs asserted an area must be a habitat for a listed species in order to be designated as critical habitat for that species, thus the FWS misinterpreted the ESA when it designated Unit 1 as critical habitat for the dusky gopher frog.[84]

Since the plaintiffs were challenging an agency, the designation was reviewed under the Administrative Procedure Act to determine if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[85] However, the standard of review is highly deferential.[86] The plaintiffs' challenge was based on the Services' statutory interpretation of the ESA, specifically that Unit 1 does not meet the definition of critical habitat under the ESA. Thus, the courts reviewed the interpretation under the *Chevron* Test: (1) whether Congress has directly spoken to the precise question at issue, and (2) if the statute is silent or ambiguous on the issue, whether the interpretation is permissible.[87] If Congress has not directly spoken on the issue and the agency's interpretation is permissible or reasonable, then *Chevron* deference applies, and the court will defer to the agency's interpretation of the statute.[88]

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81. *Id.* at 367.

82. Markle Interests, LLC v. U.S. Fish & Wildlife Serv., 40 F. Supp. 3d 744, 753 (E.D. La. 2014), *aff'd*, 827 F.3d 452 (5th Cir. 2016), *vacated & remanded sub nom*. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361 (2018), *cert. granted*, *vacated sub nom*. Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 590 (2018).

83. Weyerhaeuser's Memorandum in Support of Its Motion for Summary Judgment at 1–2, Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 40 F. Supp. 3d 744 (E.D. La. 2014) (Nos. 13-234, 13-362, 13-413), 2013 WL 7040456.

84. *Id.* at 2.

85. 5 U.S.C § 706(2) (2018).

86. Gulf Restoration Network v. McCarthy, 783 F.3d 227, 243 (5th Cir. 2015).

87. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

88. *See id.*; *see also* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704, 708 (1995). The Service's interpretation of the Act is

Finding that the FWS reasonably determined Unit 1 was "essential for the conservation of" the dusky gopher frog and was therefore entitled to *Chevron* deference, the Eastern District upheld the designation.[89] The Fifth Circuit Court of Appeals affirmed, rejecting the petitioners' assertion that the definition of critical habitat contains a habitability requirement.[90] The Fifth Circuit denied rehearing en banc, though six judges issued a dissenting opinion favoring the petitioners' argument.[91] The Supreme Court granted certiorari to consider the issue of whether critical habitat under the ESA must be habitat.[92]

C. The Supreme Court's Analysis

The Court began its analysis with a grammatical interpretation of the ESA.[93] The Court explained that "according to the ordinary understanding of how adjectives work, 'critical habitat' must also be 'habitat.' Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality."[94] Next, the Court analyzed "critical habitat" in the statutory context.[95] The Court pointed to 16 U.S.C. § 1533(a)(3)(A)(i), which states that "when the Secretary lists a species as endangered he must also 'designate any *habitat of such species* which is then considered to be critical habitat.' Only the 'habitat' of the endangered species is eligible for designation as critical habitat."[96]

The Court then went further, explaining that "even if an area otherwise meets the statutory definition of unoccupied critical habitat because the

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entitled to *Chevron* deference provided it "rests on a permissible construction of the ESA." *See id.*

89. Markle Interests, LLC v. U.S. Fish & Wildlife Serv., 40 F. Supp. 3d 744, 760 (E.D. La. 2014), *aff'd*, 827 F.3d 452 (5th Cir. 2016), *vacated & remanded sub nom*. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361 (2018), *cert. granted*, *vacated sub nom*. Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 590 (2018).

90. Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 827 F.3d 452, 468 (5th Cir. 2016), *vacated & remanded sub nom*. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361 (2018), *cert. granted*, *vacated sub nom*. Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 590 (2018).

91. Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 848 F.3d 635, 636 (5th Cir. 2017) (Jones, J., dissenting).

92. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 368 (2018).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* (emphasis in original).

Secretary finds the area essential for the conservation of the species, [16 U.S.C. § 1533(a)(3)(A)(i)] does not authorize the Secretary to designate the area as critical habitat unless it is also habitat for the species."[97] Weyerhaeuser Co. contended "that habitat cannot include areas where the species could not currently survive."[98] Considering that the Fifth Circuit found no habitability requirement to critical habitat and therefore did not have the occasion to interpret "habitat" as mentioned in 16 U.S.C. § 1533(a)(3)(A)(i), the Court vacated the judgment and remanded to the Fifth Circuit for further consideration.[99]

The Fifth Circuit remanded the case to the Eastern District of Louisiana.[100] Upon all parties reaching a settlement, the Eastern District of Louisiana issued a consent decree on July 3, 2019.[101] The designation of Unit 1 as critical habitat for the dusky gopher frog was vacated, marking an end to the nearly six and a half year legal battle.[102]

III. THE AFTERMATH OF *WEYERHAEUSER*

A. The Services' Joint Rules: The 2019 Final Rule and the 2020 Final Rule

On August 27, 2019, the Services published a final rule (2019 Final Rule) changing how the ESA is implemented.[103] The 2019 Final Rule amends 50 C.F.R. part 424 and among the new regulations is a change in how critical habitat is designated.[104] Part of the impetus behind the rule change was responding to the *Weyerhaeuser* decision.[105] When designating critical habitat, the 2019 Final Rule will require the Services to first evaluate areas occupied by the species.[106] Only upon a determination that "a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the

97. *Id.*
98. *Id.* at 369.
99. *Id.*
100. Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 919 F.3d 963, 964 (5th Cir. 2019).
101. Consent Decree, *supra* note 13.
102. *Id.* at 3.
103. Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 424).
104. *Id.*
105. *Id.* at 45,022.
106. *Id.* at 45,021.

species" may the Secretary designate unoccupied areas as critical habitat.[107] Furthermore, the 2019 Final Rule seeks to address *Weyerhaeuser* by adding a requirement that the Secretary may only designate unoccupied areas as critical habitat based on a determination of "reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species."[108] The Services argue that this interpretation is based on the statute's language, structure, and legislative history.[109]

The 2019 Final Rule was slated to take effect on September 26, 2019;[110] however, an environmental legal organization and a coalition of states have filed separate suits in the Northern District of California to block the rule's passage, and the litigation is still ongoing.[111] Notably, the 2019 Final Rule leaves many questions unanswered. As the 2019 Final Rule explicitly states, it does not "attempt to definitively resolve the full meaning of the term 'habitat.'"[112]

Thus, on August 5, 2020, the Services published a proposed rule (Proposed Rule) that would provide a definition of habitat.[113] The Proposed Rule aimed to define habitat as follows: "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."[114] The Proposed Rule also provides an "alternative" definition for which it seeks comment on: "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."[115]

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107. *Id.*
108. *Id.*
109. *Id.* at 45,022.
110. *Id.*
111. *See* California v. Bernhardt, 460 F. Supp. 3d 875 (N.D. Cal. 2020).
112. Listing Species and Designating Critical Habitat, 84 Fed. Reg. at 45,022.
113. Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 47,333, 47,334 (proposed Aug. 5, 2020) (to be codified at 50 C.F.R. § 424.02).
114. *Id.*
115. *Id.*

On December 16, 2020, the Services issued a Final Rule (2020 Final Rule).[116] The 2020 Final Rule ultimately settled on the following definition: "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 or more life processes of a species."[117] However, environmental legal organizations and a coalition of states have once again filed suits to block the rule as they had with the 2019 Final Rule.[118] Furthermore, the Biden Administration has signaled that it will review environmental regulations promulgated during the Trump presidency and modify or revoke policies and regulations that it believes are inconsistent with the law or the new administration's policy objectives.[119] While the new definition became effective as of January 15, 2021, it is yet to be seen how the new presidential administration will treat the 2020 Final Rule. The wake of rulemaking and litigation demonstrates the uncertainty and policy issues left in the aftermath of *Weyerhaeuser*. As this Comment will discuss later in Part III and in Part IV, defining habitat is a difficult balancing act that provides the scope of critical habitat designations. The 2020 Final Rule frames the policy debate and seeks to resolve the issue, but as will be discussed later, addressing this issue through administrative action rather than legislative action is inadequate and presents issues of its own.

B. Unresolved Issues

Since critical habitat must be habitat, the threshold question is: what is habitat? After *Weyerhaeuser*, the Fifth Circuit's remand, and the subsequent consent decree, this question remains unanswered. Based on a lay understanding of the word "habitat," it is obvious that an area generally occupied by a species would constitute habitat.[120] Black's Law Dictionary defines "habitat" as "the place where a particular species of animal or plant

116. Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 81,411 (Dec. 16, 2020) (to be codified at 50 C.F.R. § 424.02).

117. *Id.* at 81,412.

118. *See* Complaint, California v. Bernhardt, No. 4:21-cv-00440-LB (N.D. Cal. Jan 19, 2021), available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210119_docket-421-cv-00440_complaint-1.pdf [https://perma.cc/GK9Z-ZWZT].

119. Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

120. *See, e.g.*, *Habitat*, OXFORD ENGLISH DICTIONARY (2d ed. 1989). Most dictionary definitions of "habitat" are based on the presence of the species in a particular area.

is normally found."[121] Hence, it should be uncontroversial to reason that an area occupied by a species constitutes habitat.[122]

However, the real issue is defining "unoccupied habitat." A plain reading of the ESA demonstrates that the ESA clearly contemplates that geographical areas not currently occupied by a species can potentially constitute habitat. The definition of critical habitat in section 3(5)(A)(ii) of the ESA provides that critical habitat can include "specific areas outside the geographical area occupied by the species at the time [of listing]" provided they are essential for the conservation of the species.[123] Since critical habitat must be habitat, and the ESA provides that unoccupied areas may be critical habitat, then logically, unoccupied areas can be habitat.[124] However, as evidenced by *Weyerhaeuser*, unoccupied critical habitat designations are the most contentious.[125] Furthermore, the language of the ESA provides little guidance other than the prerequisite of "essential for the conservation of the species."[126]

While unoccupied critical habitat designations are a small fraction of all critical habitat designations, factors such as climate change and land development will put further strain on the habitat needs of endangered and threatened species. The Intergovernmental Panel on Climate Change predicts that global warming will likely reach 1.5°C above pre-industrial levels between 2030 and 2052 if it continues at its current rate.[127] Sea levels are projected to rise between 1 and 2.5 feet by 2100.[128] Between 4 and 13 percent of global terrestrial land area is projected to undergo a transformation of ecosystems, and 4 percent of vertebrates and 8 percent

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121. *Habitat*, BLACK'S LAW DICTIONARY (11th ed. 2019).

122. The Services interpret the statutory definition of "critical habitat" as it applies to occupied habitat, to inherently verify that an area meeting that definition is "habitat." *See* Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 47,333, 47,334 (Aug. 5, 2020) (to be codified at 50 C.F.R. § 424.02).

123. 16 U.S.C. § 1532(5)(A)(ii) (2018).

124. Both definitions in the Proposed Rule seem to acknowledge this as well. *See* Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. at 47,334.

125. *See also, e.g.*, Bear Valley Mut. Water Co. v. Jewell, 790 F.3d 977, 994 (9th Cir. 2015).

126. 16 U.S.C. § 1532(5)(A)(ii).

127. Myles Allen et al., *Summary for Policymakers*, *in* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5°C, at 3, 4 (Valérie Masson-Delmotte et al. eds., 2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2019 /05/SR15_SPM_version_report_HR.pdf [https://perma.cc/6FNJ-AWSQ].

128. *Id.* at 7.

of plant species may lose over half of their range.[129] It projects greater weather extremes with some areas facing more droughts while others will have increased precipitation.[130] With such changes, it is likely that many species' ranges will naturally shift or shrink and the Services will have to designate additional critical habitat in order to prevent extinction and support recovery efforts.

1. The Problem with Making the Definition of Habitat an Administrative Decision

The 2019 Final Rule is effectively the third iteration of regulation dictating the critical habitat designation process within the last decade.[131] Until 2016, the only regulation governing unoccupied critical habitat required the Services to "designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."[132] In 2016, the Services issued a rule completely overhauling how unoccupied critical habitat was to be designated.[133] The stated purpose for the rule change was "to clarify the procedures and criteria used for designating critical habitat, addressing in particular several key issues that have been subject to frequent litigation."[134] The rule replaced section 424.12(e) with section 424.12(b)(2), which required the Services to "identify, at a scale determined by the [Services] to be appropriate, specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species based on the best available scientific data."[135] Now, the 2019 Final Rule and 2020 Final Rule have overhauled the critical habitat process once again.

Regardless of how habitat is ultimately defined, there are issues with placing the responsibility of extrapolating a definition in the hands of the executive branch. As noted above, this is the third time in the last decade that regulations regarding the designation of unoccupied critical habitat

129. *Id.* at 8.
130. *Id.* at 7.
131. The 2020 Final Rule could be viewed as iteration 3.1 as it expands upon the 2019 Final Rule.
132. 50 C.F.R. § 424.12(e) (2012).
133. Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414 (Feb. 11, 2016) (to be codified at 50 C.F.R. pt. 424).
134. *Id.* at 7429.
135. *Id.* at 7439.

have changed.[136] Moreover, each new presidential administration regularly repeals, amends, or adds regulations.[137] The rules promulgated by a previous administration are often delayed or suspended by the incoming administration, and this is particularly true for cabinet-level agencies.[138] As noted earlier, the Biden Administration has indicated that it will review environmental regulations and many observers expect the new regulations regarding critical habitat designations to be targeted.[139]

In the wake of *Weyerhaeuser*, the definition of habitat is central to the critical habitat designation process.[140] Now that the Supreme Court has clarified that critical habitat designations must be limited to habitat, the definition of habitat provides the scope of critical habitat designations.[141] The scope of critical habitat designations should not be determined by political winds of change, but by the broad-based consensus of Congress necessary to pass legislation.[142] Business interests need certainty, and regulatory vacillations harm economic development.[143] Observers have noted that "landowners and action agencies are generally well acquainted with the lines on a map that depict designated critical habitat, and the mere existence of designated critical habitat will often deter activities that might otherwise affect protected species."[144] Development projects take years to

136. *See supra* note 131 and accompanying text.

137. Sharece Thrower, *Regulatory Delay Across Administrations*, BROOKINGS (July 10, 2019), https://www.brookings.edu/research/regulatory-delay-across-administrations/ [https://perma.cc/QG7D-UHFD].

138. *Id.*

139. Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021); *see* Juliet Eilperin, Brady Dennis & John Muyskens, *Tracking Biden's Environmental Actions*, WASH. POST, https://www.washingtonpost.com/graphics/2021/climate-environment/biden-climate-environment-actions/ [https://perma.cc/3DZ9-8TJZ] (last updated Apr. 6, 2021).

140. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 369 (2018).

141. *See id.* (describing critical habitat as a subset of habitat).

142. *See* James & Ward, *supra* note 49, at 15–26 (Both passage of the ESA and the 1978 amendment were achieved with overwhelming bipartisan support. The amendment process in Congress encourages broad consensus and compromise whereas executive rulemaking is often conducted unilaterally to conform with the political goals of the administration in office.).

143. *See* Alexander K. Obrecht, *Regulatory Uncertainty: A Case Study for Applying A Predictable and Steady Hand*, WYO. LAW., Dec. 2017, at 34, 36.

144. Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation: A Comment on Critical Habitat and the Challenge of Regulating Small Harms*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10,678, 10,679 (2013).

plan and execute, particularly when government permits are required.[145] Changing standards for critical habitat designations creates regulatory landmines for development interests.[146] Landowners and developers are owed fair notice before investments are made of whether their project will hit regulatory roadblocks.[147]

Species recovery efforts are often impeded by ever-changing regulations as well.[148] Critical habitat designations have ebbed and flowed throughout the ESA's history, often based on political preferences of the presiding administration.[149] As Justice Scalia observed, regulatory decisions are inherently political, "made by institutions whose managers change with each presidential election and which are under the constant political pressure of the congressional authorization and appropriations processes."[150] History has shown that the ESA's implementation decisions are no different.[151] This has led in part to the "large discrepancy between statutory requirements and actual practice."[152] As Dave Owen, an environmental law expert and law professor, notes, "the process of implementing the adverse modification prohibition remains a black box with disputed outputs."[153] A clearer statutory basis for critical habitat designations would serve to insulate the process from wild regulatory swings, ultimately leading to more efficient and transparent designations. It is in the best interest of property rights, economic development, and species recovery to regularize the critical habitat designation process.

2. The Challenge of Defining Habitat

While the Services have settled on a definition of habitat and clarified the critical habitat designation process, the policy debate is just beginning.

145. *See* Andy Winkler, *Accelerate the Permitting Process*, BIPARTISAN POL'Y CTR. (Feb. 2, 2017), https://bipartisanpolicy.org/blog/accelerate-the-permitting-process/ [https://perma.cc/J55S-SL4E].

146. *See* discussion *supra* Part I (discussing the impacts of Section 7 consultation process and costs to applicants).

147. *See* discussion *supra* Part I (discussing the impacts of Section 7 consultation process and costs to applicants).

148. Owen, *supra* note 66, at 146.

149. *See* Darin, *supra* note 9, at 224; Petersen, *supra* note 3, at 468.

150. Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUS. L. REV. 97, 107 (1987).

151. Owen, *supra* note 66, at 186; *see also* Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of "New Age" Environmental Protection*, 41 WASHBURN L.J. 50, 62 (2001).

152. Owen, *supra* note 66, at 146.

153. *Id.* at 145–46.

All signs point to continued litigation and regulatory battles over the definition of habitat and the process of designating critical habitat. Thus, it is important to understand the framework of the policy and legal debate over what habitat means or should mean in the context of critical habitat under the ESA.

a. Should Habitat be Habitable?

Must habitat be limited to an area where the species in question can survive? The petitioners in *Weyerhaeuser* argued that habitat, as contemplated by the ESA, must be habitable.[154] Since the Supreme Court remanded the question and no court ended up ruling on the issue, it is likely that Weyerhaeuser Co.'s argument will be a blueprint for future parties attempting to challenge designations of unoccupied critical habitat.

As Weyerhaeuser Co. noted, the ESA does not define "habitat."[155] While undefined or ambiguous terms of a statute often begin a *Chevron* analysis, the absence of a statutory definition does not automatically trigger deference.[156] Weyerhaeuser Co. noted that courts construe undefined terms based on their "ordinary or natural meaning."[157] Weyerhaeuser Co. argued that considering areas that are not habitable for a species as habitat is inconsistent with the ordinary or natural meaning, because it fails the dictionary definition of habitat.[158] Most definitions of habitat are based on the element of habitability.[159] Even the FWS's Habitat Conservation Planning Handbook and international conventions define habitat based on habitable qualities.[160] Furthermore, broader definitions, which the FWS cites, require habitat to be naturally occurring and not in need of restoration.[161] As commonly understood, habitat indicates being able to support a species.[162]

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154. Brief for Petitioner at 22–23, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361 (2018) (No. 17-71), 2018 WL 1960816, at *22–23.

155. *Id.* at 23.

156. *E.g.*, Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172, 174 (2001).

157. Reply Brief for Petitioner at 4, *Weyerhaeuser*, 139 S. Ct. 361 (No. 17-71), 2018 WL 3854758, at *4 (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994)).

158. *Id.*; *see also Habitat*, Black's Law Dictionary (11th ed. 2019); *see also, e.g.*, *Habitat*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (describing habitat as the "locality in which a plant or animal naturally grows or lives").

159. Reply Brief for Petitioner, *supra* note 157, at 4.

160. *Id.* at 4–5.

161. *Id.* at 5.

162. *Id.* at 6.

In addition to the dictionary definition of habitat, Weyerhaeuser Co. argued that habitat in the statutory context of the ESA requires habitability. Section 3(5)(C) provides that "critical habitat" generally "shall not include the entire geographical area which *can be occupied*" by the species.[163] Weyerhaeuser Co. argued that this provision, when read *in pari materia* with the definition of critical habitat in subpart (5)(A), means that only areas capable of being occupied by the species may be deemed critical habitat.[164] Section 3(5)(C) of the ESA clearly contemplates both occupied and unoccupied critical habitat by employing the phrase "can be occupied" rather than *is* occupied.[165] However, the logical implication of this language is that only areas that "can be occupied" are eligible for critical habitat designations.[166]

Despite these arguments, there are numerous issues resulting from such a limited definition of habitat.[167] First, the FWS, the respondent in *Weyerhaeuser*, argued that even some dictionary definitions of habitat are broader than just habitability—"kind of locality;" "site or region with respect to physical features normally preferred by biological species;" "native environment of an animal or plant;" and "the kind of place that is natural for the life and growth of an animal or plant," to name a few.[168] Additionally, as the Center for Biological Diversity, the intervenor-respondent in *Weyerhaeuser*, discussed, the ESA uses the term "habitat" more liberally than the strict habitable sense in another section of the statute.[169] For example, Section 8a(e)(2)(B) requires international cooperation in identifying "habitats upon which [migratory birds] depend."[170] Furthermore, Congress has also used the term habitat outside of a strict habitable sense in other conservation statutes.[171] For example, the Marine Turtle Conservation Act of 2004 describes the "nesting habitat" for marine turtles and the Coast Barrier Resources Act describes

163. 16 U.S.C. § 1532(5)(C) (2018).

164. Reply Brief for Petitioner, *supra* note 157, at 7–8. *See* 16 U.S.C § 1532(5)(A), (C).

165. 16 U.S.C. § 1532(5)(C).

166. Reply Brief for Petitioner, *supra* note 157, at 7–8.

167. Brief for the Federal Respondents at 33, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361 (2018) (No. 17-71), 2018 WL 3238924, at *33.

168. *Id.* (internal citations and emphasis omitted).

169. Brief for Intervenor-Respondents at 44, *Weyerhaeuser*, 139 S. Ct. 361 (No. 17-71), 2018 WL 3217374, at *44.

170. 16 U.S.C. § 1537(a)(e)(2)(B).

171. Brief for the Federal Respondents, *supra* note 167, at 29. *See, e.g.*, 16 U.S.C §§ 6602(2), 6603(b)(1)(A) (nesting habitats of marine turtles, etc.).

the habitat essential for "spawning, nursery, nesting, and feeding."[172] Finally, the courts have used the term habitat to describe areas that do not fit the strict definition asserted by Weyerhaeuser Co.[173] As a matter of fact, the Ninth Circuit has stated explicitly that "there is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service[s] to show that the area is 'essential,' without further defining that term as 'habitable.'"[174]

Some of the statutory construction undercuts a strict definition of habitat as well. While the definition of occupied critical habitat is tied to "physical or biological features" that are essential, the definition of unoccupied critical habitat is based upon "areas" that are deemed essential.[175] While Weyerhaeuser Co. asserted that the two definitions are related and the structure implies that "features" are necessary to be deemed essential, it is just as reasonable to interpret the omission of features from the unoccupied definition as deliberate to allow increased flexibility in unoccupied critical habitat designations.[176] In addition, even if section 3(5)(C) requires critical habitat to be limited to areas that "can be occupied," the phrase "can be occupied" is not necessarily synonymous with habitability as described by Weyerhaeuser Co. A geographical area's "occupied" status is a "highly contextual and fact-dependent inquiry" which is subject to various factors such as frequency and nature of use of the area rather than purely whether a species can survive in a localized area.[177]

The biggest strike against interpreting the ESA as requiring unoccupied critical habitat to be habitable is that this would undermine the ESA's goal of species recovery.[178] Each listed species' recovery needs are unique, and inflexibility will restrain recovery efforts.[179] Some listed species may not have sufficient habitable areas available to survive and the restoration of habitat may be the only option to prevent extinction of

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172. 16 U.S.C. § 6602(2); 16 U.S.C. § 3501(a)(1)(B).

173. *See, e.g.*, Brief for the Federal Respondents, *supra* note 167, at 29.

174. Bear Valley Mut. Water Co. v. Jewell, 790 F.3d 977, 994 (9th Cir. 2015). To be fair, this assertion could be construed as dicta and carries less weight in light of *Weyerhaeuser*, 139 S. Ct. 361.

175. 16 U.S.C. § 1532(5)(A).

176. Reply Brief for Petitioner, *supra* note 157, at 7–8.

177. Ariz. Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1164 (9th Cir. 2010).

178. 16 U.S.C. § 1531(b).

179. *See* Brief of Amici Curiae Scientists in Support of Respondents at 15–16, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361 (2018) (No. 17-71), 2018 WL 3375001, at *15–16.

those species.[180] Historically, the courts have upheld critical habitat designations of unoccupied areas that do not fit in the strict definition of habitable.[181] Courts have recognized critical habitat designations of migratory areas, seasonal areas, areas where a species is to be reintroduced, and even areas that the species could never occupy but still relies upon.[182]

Further, Judge Owen's dissent from the Fifth Circuit opinion agreed that not all unoccupied areas must be habitable in order to be designated critical habitat.[183] Judge Owen's dissent distinguished Unit 1's designation from situations where areas unoccupied by an endangered species "provide[] elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy."[184] However, the dissent suggested that areas that support a species' survival, short of being strictly habitable, could be eligible for critical habitat designation.[185]

Finally, habitat is dynamic.[186] Critical habitat might be suitable for a species when it is designated, but may then become degraded over time.[187]

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180. *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,390 (proposed June 3, 2010). FWS designation of Unit 1 was the result of litigation asserting that the Dusky Gopher Frog had insufficient critical habitat and FWS deemed that restoration of habitat was necessary to achieve its recovery goals for the Dusky Gopher Frog. *See* Stipulated Settlement with [Proposed] Order, Friends of Miss. Pub. Lands v. Kempthorne, No. 1:07-cv-02073-RBW (D.D.C. June 11, 2008), ECF No. 7.

181. *See, e.g.*, Bear Valley Mut. Water Co. v. Jewell, 790 F.3d 977, 994 (9th Cir. 2015).

182. *See, e.g.*, *id.* (upholding an unoccupied critical habitat designation for an area where the species could not survive but provided essential elements for the survival of the species); Aina Nui Corp. v. Jewell, 52 F. Supp. 3d 1110, 1129 (D. Haw. 2014) (upholding an unoccupied critical habitat designation for the purpose of providing "suitable habitat and space for expansion or reintroduction").

183. Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 827 F.3d 452, 483–84 (5th Cir. 2016) (Owen, J., dissenting), *vacated & remanded*, 139 S. Ct. 590 (2018).

184. *Id.*

185. *Id.*

186. Brief of Amici Curiae Scientists in Support of Respondents, *supra* note 179, at 8.

187. *See* Brief for Intervenor-Respondents, *supra* note 169, at 5 (noting that the ESA's definition of unoccupied critical habitat is tacit acknowledgment that "merely protecting the curtailed or degraded areas an endangered species currently occupies will, for many species, preclude recovery").

Conversely, areas that were not initially suitable for a species may change or improve over time to the point where they can support the species.[188] Climate change only compounds this issue.[189] Rising sea levels and changing climate shifts, shrinks, and possibly even expands, in some instances, the ranges of listed species.[190] These inevitable changes will require the Services to examine designating unoccupied critical habitat more often, and while biospheres are in flux, construing habitat on the basis of habitability will restrain recovery efforts and ultimately imperil more species.[191]

b. Should the Services Adopt a Broad Definition of Habitat?

If habitat does not carry a habitable requirement, should the Services adopt a broad definition of habitat? The FWS described the Services' understanding of "habitat" as a "case-by-case application."[192] Since the ESA's enactment, the Services have designated areas as critical habitat because these areas were deemed essential for the conservation of the species and not necessarily based on whether the species could survive there.[193] As the FWS noted, "'habitat' is not limited to areas that simultaneously provide optimal conditions for every stage of a species' life cycle."[194] The Services contend that habitat should be understood broadly since it may vary in suitability and purpose for each species.[195]

The grammatical context of the term "habitat" in Section 4 of the ESA supports the notion that definition of habitat should be broad.[196] Section 4 provides that "*any* habitat" of the species is eligible to be considered as critical habitat.[197] While it supports the notion that critical habitat is a

188. *See* 16 U.S.C § 1533(a)(3)(A)(ii) (2018) (provision that allows the Services to modify and revise critical habitat designations, which is an acknowledgement that a species' habitual needs may change as conditions improve or deteriorate).

189. *See* Allen et al., *supra* note 127.

190. *Id.* at 8–9.

191. *See* Olivia Bensinger, *Endangered Species Act to the Rescue? Climate Change Mitigation and Adaptation Under the ESA*, N.Y.U. ENVTL. L.J. (Mar. 29, 2017), https://www.nyuelj.org/2017/03/endangered-species-act-rescue/ [https://perma.cc/EW3C-VB52].

192. Brief for the Federal Respondents, *supra* note 167, at 25.

193. *See* 16 U.S.C §§ 1532(5)(A), 1533(a)(3)(A)(i) (2018); Brief for the Federal Respondents, *supra* note 167, at 34.

194. Brief for the Federal Respondents, *supra* note 167, at 26.

195. *Id.*

196. *See* 16 U.S.C § 1533(a)(3)(A)(i).

197. *Id.* (emphasis added).

subset of habitat, the word "any" contemplates a designation from a larger group that is not necessarily uniform.[198] Therefore, the phrase "any habitat" connotes that a species may have multiple habitats that may vary in suitability.[199] As noted previously, the Services designate, and courts uphold, critical habitat designations of areas that cannot strictly support a species in all circumstances.[200]

Some of the legislative history supports a broader definition of habitat as well. As the FWS contended, Congress rejected "language that would have permitted designation of unoccupied areas only if 'the species can be expected to expand naturally' to those areas."[201] Additionally, the 1978 Amendment ultimately framed the definition of critical habitat in terms of what is "essential for the conservation of the species."[202] The focus on conservation rather than survival of a species highlights Congress's intent that the ESA would be broad and flexible enough to support species recovery.[203]

A species' environmental needs often change throughout different stages of that species' lifecycle.[204] One area may be suitable for foraging and hunting, but not for nesting.[205] An anadromous fish may spawn in freshwater and mature in saltwater.[206] Migratory species may only use areas seasonally and, more so, as a stopover in areas along their migratory path that could never sustain a species long term.[207] While these areas cannot sustain a species alone or at all times, it would be absurd to exclude these areas from being considered habitat. In *Bear Valley Mutual Water Co. v. Jewell*, the Ninth Circuit went further, upholding a designation of unoccupied critical habitat that the species could not occupy but was

198. Brief for the Federal Respondents, *supra* note 167, at 29.

199. *Id.*

200. *See supra* text accompanying notes 180–82.

201. Brief for the Federal Respondents, *supra* note 167, at 39 (quoting CONG. RESEARCH SERV., S. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 1169–70 (Comm. Print 1982)).

202. 16 U.S.C. § 1532(5)(A)(i)–(ii) (2018).

203. Brief for the Federal Respondents, *supra* note 167, at 39; Brief for Intervenor-Respondents, *supra* note 169, at 35.

204. Brief for the Federal Respondents, *supra* note 167, at 29.

205. *See* Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv., 616 F.3d 983, 988 (9th Cir. 2010) (discussing how essential elements upon which a species relies may be in "distinct areas").

206. Brief for Intervenor-Respondents, *supra* note 169, at 35.

207. *Id.* at 44.

deemed essential because it provided elements downstream to occupied areas that were necessary for the species survival.[208]

While there could be potential benefits to having a broad definition of habitat, the FWS and Center for Biological Diversity's purported understanding of habitat provides little clarity to how the term should be defined.[209] Both parties made a strong argument as to what could or should constitute habitat but did not provide any explanation on what would not qualify as habitat. Ultimately, critical habitat designations would be based on the Services' determination that an area is essential for the conservation of the species, which is equally ambiguous. Such a broad definition of habitat, which is so ambiguous that it can hardly be considered a definition, is inconsistent with legislative intent of the ESA and the holding of *Weyerhaeuser*.[210]

Specific language in the ESA undercuts an expansive definition of habitat. As noted earlier, section 3(5)(C) provides that "critical habitat" generally "shall not include the entire geographical area which *can be occupied*" by the species.[211] The implication of section 3(5)(C) is that only areas that "can be occupied" can be considered critical habitat.[212] While *Bear Valley* suggests that there is no requirement that an area be occupiable by a species, there is no evidence that the Ninth Circuit considered the language in section 3(5)(C).[213] Additionally, *Bear Valley* was decided before *Weyerhaeuser*, thus its holding is significantly less persuasive.[214] If critical habitat must be habitat, it would be difficult to claim an area that could not be not be occupied by a species is habitat.

In addition, the ESA's structure cuts against a broad-based definition of habitat. Weyerhaeuser Co. pointed out that areas, whether occupied or unoccupied, must be "essential" for the conservation of the species to be designated critical habitat.[215] Occupied critical habitat is defined as areas that contain "features" that are "essential to the conservation of the species" and "which may require special management considerations or protection."[216] Unoccupied critical habitat is defined as "areas" that "are

208. Bear Valley Mut. Water Co. v. Jewell, 790 F.3d 977, 994 (9th Cir. 2015).

209. Brief for the Federal Respondents, *supra* note 167, at 28; Brief for Intervenor-Respondents, *supra* note 169, at 33.

210. *See* James & Ward, *supra* note 49, at 26 (discussing how Congress sought to narrow the scope of critical habitat designations).

211. 16 U.S.C. § 1532(5)(C) (2018).

212. *Id.*; Reply Brief for Petitioner, *supra* note 157, at 7–8.

213. *See Bear Valley Mut. Water Co.*, 790 F.3d 977.

214. *See id.*

215. 16 U.S.C § 1532(5)(A); Reply Brief for Petitioner, *supra* note 157, at 7.

216. 16 U.S.C § 1532(5)(A)(i).

essential for the conservation of species."[217] Based on the former definition, "essential" must be linked to "physical or biological features" of occupied critical habitat.[218] As noted earlier, a logical reading of the definition of unoccupied critical habitat is that it is a secondary alternative to occupied critical habitat and carries the same requirements as occupied critical habitat with the obvious exception of the presence of the species.[219] Courts and most legal experts have observed that the test for unoccupied critical habitat is supposed to be "more stringent" than occupied critical habitat designation.[220] If the definition of unoccupied critical habitat does not have an implied requirement of "physical or biological features," it would be less stringent than the occupied critical habitat standard.[221]

The legislative history of the ESA demonstrates that Congress has been wary of wide-ranging discretion in critical habitat designations. In the wake of *Tennessee Valley Authority v. Hill*, Congress limited the Services' discretion in critical habitat designations in the 1978 Amendment to the ESA by adding a definition of critical habitat.[222] By adding its own definition, Congress rebuked the broader definition that the Services had adopted and that the Supreme Court analyzed in *Tennessee Valley Authority v. Hill*.[223] Legal experts observe that "Congress added the definition of "critical habitat" to the ESA in 1978 to "narrow[] the scope of the term as it is defined in the existing regulations."[224] Therefore, a broad and ambiguous standard that affords wide discretion in critical habitat designations to the Services is inconsistent with Congress's intent behind the ESA's 1978 Amendment.[225]

Furthermore, based on *Weyerhaeuser*, habitat must have some sort of limiting principle.[226] As Judge Owen observed in her dissent from the Fifth Circuit opinion, a broad interpretation of "'essential' means that virtually any part of the United States could be designated as 'critical habitat' for

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217. 16 U.S.C § 1532(5)(A)(ii).
218. Reply Brief for Petitioner, *supra* note 157, at 7.
219. *Id.* at 7–8.
220. *Id.*; *see also* James & Ward, *supra* note 49, at 30.
221. Reply Brief for Petitioner, *supra* note 157, at 7–8.
222. James & Ward, *supra* note 49, at 30.
223. *Id.* at 15.
224. *Id.* at 30.
225. *See id.*
226. *See* Weyerhaeuser Co. v. U.S. Fish & Wildlife Services, 139 S. Ct. 361, 369 (2018). The Supreme Court has endorsed the concept that critical habitat is a subset of habitat. Thus, habitat must have some defining parameters or else the Court's holding would be meaningless. Something can only be a subset if it is a portion of a defined category or group.

any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[227] Without limiting principles of what can reasonably constitute habitat in the context of unoccupied areas, the Services would have "nearly limitless authority to burden private lands with a critical habitat designation."[228] According to the Supreme Court's holding in *Weyerhaeuser*, critical habitat must be a subset of habitat.[229] If habitat is just a synonym for land or specified area, then anywhere could be deemed critical habitat provided the Services justify the area as being essential. In the words of Judge Owen, "This is not a reasonable construction of § 1532(5)(A)(2)."[230]

Finally, policy reasons contradict a limitless definition of habitat. The critical habitat designation process needs to be transparent, predictable, and met with public buy-in. A broad definition of habitat is too ambiguous to accomplish this goal. As discussed earlier, the Services will likely need to make more unoccupied critical habitat designations in the future.[231] However, the Services should only make such designations when necessary and with fair notice to the parties that will be affected. Landowners, investors, and businesses need fair notice of a possible critical habitat designation.[232] If the definition of habitat is amorphous, affected parties have no way of predicting a future critical habitat designation, particularly when the land is unoccupied.[233] Unforeseen critical habitat designations are likely to be received as regulatory zealotry and overreach.[234] Perceived overreaches will be typically met with political backlash either through funding cuts or regulatory rollbacks from a future administration.[235] Ultimately, unpredictable critical habitat designations will damage species recovery and the goals of the ESA.

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227. Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 827 F.3d 452, 483 (5th Cir. 2016) (Owen, J., dissenting), *vacated & remanded*, 139 S. Ct. 590 (2018).

228. *Id.* at 471.

229. *Weyerhaeuser*, 139 S. Ct. at 368.

230. *Markle Interests*, 827 F.3d at 483 (Owen, J., dissenting).

231. *See* discussion *supra* Part III.B.

232. *See supra* text accompanying notes 143–47.

233. *See* Owen, *supra* note 66, at 180 (on how critical habitat designations serve as a signal to federal agencies and private entities for possible ESA-related regulatory constraints).

234. *See* Salzman, *supra* note 69, at 335–37.

235. Owen, *supra* note 66, at 190.

IV. SOLUTION

A. Amending the Endangered Species Act

The definition of critical habitat has not been revisited by Congress since 1978, five years after the ESA was first enacted.[236] Over the last four decades, the Services and courts have struggled to extricate Congress's intent.[237] The definition of critical habitat under the ESA is too important to leave up to the executive branch.[238] Leaving the definition to the administrative state allows the foundation of the ESA to swing in political winds with every new election of a presidential administration.[239] Since critical habitat is often the primary reason for section 7 consultations, the definition of critical habitat goes to the scope of the ESA and merits a debate in Congress. Thus, Congress should amend the ESA to provide a definition of habitat that clearly addresses unoccupied critical habitat. The current definition of unoccupied critical habitat is too vague, as evidenced by *Weyerhaeuser*, and it is time for Congress to define the limits of the ESA and weigh and debate the government's interest in preserving biodiversity against economic development and the rights of property owners. The current status quo creates uncertainty for property owners and undermines the long-term conservation goals of the statute.

If Congress were to amend the ESA, it should follow the policy analysis that the Services articulate in the 2019 Final Rule and the 2020 Final Rule by explicitly prioritizing occupied critical habitat designations over unoccupied and providing a definition of habitat. Amending critical habitat designations to prioritize occupied critical habitat over unoccupied critical habitat would ratify the prevailing view of how critical habitat is to be designated and make critical habitat designations less contentious.[240]

Moreover, providing a new definition of habitat that is flexible enough to adequately serve the conservation and recovery goals of the ESA, but also must provide transparency and predictability to stakeholders, is critical. To achieve this goal, Congress should adopt the definition in the 2020 Final Rule: "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 or more

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236. James & Ward, *supra* note 49, at 24.

237. *See, e.g.*, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361 (2018).

238. *See* discussion *supra* Part III.A.

239. *See id.*

240. *See* discussion *infra* Part IV.B.

life processes of a species."[241] This definition would be more flexible than a habitability-based definition of habitat, but more definitive than a broad-based, ambiguous definition championed by the FWS and the Center for Biological Diversity in *Weyerhaeuser*.

A core goal of the ESA is species recovery.[242] It is foreseeable that some species will require restored unoccupied habitat particularly in light of climate change.[243] As the Ninth Circuit has explained, "The purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery."[244] If a species is limited to an ever-shrinking habitat, recovery is out of the question and the species' survival comes into question. Opening up the possibility of designating unoccupied critical habitat for restoration purposes conjures a parade of horribles.[245] However, the requirement that habitat "currently or periodically contains resources and conditions necessary to support [a species' lifecycle]" provides a meaningful check against government overreach and fair notice to landowners and developers.

The new definition of habitat will allow the Services to designate essential critical habitat in a variety of foreseeable circumstances. Habitable areas would constitute an "abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species."[246] Seasonal, migratory, or intermittently used areas also qualify as areas that "currently or periodically contain[] the resources and conditions necessary to support" life processes of a species.[247] Areas that provide essential elements, such as in *Bear Valley*, by definition contain "resources and conditions" necessary to support species' life processes.[248] Only restoration habitat

241. Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 81,411, 81,412 (Dec. 16, 2020) (to be codified at 50 C.F.R. § 424.02).

242. 16 U.S.C. § 1531(b) (2018).

243. Allen et al., *supra* note 127, at 8–9.

244. Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1070 (9th Cir.), *amended*, 387 F.3d 968 (9th Cir. 2004).

245. *See* Brief for Alabama and 19 Additional States as Amici Curiae in Support of Petitioner at 4, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361 (2018) (No. 17-71), 2018 WL 2059535, at *4.

246. Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. at 81,412.

247. *Id.* The 2020 Final Rule demonstrates that the Services view seasonally or intermittently used areas as habitat.

248. Bear Valley Mutual Water Co. v. Jewell, 790 F.3d 977 (9th Cir. 2015).

would be in question meeting such a definition of habitat. However, this is the area where the Services should apply the most discretion. If an area does not at least "periodically" contain "resources and conditions" that support a species lifecycle, developers and property owners will have no notice of a potential critical habitat designation.[249] The new definition would protect against such actions and tie restoration efforts to areas with a meaningful standard of habitat.

The new definition would help the Services account for the dynamic nature of habitat. Areas may slowly lose or gain "resources and conditions" naturally, and the "abiotic and biotic setting" that is "necessary to support" a species' life processes may change.[250] Using this definition of habitat gives the needed flexibility to proactively make new designations and account for naturally degrading critical habitats as time progresses.[251] Statutorizing the definition will provide clarity to the courts and litigants by eliminating the quandary of having to hash out the definition of habitat in a manner consistent with critical habitat jurisprudence.[252] It will help insulate the critical habitat designation process from political influence and provide certainty and continuity that will benefit both species recovery and property interests.[253]

That is not to say the new rule could not be improved. The "resources and conditions" terminology is vague and should be substituted for a term more familiar with parties that regularly deal with the ESA: "physical or biological features." However, as the Services explained, they "intentionally chose not to use the statutory phrase 'physical or biological features' to avoid conflating the statutory language regarding occupied critical habitat with that of the broader definition of 'habitat' promulgated [in the rule]."[254] Either way, a robust debate in Congress could flesh out the best phraseology. For these reasons, providing a definition of habitat through the legislative process is the most reasonable solution to deal with the fallout of *Weyerhaeuser*.

Considering contemporary political realities, it is unlikely that Congress will address the statutory pitfalls of the ESA's critical habitat

249. Brief for Petitioner, *supra* note 154, at 28.
250. *See* Allen et al., *supra* note 127, at 8–9.
251. *See* discussion *supra* Part III.A.
252. *Id.*
253. *Id.*
254. Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 81,411, 81,412 (Dec. 16, 2020) (to be codified at 50 C.F.R. § 424.02).

definition any time soon.[255] When Congress passed the ESA in 1973 and the subsequent 1978 Amendment, it did so with overwhelming bipartisan support.[256] Under the 116th Congress, the most notable bill supported by the Democratic Caucus, introduced by Representative Raúl M. Grijalva (D-AZ), the current Natural Resources Committee Chair, was H.R. 4348.[257] This bill seeks to void the recent rule change, but does so without any further guidance to the implementing agencies.[258] This will unfortunately only lead to more chaos and uncertainty in the wake of *Weyerhaeuser*.[259] On the Republican side of the aisle, Representative Mike Johnson (R-LA) introduced a bill entitled the "Critical Habitat Improvement Act."[260] Notably, this bill seems to favor a more restrictive view of habitat by requiring that unoccupied critical habitat be "able to sustain occupancy by such species."[261] While the bill seems to overhaul the definition of critical habitat in a way that addresses *Weyerhaeuser*, strict occupancy capability requirements present aforementioned issues.[262] Occupancy is analogous to habitability and, as noted before, species can often rely on areas that they do not strictly occupy.[263]

B. If There is No Congressional Action

If Congress does not amend the ESA, the Service's 2019 Final Rule and 2020 Final Rule are the best intermediary solutions. First, the 2019 Final Rule makes clear that critical habitat designations should focus first on occupied areas before unoccupied areas.[264] The majority view among legal experts is that the ESA's language, structure, and legislative history suggest that occupied areas should be the primary focus of critical habitat

255. Derek Willis & Paul Kane, *How Congress Stopped Working*, PROPUBLICA (Nov. 5, 2018, 10:00 AM), https://www.propublica.org/article/how-congress-stopped-working [https://perma.cc/74BQ-ET8Q].

256. James & Ward, *supra* note 49, at 24.

257. PAW and FIN Conservation Act of 2019, H.R. 4348, 116th Cong. (2019).

258. *Id.*

259. *Id.*

260. H.R. 5591, 116th Cong. (2020).

261. *Id.*

262. *Id.*

263. *See* discussion *supra* Part III.B.2.a.

264. Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 424).

designations and unoccupied areas should only be considered as an alternative.[265]

Furthermore, prioritizing occupied critical habitat designations is a prudent political and legal decision. Focusing on less controversial options will dispel charges of administrative zealotry and inhibit political backlash that would ultimately lead to adverse outcomes.[266] Critical habitat designations of occupied areas will draw less legal scrutiny and can be more easily justified.[267] Moreover, the Services' attempt to provide a definition of habitat will help ensure uniformity and transparency in critical habitat designations. As the Services explained when it first proposed the rule defining habitat, "the proposed regulatory definition of 'habitat' would not impose any additional procedural steps or change in how we designate critical habitat, but would instead serve as a regulatory standard to help ensure that unoccupied areas that we designate as critical habitat are 'habitat' for the species and are defensible as such."[268]

Additionally, the 2019 Final Rule and 2020 Final Rule are the only regulations that address *Weyerhaeuser*.[269] If the Services had not taken any regulatory action, it would have been foreseeable that similar cases to *Weyerhaeuser* could arise again. These regulations demonstrate that the Services are attempting to comply with the key holding of *Weyerhaeuser*—critical habitat must be habitat.[270] If the agencies failed to take any action, future litigation over critical habitat designations would be certain as it would suggest that the Services ignored the Supreme Court's ruling.

Critics are likely to argue that the Services are reading in a nonexistent requirement to the definition of unoccupied critical habitat, since section 3(5)(A)(ii) of the ESA makes no reference to "physical or biological

265. Reply Brief for Petitioner, *supra* note 157, at 7–8; *see also* Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv., 616 F.3d 983, 990 (9th Cir. 2010) (describing how the standard for unoccupied critical habitat is a more demanding standard than that of occupied critical habitat); James & Ward, *supra* note 49, at 30.

266. Owen, *supra* note 66, at 146.

267. *Id.*

268. Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 47,333, 47,335 (Aug. 5, 2020) (to be codified at 50 C.F.R. § 424.02).

269. Listing Species and Designating Critical Habitat, 84 Fed. Reg. at 45,022.

270. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 369 (2018).

features."[271] However, a reasonable statutory construction indicates that features are required for not just occupied, but also unoccupied critical habitat.[272] First, most legal experts agree that the test for unoccupied critical habitat is more stringent than critical habitat.[273] Second, section 3(5)(C) uses the language "can be occupied," which supports an interpretation that features have to be present to be designated as critical habitat.[274] Finally, the Supreme Court's holding in *Weyerhaeuser* that critical habitat must be habitat supports the notion that there is a features requirement implicit to all critical habitat.[275]

The 2020 Final Rule is equally prudent, as the holding in *Weyerhaeuser* tacitly requires the Services to come up with a definition of habitat.[276] As noted above, the Supreme Court remanded on grounds that "the [Fifth Circuit] . . . had no occasion to interpret the term 'habitat' in section 4(a)(3)(A)(i) or to assess [FWS's] administrative findings regarding Unit 1."[277] It is reasonable to infer that the Services sought a consent decree at that point in order to give the agency time to conduct proper rulemaking through the notice and comment process rather than trying to arrive at a definition, or more likely partial definition, of habitat through litigation. Regardless, the Services would have been tasked with providing an interpretation of the term "habitat" at some point.

The 2019 Final Rule and 2020 Final Rule provide needed transparency and consistency in critical habitat designations. The 2019 Final Rule's "reasonable certainty" standard helps assure the public that designations are not the result of speculation or administrative overreach and is consistent with the "to the maximum extent prudent and determinable"

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271. 16 U.S.C. § 1532(5)(A)(ii) (2018); *see also* Brief for the Federal Respondents, *supra* note 167, at 40; Brief for Intervenor-Respondents, *supra* note 169, at 34; Markle Interests, LLC v. U.S. Fish & Wildlife Serv., 40 F. Supp. 3d 744, 761 (E.D. La. 2014); Markle Interests, LLC v. U.S. Fish & Wildlife Serv., 827 F.3d 452 (5th Cir. 2016).

272. Reply Brief for Petitioner, *supra* note 157, at 7-8; *see also* 16 U.S.C § 1532 (5)(A), (C).

273. *E.g.*, Steven Quarles et al., *Critical Habitat in Critical Condition: Can Controversial New Rules Revive It?*, NAT. RESOURCES & ENV'T, Summer 2015, at 8, 10.

274. 16 U.S.C. § 1532(5)(C). An area that "can be occupied" would logically have physical or biological features. This is particularly true since the definition of occupied critical habitat in section 3(5)(A)(i) requires physical or biological features.

275. *See* discussion *supra* Part III.B.2.

276. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 369 (2018).

277. *Id.*

standard provided in section 4(a)(3)(A) of the ESA.[278] More importantly, the Services' definition of habitat will provide a "regulatory standard" that not only will create transparency on its own accord but will be formed through the notice and comment rulemaking process.[279]

The changes to unoccupied critical habitat designations set forth in the 2019 Final Rule are consistent with the text and structure of the ESA and even more so in the context of *Weyerhaeuser*.[280] The 2020 Final Rule's effort to define habitat is necessary and reasonable. Both agency actions will make critical habitat designations more transparent and consistent with the text of the ESA and Congressional intent.

CONCLUSION

Critical habitat designations have been and will continue to be contentious.[281] Critical habitat designation is an important tool of the ESA in combating extinction and has certainly played a role in preserving endangered and threatened species. However, critical habitat designations also carry potential economic costs and restrain the rights of property owners. Due to this tension, it is imperative that the ESA provide clear guidelines on what areas are eligible to be designated as critical habitat. Unfortunately, due to the varying needs of listed species and the wide discretion the ESA provides to the Services, there is much uncertainty and ambiguity when designating critical habitat, particularly unoccupied critical habitat.

Fortunately, the recent case of *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service* brought a spotlight to this issue and provided marginal clarity, but questions still remain. The onus is on Congress to amend the ESA and provide stronger guidelines on how the Services are to designate unoccupied critical habitat. Legislatively prioritizing occupied critical habitat designations over unoccupied and defining habitat will perpetuate the flexibility required for species recovery, while also providing fair notice to landowners and developers. Furthermore, it will provide for a more uniform implementation of critical habitat designations.

If Congress does not act, the 2019 Final Rule and 2020 Final Rule published by the Services are the best intermediary solution. Both rules are the only regulations that address the holding of *Weyerhaeuser* and are

278. 16 U.S.C. § 1533(a)(3)(A).

279. Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 47,333, 47,335 (Aug. 5, 2020) (to be codified at 50 C.F.R. § 424.02).

280. *See* discussion *supra* Part III.

281. Owen, *supra* note 66, at 182–88; *see also* discussion *supra* Part I.D.

consistent with the language, structure, and legislative intent of the ESA. The 2020 Final Rule's definitions of habitat are reasonable and strike a balance between accounting for the various habitat needs of threatened and endangered species while providing transparency, clarity, and consistency for stakeholders. Both actions will improve the critical habitat designation process.

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