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Department of the Interior **Fish and Wildlife Service** (FWS) Proposed Rule:
**Endangered and Threatened**
**Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat**
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**AFA Comment on Proposed Rule Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat**

Attorneys for Animals, Inc. (AFA) is a Michigan non-profit and 501(c)(3) organization of legal professionals and animal advocates. Founded in the 1990s, we actively follow legislative, administrative, and policy actions related to the welfare of animals, both in Michigan and nationwide.

Attorneys for Animals opposes both the proposed definition of "habitat" and the alternative proposed definition crafted by the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively, "the agencies"), because they are too narrow and therefore inconsistent with the United States Supreme Court case which was the impetus for the proposal. Additionally, they contradict long-standing interpretations of the Endangered Species Act of 1973, 16 USC 1531 *et seq*. ("the Endangered Species Act"), the purpose of which is "to halt and reverse the trend toward species extinction, whatever the cost," *Tennessee Valley Auth v Hill*, 437 US 153, 184 (1978) and that "endangered species . . . be afforded the highest of priorities," *id*. at 174.

Critical habitat for a threatened or endangered species is defined by the Endangered Species Act 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 4 of [the Endangered Species Act], 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 4 of [the Endangered Species Act], upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 USC 1532(5)(A).

The United States Supreme Court noted that the Endangered Species Act's "statutory definition of 'critical habitat' tells us what makes habitat 'critical,' not what makes it 'habitat,'" *Weyerhaeuser Co v US Fish & Wildlife Serv*, 139 S Ct 361, 368 (2018) and "leaves the *larger category* of habitat undefined," *id*. at 369 (emphasis added). Because, as the Supreme Court recognized, "[a]djectives modify nouns," "[i]t follows that 'critical habitat' is the subset of 'habitat' that is 'critical' to the conservation of an endangered species." *Id*. at 368. Additionally, as the FWS and the NMFS recognize in their proposal, "[h]abitat can . . . include areas where the species does not currently *live*, given that the statute defines critical habitat to include unoccupied areas," *id*. at 369 (emphasis in original). Consequently, habitat necessarily includes both occupied and unoccupied areas.

The Supreme Court's analysis in *Weyerhaeuser* – that habitat is a larger category than critical habitat – dictates that occupied habitat *need not* contain physical or biological features essential to the conservation of the species and unoccupied habitat *need not* be essential for the conservation of the species. Similarly, because "[a]djectives modify nouns," *id*. at 368, habitat need not be critical to the conservation of an endangered species. Otherwise, the terms habitat and critical habitat would be coterminous, contrary to the Supreme Court's finding that habitat is a larger category than critical habitat.

Nevertheless, the proposal defines habitat as places upon which individuals of a species *depend*. This is merely another way of saying that the place is *critical* or *essential* to the species. In other words, the FWS and the NMFS are proposing to define habitat as coterminous with critical habitat, notwithstanding the agencies' ostensible acknowledgement of the Supreme Court's conclusion that "the definition of 'habitat' must inherently be broader than the statutory definition of 'critical habitat,' *Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat*, 85 Fed Reg 47333, 47334 (Aug 5, 2020).

The alternative proposed definition is even more restrictive, with one exception: It defines habitat as places *used* by individuals of a species, which is substantially more consistent with *Weyerhaeuser*'s indication that habitat is a larger category than critical habitat. However, the first sentence of the alternative proposed definition – indicating that habitat is used by individuals of a species - is contradicted by the second sentence of the alternative proposed definition, which indicates that "habitat includes areas where individuals of the species do not presently exist" (and therefore could not possibly use). Although inclusion of the second sentence appears to be an effort to acknowledge what the Supreme Court and the agencies agree upon – that habitat necessarily includes both occupied and unoccupied areas – it is also unnecessary to employ this false dichotomy.

An appropriate definition of habitat would more logically encompass both such categories (occupied areas and unoccupied areas) comprehensively rather than separately identify each category in a way that naturally excludes the other. Specifically, defining habitat in the first instance as an area *used* by individuals of a species obviously *excludes* unoccupied areas from the definition, contrary to *Weyerhaeuser*'s (and the agencies') conclusion that the definition of habitat necessarily *includes* unoccupied areas. Thus, it might be more accurate to define "habitat" as physical areas that *could be* used by individuals of a species.

Additionally, the alternative proposed definition incorporates the word "necessary" to modify the attributes of "habitat." But "necessary" is merely another synonym for "essential" or "critical" which also renders the alternative proposed definition of habitat nearly coterminous with "critical habitat," rather than delineating a larger category. A more appropriate definition would not limit habitat to areas where "necessary" attributes presently exist.

In sum, an appropriate definition of habitat should not incorporate terms such as "depend," "necessary," or "essential," as they are synonymous with "critical" and therefore render the definition nearly coterminous with critical habitat. Moreover, the definition of habitat should not naturally exclude a category that the Supreme Court and the agencies agree must be included.

An analysis of the legislative history and interpretation of the Endangered Species Act leads to the conclusion that narrowing the definition of habitat in the way proposed by the agencies is out of step with the letter and spirit of the law and will result in a narrowing of protections for threatened or endangered species inconsistent with the Endangered Species Act.

Very truly yours,

Attorneys for Animals, Inc.

By:

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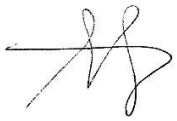

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