



November 30, 2021

**ATTN: Docket No. FWS-HQ-ES-2020-0047**  
**Docket No. FWS-HW-ES-2018-0115**

Martha Williams  
Principal Deputy Director  
U.S. Fish and Wildlife Service  
MS: PRB(3W)  
5275 Leesburg Pike, Falls Church  
VA 22041-3803

Janet Coit  
Assistant Administrator for Fisheries  
NOAA Fisheries  
1315 East-West Highway  
14th Floor  
Silver Spring, MD 20910

**Re: Comments of the Northwest Hydroelectric Association and National Hydropower Association on the U.S. Fish and Wildlife Service's and National Marine Fisheries Service's Proposed Recission of the Final Habitat Definition Rule and Critical Habitat Exclusion Rule**

Dear Principal Deputy Director Williams and Assistant Administrator Coit:

The Northwest Hydroelectric Association (NWHA) and the National Hydropower Association (NHA) (together, the Associations) welcome the opportunity to comment on the U.S. Fish and Wildlife Service's (USFWS) and National Marine Fisheries Service's (NMFS) (together, the Services) proposed recission of the Endangered Species Act (ESA) final "Habitat Definition Rule"<sup>1</sup> and "Critical Habitat Exclusion Rule."<sup>2</sup> There is a long history of confusion about how critical habitat designations are made, particularly with respect to the designation of unoccupied habitat. This confusion culminated in the Supreme Court's decision in *Weyerhaeuser Co. v. USFWS* case. 139 S. Ct. 361, 372 (2018).

---

<sup>1</sup> The Habitat Definition Rule was published in the *Federal Register* on December 16, 2020, at *Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat*, 85 Fed. Reg. 81,411-81,421, became effective on January 15, 2021, and is codified at 50 C.F.R. § 424.02.

<sup>2</sup> The Critical Habitat Exclusion Rule was published in the *Federal Register* on December 18, 2020, at *Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat*, 85 Fed. Reg. 82,376-82,389, became effective on January 19, 2021, and is codified at 50 C.F.R. § 17.90

As described further below, the Habitat Definition Rule and Critical Habitat Exclusion Rule provide needed certainty in this area. For this reason, the Associations request that the Services reconsider their proposal to rescind these rules.

### Interests of NWA and NHA Members

NWA is a non-profit trade association that represents and advocates on behalf of the Northwest hydropower industry. NWA has over 130 member companies from all segments of the industry: public and private utilities; independent developers and energy producers; manufacturers and distributors; local, state, and regional governments including water and irrigation districts; consultants; and contractors. NWA is dedicated to the promotion of the Northwest region's hydropower resources as a clean, efficient, and cost-effective source of energy while maintaining fundamental environmental and wildlife protections.

NHA is a non-profit national association dedicated to securing hydropower as a clean, carbon-free, renewable, and reliable energy source that serves the nation's environmental and energy objectives. Its membership consists of more than 240 organizations, including public and investor-owned utilities, independent power producers, equipment manufacturers, and professional organizations that provide legal, environmental, and engineering services to the hydropower industry. NHA promotes innovation and investment in all waterpower technologies, including conventional hydropower, marine and hydrokinetic power systems, and pumped storage to integrate other clean power sources, such as wind and solar.

The hydropower industry understands the importance of protecting threatened and endangered species and their habitats. NWA and NHA members commit tremendous resources toward the protection of protected species and their habitats. The Associations' members operate hydropower projects licensed by the Federal Energy Regulatory Commission (FERC) pursuant to the Federal Power Act (FPA).<sup>3</sup> FERC licenses include measures to protect, mitigate, and enhance ("PM&E measures") resources affected by a hydropower project, including threatened and endangered species and their habitats. In addition to incorporating PM&E measures for threatened and endangered species and their habitats under the FPA, FERC consults with NMFS and USFWS, as appropriate, under Section 7 of the ESA, prior to issuing a new or original license whenever operation under the proposed license "may affect" ESA-listed species or their critical habitats. Accordingly, hydropower projects are directly affected by the definition of habitat and designations of critical habitat for protected species.

### Proposed Recission of the Habitat Definition Rule

In the *Weyerhaeuser* case, the Supreme Court evaluated the USFWS' designation of critical habitat for the dusky gopher frog. The designation included areas unoccupied by the frog, and one of the issues in the case was whether and when unoccupied habitat is considered critical habitat. The Supreme Court noted that, before property could be considered critical habitat, it must first be determined to be habitat. As there was no definition of habitat in the ESA and related regulations, this issue was remanded to the Fifth Circuit Court of Appeals for additional consideration.

---

<sup>3</sup> 16 U.S.C. § 817(1).

The Habitat Definition Rule sought to address this point by establishing a definition of habitat. Rescinding the definition is inconsistent with the Court's opinion in *Weyerhaeuser* and is likely to lead to further confusion on this topic.

#### Proposed Recission of the Critical Habitat Exclusion Rule

Another issue in the *Weyerhaeuser* case was when areas that could be classified as critical habitat should be excluded from the designation. As an initial matter, the Court found that the decision whether or not to exclude an area from a critical habitat designation is reviewable under the Administrative Procedure Act. The Court discussed the directive in the ESA that the Services consider the economic and other impacts of designation when making its exclusion decision. While there have been informal policies relating to this process, there is no clear understanding by the regulated community of how this process works, and the information that the Services will consider as part of this process. The Critical Habitat Exclusion Rule outlined the process and criteria, providing much-needed clarity on this issue. This is particularly important when unoccupied habitat that is presently degraded or otherwise unsuitable for such species is under consideration for designation.

#### Conclusion

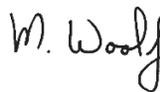
The Associations urge the Services to reconsider their recission proposals for the Habitat Definition Rule and Critical Habitat Exclusion Analysis Rule. These rules provide much-needed clarity about the critical habitat designation process, which is necessary to facilitate compliance with the ESA.

Thank you for your consideration of these comments.

Sincerely,



Brenna Vaughn  
Executive Director  
Northwest Hydroelectric Association  
PO Box 441  
Lake Oswego  
(503) 502-7262



Malcolm Woolf  
President and Chief Executive Officer  
National Hydropower Association  
601 New Jersey Ave NW Suite 660,  
Washington, DC 20001  
(202) 682-1700