

December 19, 2025
ELECTRONIC SUBMISSION
ATTN: FWS-HQ-ES-2025-0039

U.S. Department of the Interior
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, Virginia 22041

Re: Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat. Docket No. FWS-HQ-ES-2025-0039

To Whom It May Concern:

I respectfully submit this comment in strong support of the proposal by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, “the Services”) to revise portions of the regulations to best align with Section 4 of the Endangered Species Act of 1973, as amended (ESA).¹ Specifically, this comment addresses the proposed return to the 2019 version of 50 CFR 424.12(b)(2).

Given the Supreme Court’s recent directive to promulgate regulations based on the “single, best meaning” of the statute,² as reinforced by the current Administration’s directive to rescind regulations “based on anything other than the best reading of the underlying statutory authority,”³ this proposal represents an encouraging move by the Services to administer the ESA more faithfully. Restoring the two-step process for critical habitat designation in § 424.12(b)(2) better implements the statutory definition of critical habitat, although the standard for determining whether unoccupied areas are “essential” for critical habitat could be further improved to best align with the statute.

The Services are Correct to Restore the Two-Step Process

The two-step process – evaluating occupied areas before unoccupied areas for critical habitat designation – best implements the ESA’s definition of critical habitat. The statute defines critical habitat in two parts: (1) areas occupied by the species that contain

¹ U.S. Fish and Wildlife Service and National Marine Fisheries Service, “Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat,” *Federal Register*, Vol. 90, No. 223 (November 21, 2025), p. 52,607.

² *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

³ Exec. Order No. 14219, “Ensuring Lawful Governance and Implementing the President’s ‘Department of Government Efficiency’ Deregulatory Initiative,” 90 Fed. Reg. 10583 (Feb. 19, 2025).

physical or biological features essential to its conservation;⁴ and (2) areas not occupied by the species that are “essential for the conservation of the species.”⁵

Whether an unoccupied area is “essential” can logically be determined only by first assessing whether protection of the habitat already occupied is adequate to conserve the species. If the occupied habitat is sufficient, then additional unoccupied areas would by definition not meet the statutory standard of being “essential.” The proposed two-step process therefore ensures that unoccupied areas are designated as critical habitat only when they are truly essential, as Congress intended.

While the two-step process best reflects the statute, the proposed standard for determining whether unoccupied areas are essential could be further improved to best align with the statute. The proposed standard states that “for an unoccupied area to be considered essential, the Secretary must determine that there is a 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.”⁶

The phrase “reasonable certainty” could be strengthened by replacing it with language that requires a higher level of certainty, such as “near certainty.” Although the proposed rule correctly explains that “reasonable certainty” precludes potential or speculative designations, this revision would further ensure that unoccupied areas are designated as critical habitat only when it is certainly established that they are essential, as Congress intended.

The term “contribute” could also be strengthened by replacing it with stronger language that requires the unoccupied area to be necessary to the conservation of the species. In the proposed rule, an unoccupied area can “contribute” to the conservation of the species in a marginal way and still be considered essential. This revision would further ensure that unoccupied areas are truly essential for conservation to be designated as critical habitat, as Congress intended.

Conclusion

Overall, the proposed revisions represent important progress to better align the regulations with the ESA, as required by recent Supreme Court caselaw, although the

⁴ 16 U.S.C. 1532(5)(A)(i).

⁵ 16 U.S.C. 1532(5)(A)(ii).

⁶ 90 Fed. Reg. at 52615.

proposed standard for determining whether unoccupied areas are essential could be further improved as discussed above. Thank you for the opportunity to comment.

Respectfully Submitted,

Austin Gae

Research Associate

Center for Energy, Climate, and Environment

The Heritage Foundation⁷

⁷ Affiliation and title provided for identification purposes only. I submit this comment in my personal capacity only and not as an employee of The Heritage Foundation.