



September 3, 2020

UD Fish and Wildlife Service  
MS: PRB(3W)  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

Re: Definition of Habitat Areas  
Docket No. FWS-HQ-ES-2020-0047

Dear Sirs:

Please accept this correspondence as the above Organizations comments regarding the insertion of a definition of habitat into USFWS regulations (“the Proposal”) as addressed under the recent *Weyerhauser* Supreme Court decision. Prior to addressing the specifics of the Proposal, the Organizations would like to address the general consternation and shock that our members have expressed when discussing the *Weyerhauser* decision, mainly that critical habitat must be designated in areas that are also habitat for a species. Generally, our members are shocked that such a basic question had to be ruled on by the Supreme Court, as most assumed that any critical habitat areas are a subset of existing habitat for the species. The Organizations submit this type of foundational question is all too commonly answered in a manner outside the scientific process, as a result of the passion that often surrounds the ESA consuming basic scientific process.

While addressing modeled but unoccupied habitat is important for species with somewhat small habitat areas such as the gopher frog, the Organizations believe that looking at habitat issues for larger ranging species, such as wolves, grizzly bears, lynx or wolverine is also important. Often the definition of habitat for these wide-ranging species is based on the mere sighting of a species in the area. Much of habitat designation discussions on these species does not center on habitat that the species depends upon, but rather focuses on the belief that the species prefers the area

resulting in some interests asserting the area should be habitat despite the lack of consistent usage.

Too often decisions are based on passion and relying on passion instead of science when addressing habitat results in conclusions on habitat designations across species boundaries that are foundationally in conflict with basic issues. Some species have critical habitat that includes only occupied habitat while other species have designated critical habitat that is almost entirely unoccupied. The Organizations submit that critical habitat should be similar in terms of issues such as occupation of the habitat by the species. Differences in management or designation criteria should rely on legal factors for habitat designation decisions such as if the species is threatened or endangered for ESA purposes. The Organizations submit that creating a STRONG definition of "habitat" will serve a check towards rebalancing the relationship of the scientific process with the passion of possibly saving a species from extinction. This rebalancing will bring greater consistency to the ESA critical habitat process and in turn build public support for these efforts. This public support is growing more critical everyday simply due to budget limitations but also due to issues such as some species rely on voluntary conservation measures on private lands for their survival.

It has been the Organizations experience that the current species by species management process of this issue has resulted in conclusions for the management of these areas that simply cannot be reconciled or based on solid scientific theory. This is simply not good management and erodes public support for the ESA and related management. The Organizations would support a strengthening of the either definition to include a requirement that habitat must be lands that the species *depends* upon for basic life function in order to avoid areas that a species prefers being designated as critical. The Organizations would also submit that **specific life functions** for the species be identified and that habitat designations must discuss in some detail how the proposed habitat relates to these general functions. The Organizations are unsure why dependency is present in the first definition but is omitted in the second and the Organizations believe this is an important concept in the definition in order to avoid designation of habitat simply because a species prefers a specific area.

### **1. Who we are.**

Prior to addressing the specific concerns on the Proposal, the Organizations believe a brief summary of each Organization is needed. The Colorado Off-Highway Vehicle Coalition ("COHVCO") is a grassroots advocacy organization of approximately 250,000 registered OHV users in Colorado seeking to represent, assist, educate, and empower all OHV recreationists in the protection and promotion of off-highway motorized recreation throughout Colorado. COHVCO is an environmental organization that advocates and promotes the responsible use and conservation of our public lands and natural resources to preserve their aesthetic and recreational qualities for future generations. The Trail Preservation Alliance ("TPA") is a 100 percent volunteer organization whose intention is to be a viable partner, working with the United

States Forest Service (USFS) and the Bureau of Land Management (BLM) to preserve the sport of trail riding. The TPA acts as an advocate of the sport and takes the necessary action to ensure that the USFS and BLM allocate to trail riding a fair and equitable percentage of access to public lands. Colorado Snowmobile Association ("CSA") was founded in 1970 to unite the more than 30,000 winter motorized recreationists across the state to enjoy their passion. CSA has also become the voice of organized snowmobiling seeking to advance, promote and preserve the sport of snowmobiling through work with Federal and state land management agencies and local, state and federal legislators telling the truth about our sport. The Idaho Recreation Council ("IRC") is a recognized, statewide, collaboration of Idaho recreation enthusiasts and others that will identify and work together on recreation issues in cooperation with land managers, legislators and the public to ensure a positive future for responsible outdoor recreation access for everyone, now and into the future. For purposes of this correspondence TPA, COHVCO, CSA, and IRC will be referred to as "The Organizations".

The Organizations have actively participated in planning projects ranging from hundreds of localized efforts to maintain or reroute portions of trails to large regional efforts such as the revision of land management plans at the forest or field office level to national efforts such as: Participation in the Western Congressional Caucus meetings on ESA reform in 2019; Active and ongoing efforts with the Western Governors Association on Species protection and ESA reform since 2015; The Desert Renewable Energy Efforts in California; Sage Grouse management efforts in the Rocky Mountains; California Desert Tortoise efforts in the sand dunes of California; recent revisions of the new USFS planning rule; development and revocation of the BLM 2.0 Planning Rule; and development of the USFS winter travel rule.

## **2. Dependency of a species is the legal minimum for defined habitat areas.**

The Organizations must note that "dependency" of a species on a specific habitat area is one of the cornerstones of the ESA since its adoption in 1973. While the concept of habitat dependency has been a cornerstone for protection, this concept simply has been largely ignored or minimized since the passage of the ESA. Reflecting the requirement of dependency in the habitat definition is a minimum to pass legal review and is also supported by best available science on this issue. As further discussed in these comments, best available science on habitat definitions requires discussion of specific life functions occurring in the habitat. The Organizations would submit that this discussion must be required under the definition of habitat, and is not currently provided for.

The clarity of the Act on the issue of habitat dependency cannot be more clear. The Act initially provides for habitat dependency of the species on the habitat area as follows:

“(b) Purposes. The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species **depend** may

be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.”<sup>1</sup>

The Act further repeats the dependency standard in the management of habitat for migratory birds as follows:

“B) identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species **depend**, and the implementation of cooperative measures to ensure that such species will not become endangered or threatened; and”<sup>2</sup>

The Act specifically provided for a similar process in the designation of critical habitat area under §4a and as a result there should be similar discussions around habitat areas.

It is significant to note that the ESA does not provide a habitat standard that a species “may depend on” or “could depend on” an area for designation, the Act clearly states dependency is required. The concept of habitat dependency was a major discussion point between the House and Senate with the passage of the ESA in 1973 as the Senate sought a more restrictive standard for the management of plans species when compared to other species based on a study from the Smithsonian Institute. For this reason alone, the Organizations vigorously assert that the definition of habitat must be clearer than ever before and must include specific identification of factors and a detailed discussion of the relationship of the species to the area that a species is relying on the area for.

### **3a. The scientific definition of wildlife habitat is more stringent than the proposed habitat definition under ESA.**

The Organizations welcomed the Proposal’s recognition that Best Available Science does not place significant value on modeled but unoccupied habitat as a management tool for species. While habitat and critical habitat are different terms and concepts, the proper application of these terms should not create significant conflict between the determinations when critical habitat for a species is modeled. The Organization believes the value of this landscape level statement cannot be overstated as this basic position is often lost in the passion of possibly saving a species. It has been the Organizations experience that too often critical habitat discussions place far too great a value on possible habitat areas the species has never been or cannot use or simply might prefer to use rather than areas the species depend upon to survive.

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<sup>1</sup> See, 16 USC 1531 (b) emphasis added.

<sup>2</sup> See, 16 USC 1537a(e)(2)(b) emphasis added.

The Organizations submit that this situation is a failure of basic scientific processes around the modeling of any habitat areas for a species. In critical habitat discussions driven by the ESA, too often processes fail in correcting basic modeling errors, as is mandated by the scientific process for modeling any activity. Instead these modeling errors which are not based on scientific process are sought to be normalized in a rushed effort to protect a species. The Organizations do not contest that modeling of unoccupied habitat is permitted under the ESA process, but there is little scientific basis for such a position and this simply cannot be overlooked. A strong definition of habitat tied to specific life functions the species relies on the area to conduct will help resolve this issue.

While the Proposal only provides a single sentence recognizing the conflict between basic scientific process and the habitat designation process under the ESA, this single sentence carries immense weight. The Proposal clearly recognizes the lack of scientific basis for unoccupied habitat as follows:

“In particular, the proposed definition is written so as to include unoccupied habitat, whereas many of the definitions in the ecological literature that we reviewed did not appear to consider unoccupied areas.”<sup>3</sup>

While the concern of the scientific community around management of unoccupied habitat is only reflected in one sentence of the Proposal, this is not minor. The mandate of applying best available science (“BAT”) is one of the cornerstones of the entire Endangered Species Act and is specifically applicable to the designation of both basic habitat and critical habitat. It should not be overlooked that identifying best available science on an issue has probably been one of the most litigated issues in ESA management, and it is the Organizations position that best available science should be consistently applied throughout the ESA. A few examples of the BAT requirement would include §4(b)(1)(A) of the ESA which requires agencies to make listing decisions based:

“on the basis of the best scientific and commercial data available...”

Similarly, §4(b)(2) specifically requires managers addressing critical habitat designations and review to:

“Designated critical habitat and made revisions thereto, under subsection (a)(3) on the basis of the best scientific data available...”

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<sup>3</sup> See, Proposal at pg. 6.

Section 7(a)(2) of the Act continues applying this BAT cornerstone of the Act to the consultation process as follows:

“In fulfilling the requirements of this paragraph, each agency shall use the best scientific and commercial data available.”

While the process for modeling of any activity has not been a hot bed of legislative activity, modeling of complex activities and relationships occurs consistently throughout the world on a huge number of issues and has been the basis of extensive scientific and scholarly analysis. While there are an exhaustive number of models for almost any activity, the Organizations are aware that all modeling guidelines require some basic review of the model to ensure the model is accurately predicting the behavior that is sought to be modeled. While no model is perfect in predicting all behavior, there needs to be some level of correlation between the model and the behavior modeled.

A good general summary of the modeling and simulation process is provided by *Wikipedia.com*, which provides the following general guidance on modeling of behaviors

**“Modelling as a substitute for direct measurement and experimentation.**

Within modelling and simulation, a model is a task-driven, purposeful simplification and abstraction of a perception of reality, shaped by physical, legal, and cognitive constraints.<sup>[12]</sup> It is task-driven, because a model is captured with a certain question or task in mind. Simplifications leave all the known and observed entities and their relation out that are not important for the task. Abstraction aggregates information that is important, but not needed in the same detail as the object of interest. Both activities, simplification and abstraction, are done purposefully. However, they are done based on a perception of reality. This perception is already a model in itself, as it comes with a physical constraint. There are also constraints on what we are able to legally observe with our current tools and methods, and cognitive constraints which limit what we are able to explain with our current theories.

**Evaluating a model:** A model is evaluated first and foremost by its consistency to empirical data; any model inconsistent with reproducible observations must be modified or rejected. One way to modify the model is by restricting the domain over which it is credited with having high validity. A case in point is Newtonian physics, which is highly useful except for the very small, the very fast, and the very massive phenomena of the universe. However, a fit to empirical data alone is not sufficient for a model to be accepted as valid. Other factors important in evaluating a model include:

- Ability to explain past observations
- Ability to predict future observations

- Cost of use, especially in combination with other models
- Refutability, enabling estimation of the degree of confidence in the model
- Simplicity, or even aesthetic appeal”<sup>4</sup>

As briefly outlined in the Wikipedia definition, the evaluation and revision of any modeling or simulation of behavior is a critical step in the modeling process and without success at this step the model should be modified or rejected entirely. This double check of the accuracy of the model to predict behavior is a basic review for any model of activity or behavior. While the list of modeling guidelines is overwhelming, recognition of the requirement for a double checking of the accuracy of the model under non statutory situations. For creation of a business model, *Entrepreneur* magazine recommends the following step in the development of a business model:

**“2. Confirm that your product or service solves the problem.** Once you have a prototype or alpha version, expose it to real customers to see if you get the same excitement and delight that you feel. Look for feedback on how to make it a better fit. If it doesn’t relieve the pain, or doesn’t work, no business model will save you.”<sup>5</sup>

A similar need to double check that any model is accurately reflecting the behavior sought to be modeled in the development of mathematical models. This requirement in mathematical modeling efforts is outlined by experts as follows:

**“3. Determine how the model could be improved.** In order to make your model useful for further applications, you need to consider how it could be improved. Are there any variables that you should have considered? Are there any restrictions that could be lifted? Try to find the best way to improve upon your model before you use it again.[8]”<sup>6</sup>

Similar to the modeling of business activities and mathematical theory, best available science on the modeling of wildlife habitat also has an exceptionally well-defined process for development of species or habitat models. This process includes a step to review that the results of the model are corresponding with the actual life activity of the species. This process of modeling wildlife habitat has been outlined as follows:

“Modeling wildlife habitat over this range of scales requires many assumptions about the relationships between wildlife population metrics and habitat occurrence, quality, and spatial distribution. Standard modeling protocol is to

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<sup>4</sup> See, Wikipedia.com; definition of scientific modeling @ [https://en.wikipedia.org/wiki/Scientific\\_modelling](https://en.wikipedia.org/wiki/Scientific_modelling) accessed September 1, 2020

<sup>5</sup> See, Zwilling, Martin: *7 Steps for Establishing the Right Business Model*; January 30, 2015.

<sup>6</sup> See, <https://www.wikihow.com/Make-a-Mathematical-Model>

explicitly state all assumptions early in the process; substantiate those assumptions with field data, published information, or expert opinion; hypothesize the relationships among wildlife and their habitat; and use the modeling framework to evaluate sensitivities and produce output. ***One critical assumption underlying this protocol is that habitat is accurately characterized at ecologically relevant scales to the organism(s) of interest.***<sup>7</sup>

Other experts have provided the following summary of the wildlife habitat modeling process:

“The Process of model evaluation and validation is a critical step in modeling. However, this evaluation should not focus on how well the model captures “truth” (verification) but how well the model performs for its intended purpose.”<sup>8</sup>

Without exaggeration there are libraries full of scholarly materials addressing the proper methodology for the development of habitat models for wildlife, and these range from discussions at a very general level to the specific process that was used to model habitat for a species. This level of vigor in order to establish a defensible scientific model of habitat is often simply not present in the ESA listing process.

Even when addressing wildlife habitat, best available science clearly identifies the need to ensure modeling of habitat areas is actually reflecting the areas the species depends upon for basic life activities. While best available science clearly requires if a model does not accurately reflect the modeled behavior, this is a basis for review and modification of the model and not moving forward with the recommended actions of the model. If the modeling accuracy cannot be improved to a satisfactory level, the modeling effort is stopped at some point. This simply is not how modeling of critical habitat has occurred in our experiences under the ESA process as often the rush to protect the species overwhelms any discussion of revision of models due to poor performance of the model in predicting behavior. A strong definition of habitat including requirements of discussion of how the habitat relates to basic life functions would assist in restoring the scientific validity of this discussion.

Traditionally, habitat area decisions are made after a decision has been made that a species is going to be listed for protection under some level of the ESA. As a result, habitat decisions are often made under heavy political pressure or an artificial urgency from the desire to protect a species. Revising a model to increase performance of the model can take years to complete and this is time that often is outside the scope of possibility under these pressures. It has been the Organizations experience that often habitat is mapped based on an identified number of general

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<sup>7</sup> See, Orloff & Strong; *Models for planning wildlife conservation in large landscapes*; 2009

<sup>8</sup> See, Millsbaugh et al; *Models for Planning Wildlife Conservation in Large Landscapes*, Elsevier Publishing 2009 at pg. 5. Internal citations omitted



factors for the species and factors such as actual usage by a species are not heavily weighted in this effort. In a further troubling twist, often much of the mapping of habitat is performed by special interest groups or interests that have some level of financial interest in the continued heightened management of the species being discussed. Meaningful discussions of habitat viability are often lost in efforts to try minimize proposed habitat areas that are often more of a special interest group wish list than a scientifically valid document.

Subsequent to the application of very generalized factors to areas for modeling of habitat, the habitat review process then moves to a position of presuming the modeled area being available habitat for the species. Often this occurs with little direct evidence that the species has ever **used** the area or that the boundary actually relates to some basic life function. Often this transition in the discussion of modeled habitat is based on an assertion that currently used habitat is insufficient to ensure the protection of the species and the artificial urgency created by the need to save the species. While the Organizations have seen this imbalance all too often, the example of the gopher frog habitat process provides common ground for discussion. This is exactly the situation experienced in the *Weyerhauser* case where unoccupied habitat was designated based on the following basis:

“The currently occupied habitat of the Mississippi gopher frog is highly localized and fragmented. With such limited distribution, the Mississippi gopher frog is at high risk of extinction and highly susceptible to stochastic events..... To reduce the risk of extinction through these processes, it is important to establish multiple protected subpopulations across the landscape”<sup>9</sup>

It is interesting to note that the gopher frog listing provided the following criteria for habitat which include are summarized as small ponds that hold reasonable quality water at least 195 days of the year, a lack of predatory fish; and an open canopy herbaceous forest.<sup>10</sup> The comically broad nature of these modeling factors is immediately apparent, as under these factors the gopher frog could be living in almost any pond in the country. It should be noted that these factors could be applied to a huge number of OTHER species totally unrelated to the gopher frog as well. Almost no pond in the country could be excluded with these modeling factors despite the fact the gopher frog has never lived in most of the country. This is an example of a failed habitat model, which could be corrected with a more detailed discussion of why the area is thought to be suitable.

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<sup>9</sup> See, US Fish and Wildlife Service; *Proposed Rules; Endangered and Threatened Plants and Wildlife; Designation of critical habitat for the Mississippi Gopher Frog*; Federal Register; Vol. 75, No. 106 pg. 31387; Thursday, June 3, 2010 at pg. 31394.

<sup>10</sup> See, US Fish and Wildlife Service; *Proposed Rules; Endangered and Threatened Plants and Wildlife; Designation of critical habitat for the Mississippi Gopher Frog*; Federal Register; Vol. 75, No. 106 pg. 31387; Thursday, June 3, 2010 at pg. 31404.

In an interesting failure of the scientific process, no discussion of how these generalized criteria apply to the modeled habitat is provided or is there any discussion around the fact that these criteria could be applied to almost any small pond in the country. No discussion of revision of the modeling process or refining these very generalized criteria to create a model that more accurately reflects current conditions in the area or why the species are only occurring in the small habitat ever occurs. Rather the entire decision that more habitat is needed for the gopher frog is based on two citations to articles that are not identified or discussed in any detail in the proposal. The fact that the area is currently not suitable for use by the gopher frog is lost and the fact the habitat could be used with modification is immediately accepted as the basis for its protection. It has been the Organizations experience that this fact pattern is all too common in the habitat designation process, despite the comical failures of the scientific process when an arm's length review of the effort is conducted. This must be corrected with a strong definition of habitat and detailed discussion of how the habitat proposal relates to specific life functions.

The Organizations submit the gopher frog decision is an example that simply did not strike a proper balance between the scientific process necessary to make scientifically defensible species management decisions and the passion to possibly protect a species. While the gopher frog process is arguably legally supported by ESA provisions, this presumption is simply the opposite of any scientific process in modeling behaviors or activity. When the modeled behavior or activity does not occur in the manner that is predicted in the model, this is the basis for significant review of the model rather than pursuing the decision results from the inaccurate model further. The Organizations submit that a strong definition of habitat, that required discussion of how life functions depended on that habitat would be a major step forward in bringing balance to this discussion.

**3b. Habitat designations for wide ranging species that do not have well defined habitat characteristics would benefit from a stronger definition of habitat.**

The Organizations have had a wide range of experiences with modeled habitat for many species based on VERY generalized habitat criteria, as is addressed by the Supreme Court in the *Weyerhauser* decision. Our experiences provide a different question than the gopher frog situation where habitat was modeled based on astonishingly general factors and the species only used a small portion of the habitat. Our efforts have often involved wide ranging species that do not depend on specific areas for survival or a life function as the species is more of a habitat generalist than a habitat specialist. These species generalist discussions provide a more compelling basis for a strong definition of habitat based on dependency for specific life functions as public support for management often depends on the actual recovery of the species after management actions are undertaken.

The concept of dependency on particular life functions can have significant impacts to modeling of habitat species, that may not rely on sufficiently definable criteria for traditional modeling of

habitat based on the adaptations of the species. This would generally include larger omnivore type species such as Grizzly Bears, Wolverine, Wolves or Lynx. Many of these species have home ranges of hundreds of square miles that are used at widely divergent levels of activity. Are there areas that the species does depend on for specific life activities? Yes. Does the species rely on all acres to the same level? That answer is clearly no. The management of these types of species weighs heavily in favor of a strong habitat definition with specific life functions identified and related to the habitat designations proposed. Effective identification of habitat leads to effective management.

Our concerns on the benefits of accurate designation of habitat for these wide-ranging species is best exemplified by the travels of a wolverine collared and tracked as M56 throughout the western United States over several years.<sup>11</sup> M56's voyage started outside Yellowstone National Park, where he was captured and tagged. M56 then proceeded to travel across Wyoming to northern Colorado and take up residence for several years in the vicinity of Rocky Mountain National Park. After residing there for several years, M56 again crossed Wyoming and South Dakota and ended in North Dakota, where his story eventually ended after being shot for harassing cattle. The highly mobile nature of species is not limited to just the Wolverine, but are also exemplified by the tracking of Canadian Lynx in Colorado after their reintroduction. Many of these reintroduced lynx traveled long distances into areas that were completely unsuitable habitat for lynx, as exemplified by reintroduced lynx ending up in almost every state adjacent to Colorado including Kansas and Nevada. While the Colorado reintroduction was successful for the lynx, other reintroductions such as those in NY failed with a similar habitat model. Why one succeeded another failed to support habitat sufficient to support the species should be a major point of analysis in any lynx habitat discussion. These discussions could be driven if there was a more stringent requirement of habitat areas for designations.

Another example of a wide-ranging species that does not have a well-defined habitat would be the reintroduced woodland caribou in northern Idaho. The reintroduction failed after decades of efforts and reintroduction of the species in large areas of historic habitat.<sup>12</sup> Idaho Department of natural resources summarizes woodland caribou habitat as follows:

“Southern mountain caribou are unique in that they occupy high elevation, forested areas with deep snowfall along the inland temperate rainforest. In addition, they do not make the long-distance migrations of other woodland caribou, rather they migrate vertically up and down mountains several times a year, feeding solely on tree lichens during winter.”<sup>13</sup>

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<sup>11</sup> See, <https://wildlife.org/epic-wolverine-journey-ends-in-north-dakota/>

<sup>12</sup> See, <https://www.idahostatesman.com/news/local/news-columns-blogs/letters-from-the-west/article226870904.html>

<sup>13</sup> See, <https://species.idaho.gov/wildlife-species/woodland-caribou/>

The Organizations are aware this is a brief summary of the habitat but would also note that these factors were relied on for multiple reintroductions of the woodland caribou, all of which have failed at this point. Again, habitat criteria are VERY generalized and could be applied almost anywhere in the country, often to areas that have never supported a caribou population. Threats to the species are often very generalized and reflected by Idaho Department of Conservation as follows:

“predation, forest harvest, human development, recreation and effects due to climate change (increase in wildfire and decrease in alpine habitat) are the main factors credited for the decline in caribou populations.”

In response to the reintroduction, many of these habitat threats were completely excluded or severely curtailed in the habitat areas. Despite these regulations and restrictions, populations continued to decline and eventually the reintroduction failed. There is little hope of the repopulation of caribou these areas without another reintroduction but there is no discussion of why the reintroduction failed when other species in this geographic area have been successful with shocking similar threats to their populations. While the reintroduction failed and the remaining two caribou were returned to Canada, this has not impacted the fact there remains habitat models for the species in numerous planning documents and critical habitat provided for in the ESA realm. Similar issues are present after a failed reintroduction of caribou was concluded in the early 1990s<sup>14</sup> but no efforts were provided to refine habitat definitions to understand what was causing the species to decline.

The Organizations submit that these types of models for species activity represent another situation where a stronger definition of habitat and detailed discussion of how the species relies on the area for basic life functions could streamline management efforts for species, and provide better chances of survival through meaningful habitat management efforts even before there is further action regarding their possible listing under the ESA. While clearly the states of Colorado, Wyoming, and the Dakotas are not habitat that any single animal depends on to survive, the Organizations have participated in meetings that start from this position for wolverine habitat management. Similar experiences have also occurred with other species and the Organizations submit this situation warrants a more detailed and specific definition of habitat than either alternative currently provides. This simply erodes public support for the entire process, and this public support is growing more and more critical every day.

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<sup>14</sup> See, <https://apnews.com/427d074bd86ce430a8d6e343dc38cb6a>

**3c. Best available science consistently provides a stronger definition of habitat than is provided by the Service currently.**

As the Service specifically noted in the Proposal, the definition of wildlife habitat and modeling of habitat is an issue that there is a large body of research addressing. After reviewing many of the definitions that are provided in scientific research, the Organizations believe that the definition of habitat provided by the researchers is stronger than either that is current provided by the Service. The Organizations have attached a survey of relevant researchers' definitions of wildlife habitat that was prepared Elsevier publishing as part of their Science Direct journal.<sup>15</sup> We have attached a copy of this document to these comments as Exhibit "1". The Organizations submit that this overwhelming body of research supporting a stronger and more detailed definition of wildlife habitat must be addressed in any habitat proposal.

**4a. Without a strong definition of habitat, the illogical management of unoccupied habitat areas will continue as decisions are made on a species by species basis.**

As the Organizations have discussed previously, variations in the designations of habitat areas should be generally consistent based on legal designations and not the amount of political pressure that has been applied around the species. These designations should have some type of basis in basic logical progression based on the legal designations of the species, or lack thereof. Should an endangered species have more unoccupied habitat than a threatened species? Probably. Should a threatened species have more unoccupied habitat than a species that warranted but precluded? Probably again. Should a possibly listed species have more unoccupied species than an indicator species. Probably yes. This type of basic logical consistency to the planning process can only occur when there is a strong definition of habitat and meaningful discussion of the life functions that are relied on for the habitat designations. Public support for the management of species is becoming more and more critical, as many species depend on public and private lands for survival, and this type of basic logical defensibility is critical to developing and maintaining that public support.

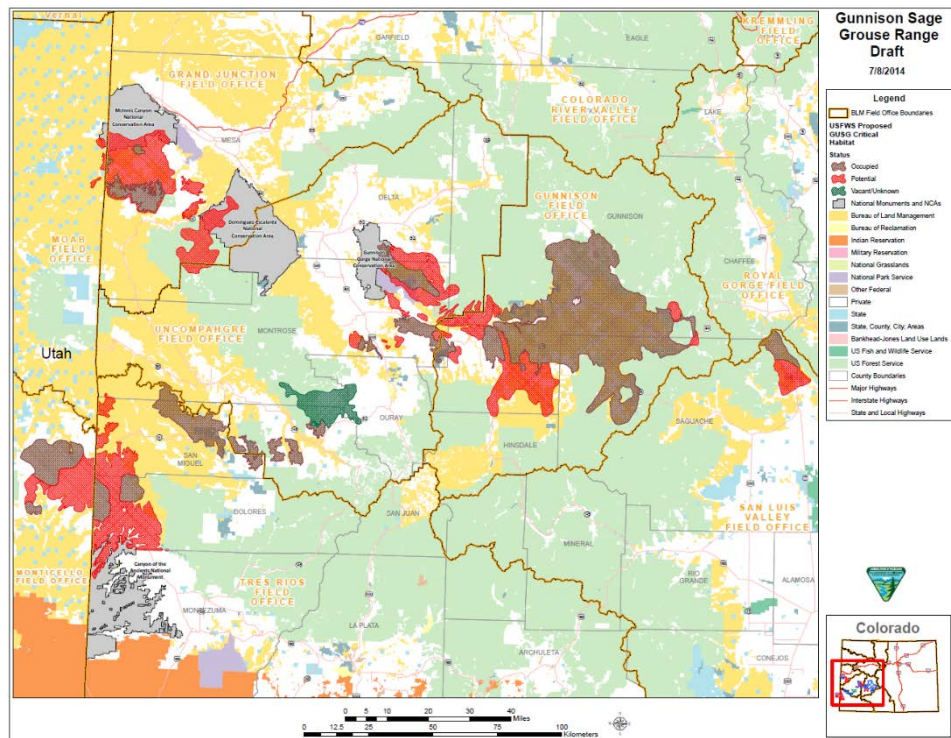
The failure of logical defensibility in many decisions is exemplified when species decisions are compared. The DPS of endangered Woodland Caribou situation in Northern Idaho, where there are 30,000 acres of critical habitat is designated to protect a known population of zero caribou. Even before the caribou were removed by Idaho Wildlife officials, this designation was clearly too large for such a small DPS. While the Organizations are aware that this is an unusual situation, that warrants a petition to amend the currently designated habitat but a stricter definition of habitat with specific discussion of life functions tied to the habitat areas would assist in remedying this situation. Too often unoccupied habitat comprises more critical habitat than

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<sup>15</sup> A copy of this review is available here: <https://www.sciencedirect.com/topics/earth-and-planetary-sciences/wildlife-habitat>

occupied habitat even for endangered species as exemplified by the Gopher Frog in the *Weyerhauser* decision where 1,572 acres of 1,957 acres (80%) of habitat is unoccupied<sup>16</sup>

The basic logical basis for habitat designations comes into question when the Gopher Frog designations are compared with habitat designations for the threatened Gunnison Sage Grouse.<sup>17</sup> While the exact breakdown of the occupied vs unoccupied habitat areas for the Gunnison Sage Grouse is not discussed in great detail, the proposed map of habitat areas clearly provides that unoccupied habitat exceeds 50% of the proposed habitat as evidenced below.<sup>18</sup>



The logical consistency of the habitat designation process fails even further when habitat designations for other threatened species are compared as other threatened species have habitat that is only occupied, as exemplified by Preble’s Jumping Mouse management efforts in Colorado.<sup>19</sup> These challenges in the application of basic logic are the types of issues that the scientific process is specifically designed to address and have too often been overlooked in the rush to protect a species.

<sup>16</sup> See, US Fish and Wildlife Service; *Proposed Rules; Endangered and Threatened Plants and Wildlife; Designation of critical habitat for the Mississippi Gopher Frog*; Federal Register; Vol. 75, No. 106 pg. 31387; Thursday, June 3, 2010 at pg. 31395.

<sup>17</sup> See, <https://www.fws.gov/mountain-prairie/es/gunnisonSageGrouse.php>

<sup>18</sup> See, <https://www.fws.gov/mountain-prairie/pressrel/2019/10312019-Draft-Plan-to-Guide-Recovery-of-the-Gunnison-Sage-Grouse-Open-for-Public-Comment.php>

<sup>19</sup> See, <https://fws.gov/mountain-prairie/es/preblesMeadowJumpingMouse.php>

**4b. Landscape level efforts to create healthy landscapes that benefit all species require public support that can only be obtained with a logical and strong habitat designation process.**

The failure of the logical and scientific process around ESA habitat designations also impacts one of the major changes in landscape management efforts for public and private lands, mainly the recognition that healthy landscapes benefit all species. This systemic shift in best available science is significant but is also difficult to summarize in a forum such as this. As a result, minimal basis is provided for this position as the Organizations are sure the Service is well aware of these landscape level management changes. The relationship of these efforts should not be overlooked either.

Best available science is moving towards a recognition that management of individual species justifies management decisions that negatively impact the landscape level habitat under the guise of benefitting an individual species. The current model of species by species management is an example of maybe winning a particular battle but losing a war. Healthy landscapes benefit all species and this improved species health will benefit all species. Put another way ESA is out of date compared to best available science. This is an issue where a strong habitat definition would reduce conflicts in management and allow for healthier landscapes to benefit all species. This type of landscape health can only be achieved when public and private lands are managed in harmony with each other and not in conflict with each other. Public support for management is a critical component in managing all lands consistently to benefit all species and logical processes are critical to this public support.

Not only is this conflict coming from best available science it is also created by competing statutory obligations on federal public lands, and has been present since the passage of the National Forest Management Act by Congress in 1974. For many areas, landscape management is the only sensible level of management as habitat area management for species is different but often conflicts at the landscape level. Agencies have struggled with implementation of regulations on this question and the Organizations submit that a strong definition of habitat will help resolve this conflict.

The landscape habitat requirements are evidenced by the National Forest Management Act, which specifically provides as follows:

"(B) provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, and within the multiple-use objectives of a land management plan adopted pursuant to this section, provide, where appropriate, to the degree

practicable, for steps to be taken to preserve the diversity of tree species similar to that existing in the region controlled by the plan;”<sup>20</sup>

The evolution of best available science and the competing legislative objectives often means engaging private lands owners and public lands that may not be federally owned. This is simply a different and probably more effective model of management than viewing federal public lands in isolation from lands that are adjacent. Public support for the combined management efforts is far more critical given that so much management on private lands is voluntary in nature when compared to managing federal lands in isolation. The Organizations are intimately familiar with public response to management that is not effective or not logical in nature. Public support wanes quickly. A detailed definition of habitat areas will help build that public support.

#### **5. Discrete areas of Critical Habitat and seasonal usage.**

The Organizations would like to make it very clear that at no point in this discussion are we addressing possible designation of discrete areas of habitat for a species based on that species depending on the habitat on a seasonal basis. This appears to be a point of confusion in many of the discussions we are seeing on this Proposal. The Organizational concerns are centered more around habitat areas that the species may not depend upon or even been seen in for extended periods of time. The Organizations believe these are two different issues for the designation and management process and a failure to clarify these two issues will lead to confusion of topics and issues and complicate the discussion around the identification of what we are referring to as modeled but unoccupied habitat for purposes of these comments. The management of modeled habitat or habitat the species does not depend upon is simply a different issue for management than habitat for a species on a seasonally dependent basis.

The Organizations have participated in numerous discussions around the management of critical habitat that is only seasonally used by a species, such as seasonal denning habitat for wolverine, or seasonal elk calving areas or other ungulate winter ranges. The Organizations have been able to strike a reasonable balance of uses of these areas with seasonal closures of these areas for recreational usage in management documents and believe these balances of the seasonal nature of particular habitats is outside the question currently being posed in the Proposal. From the Organizations perspective, the Proposal seeks to address habitats that have not been used for a variety of reasons by a species for an extended period of time or habitat areas that the species does not depend upon.

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<sup>20</sup> See, 16 USC §1604 g(3)(B)



## **6. Modeled habitat review has implications far outside the basic designation of critical habitat for a species.**

As noted previously, the Organizations have participated in a wide range of planning efforts at a variety of levels and the question of activities in wildlife habitat is often one of the more challenging issues in these discussions. It has been our experience that once any possible habitat area is mapped, these overly broad habitat designations are very difficult to conclusively stop or address. This is the result that habitat concerns for species are frequently used by some groups as a point of opposition to a specific usage of an area for multiple uses or in the development of Wilderness Proposals for Congressional action, as some see these designations as the ultimate protection of wildlife habitat. The surrogating of wildlife concerns often makes meaningful discussions of these wildlife concerns difficult in site specific efforts and often can generate significant expense for those involved in the site-specific planning which generates no benefit to the species.

The cumulative burden of overly broad habitat management is exemplified in the updating of landscape levels such as a forest plan. Resolving the conflicts of these overly broad habitat discussions directly contributed to the fact that 76 pages of the 84 page appeal decision on Rio Grande NF RMP revision was addressing possible habitat issues.<sup>21</sup> The administrative burdens and expenses incurred in developing this decision are significant and become simply overwhelming when costs and delays are compiled for each forest updating their forest plan. This is simply a massive barrier that could be reduced with a tighter and stronger definition of habitat that was meaningfully discussing life functions of the species that are tied to the habitat designations.

## **7 Conclusion.**

Please accept this correspondence as the above Organizations comments regarding the insertion of a definition of habitat into USFWS regulations (“the Proposal”) as addressed under the recent *Weyerhauser* Supreme Court decision. Prior to addressing the specifics of the Proposal, the Organizations would like to address the general consternation and shock that our members have expressed when discussing the *Weyerhauser* decision, mainly that critical habitat must be designated in areas that are also habitat for a species. Generally, our members are shocked that such a basic question had to be ruled on by the Supreme Court, as most assumed that any critical habitat areas are a subset of existing habitat for the species. The Organizations submit this type of foundational question is all too commonly answered in a manner outside the scientific process, as a result of the passion that often surrounds the ESA consuming basic scientific process.

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<sup>21</sup> See, <https://www.fs.usda.gov/detailfull/riogrande/landmanagement/planning/?cid=stelprd3819044>

While addressing modeled but unoccupied habitat is important for species with somewhat small habitat areas such as the gopher frog, the Organizations believe that looking at habitat issues for larger ranging species, such as wolves, grizzly bears, lynx or wolverine is also important. Often the definition of habitat for these wide-ranging species is based on the mere sighting of a species in the area. Much of habitat designation discussions on these species does not center on habitat that the species depends upon, but rather focuses on the belief that the species prefers the area resulting in some interests asserting the area should be habitat despite the lack of consistent usage.

Too often decisions are based on passion and relying on passion instead of science when addressing habitat results in conclusions on habitat designations across species boundaries that are foundationally in conflict with basic issues. Some species have critical habitat that includes only occupied habitat while other species have designated critical habitat that is almost entirely unoccupied. The Organizations submit that critical habitat should be similar in terms of issues such as occupation of the habitat by the species. Differences in management or designation criteria should rely on legal factors for habitat designation decisions such as if the species is threatened or endangered for ESA purposes. The Organizations submit that creating a STRONG definition of “habitat” will serve a check towards rebalancing the relationship of the scientific process with the passion of possibly saving a species from extinction. This rebalancing will bring greater consistency to the ESA critical habitat process and in turn build public support for these efforts. This public support is growing more critical everyday simply due to budget limitations but also due to issues such as some species rely on voluntary conservation measures on private lands for their survival.

It has been the Organizations experience that the current species by species management process of this issue has resulted in conclusions for the management of these areas that simply cannot be reconciled or based on solid scientific theory. This is simply not good management and erodes public support for the ESA and related management. The Organizations would support a strengthening of the either definition to include a requirement that habitat must be lands that the species **depends** upon for basic life function in order to avoid areas that a species prefers being designated as critical. The Organizations would also submit that **specific life functions** for the species be identified and that habitat designations must discuss in some detail how the proposed habitat relates to these general functions. The Organizations are unsure why dependency is present in the first definition but is omitted in the second and the Organizations believe this is an important concept in the definition in order to avoid designation of habitat simply because a species prefers a specific area.

The Organizations would ask that we be included in any further public efforts, collaborations or other efforts around this initiative as this issue and challenge is very important to our members. Please feel free to contact Don Riggle at 725 Palomar Lane, Colorado Springs, 80906, Cell (719) 338- 4106 or Scott Jones, Esq. at 508 Ashford Drive, Longmont, CO 80504. His phone is (518)281-5810 and his email is scott.jones46@yahoo.com.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Scott Jones".

Scott Jones, Esq.  
CSA Executive Director  
IRC, TPA & COHVCO Authorized Representative

A handwritten signature in black ink, appearing to read "Don Riggle".

D.E. Riggle  
Director of Operations  
Trails Preservation Alliance