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Douglas Krofta
U.S. Fish and Wildlife Service
Division of Interior
Washington, DC 20240

RE: Docket No. FWS-HQ-ES-2020-0047

The National Cotton Council (NCC) appreciates this opportunity to provide comments on the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the "Services") proposed rule "Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical habitat." The NCC recognizes the significance of defining habitat as it applies to statutory language of the Endangered Species Act (ESA). Defining the meaning and intent of statutory language must be carefully considered to craft language with minimal interpretation other than the Congressional intent. It is imperative that the definition conveys succinct meaning thus avoiding legal challenges of interpretation.

The NCC is the central organization of the United States cotton industry. Its members include producers, ginners, cottonseed processors and merchandizers, merchants, cooperatives, warehousers and textile manufacturers. A majority of the industry is concentrated in 17 cotton-producing states stretching from California to Virginia. U.S. cotton producers cultivate between 10 and 14 million acres of cotton, with production averaging 12 to 20 million 480-lb bales annually. The downstream manufacturers of cotton apparel and home furnishings are located in virtually every state. Farms and businesses directly involved in the production, distribution and processing of cotton employ more than 125,000 workers and produce direct business revenue of more than $21 billion. Annual cotton production is valued at more than $5.5 billion at the farm gate, the point at which the producer markets the crop. Accounting for the ripple effect of cotton through the broader economy, direct and indirect employment surpasses 280,000 workers with economic activity of almost $75 billion. In addition to the cotton fiber, cottonseed products are used for livestock feed and cottonseed oil are used as an ingredient in food products, as well as being a premium cooking oil.

The NCC appreciates the opinion of the Supreme Court (Weyerhaeuser Co. v. U.S. FWS, 139 S. Ct. 361, 2018), in particular acknowledging that "critical habitat" must first be "habitat"; therefore, the portion of the "habitat" "(I) essential to the conservation of the species; and (II) which may require special management considerations or protection" for conservation of threatened or endangered species is "critical habitat". The obvious beginning is the "habitat" and the "critical habitat" would represent a much smaller portion "essential" for preservation and recovery of the species. With those points in mind, we considered the Services' proposed definition and alternate definitions.
The proposed definition (P) of the term "habitat" states:

> *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.*

The alternate definition (AP) of the term "habitat" states:
> *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 exists.*

The initial comparison of the two definitions notes the following:

Definition P	Definition AP
"species depend upon"	"species use to carry out"
"includes areas with existing attributes"	"includes areas where individuals of the species do not presently exist but have the capacity to support such individuals
No qualifier for existence of attributes	"only where the necessary attributes to support the species presently exists."

"Depend upon" compared to "use"

"Depend upon" in this context would imply a *need for support* and would appropriately represent the context of the ESA.

"Use" in this context would imply *make use of*, or *utilize*, but does not succinctly represent the narrow interpretation needed for regulatory language nor for describing a "dependence" for survival. "Use" could be interpreted to include arbitrary random occurrences that do not have influence on survival and would not be appropriate interpretations representing the intent of the meaning.

The NCC believes "depend upon" most accurately and succinctly captures the intent. The NCC believes "depend upon" would convey the meaning with narrow alternative interpretations.

Where the necessary attributes to support the species presently exists

The NCC supports the clarification language "attributes to support the species presently exists" and believes the clarification represents the intent of ESA. An area that does not "presently" have the various attributes necessary for conserving a species should not be misrepresented as "habitat". Designations should be based on definable attributes present in order for the Secretary to properly consider the portion that is "critical".

One potential hybrid of the two definitions, combining their strengths in the view of NCC, would be:

The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist, but the areas have all necessary attributes present to support the species.

The definition links species survival to particular attributes present at particular places regardless of the presence of the species, similar to:

The physical place presently containing all necessary attributes required for a species' survival.

However, the NCC expresses dislike of the above definitions due to the broad inclusions that could be made without any evidence that the places previously served as habitats. The dilemma FWS faces in the definition of "habitat" is a challenge of articulating an abstract concept into an enforceable or defendable absolute. In pursuing the definition, the agency is forced to veer away from scientific concepts risking the inclusion of places with no concern. The predicament is in how to properly exclude places that have never been inhabited by a species.

The NCC would urge FWS to exclude places lacking historical records of the species' presence. A potential habitat is not a habitat. By including potential habitat, the Services would be more likely to identify places that had never served as habitat as "critical habitat".

The circumstances before FWS present a term in the statute, and the term does not represent the intended purpose. Unfortunately, the Services must continue regulatory activities with the given language, thus lending to the Services departure from ecological definitions of habitat in order to create a definition exclusively applicable for ESA. The NCC asserts that the lack of clarity associated with "habitat" and "critical habitat" are among many examples supporting the need for Congress to modernize ESA and halt the multitude of legal challenges resulting from vague language.

However, the opinion of the Supreme Court stating the need to define habitat, and stating "The statute is, therefore, not 'drawn so that a court would have not meaningful standard against which to judge the [Secretary's] exercise of [his]discretion not to exclude'. Lincoln, 508 U. S, at 191", the NCC would recommend the Services proceed with a hybrid of the proposed definitions, define attributes, and consider ways to limit habitat to some historical presence.

The NCC appreciates the opportunity to provide comments. Please don't hesitate to contact us with any questions.

Regards,

Steve Hensley
Senior Scientist, Regulatory and Environmental Issues