

PROVIDING FOR CONGRESSIONAL DISAPPROVAL UNDER CHAPTER 8 OF TITLE 5, UNITED STATES CODE, OF THE RULE SUBMITTED BY THE NATIONAL MARINE FISHERIES SERVICE RELATING TO “ENDANGERED AND THREATENED WILDLIFE AND PLANTS; REGULATIONS FOR LISTING ENDANGERED AND THREATENED SPECIES AND DESIGNATING CRITICAL HABITAT”

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JUNE 5, 2023.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. WESTERMAN, from the Committee on Natural Resources, submitted the following

## R E P O R T

together with

## DISSENTING VIEWS

[To accompany H.J. Res. 46]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the joint resolution (H.J. Res. 46) providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Marine Fisheries Service relating to “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat”, having considered the same, reports favorably thereon without amendment and recommends that the joint resolution do pass.

### PURPOSE OF THE LEGISLATION

The purpose of H.J. Res. 46 is to provide for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Marine Fisheries Service relating to “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat”.

## BACKGROUND AND NEED FOR LEGISLATION

The Endangered Species Act (ESA) directs the Secretaries of the Interior and Commerce, upon listing a species as endangered, to also designate the “critical habitat” of the species.<sup>1</sup> The ESA defines “critical habitat” as: “(i) the specific areas within the geographical area occupied by the species 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 upon a determination by the Secretary that such areas are essential for the conservation of the species.”<sup>2</sup>

Critical habitat designations can have a devastating impact on rural communities. One example is the critical habitat designation for the Northern Spotted Owl in the Pacific Northwest. Studies have shown that the listing of the Northern Spotted Owl and its 9.4 million acres of associated critical habitat<sup>3</sup> have caused the loss of at least 32,000 timber jobs.<sup>4</sup> These designations affect federal actions, funding, and permitted activities.<sup>5</sup> Section 7 of the ESA requires consultation with the U.S. Fish and Wildlife Service (USFWS) and/or National Marine Fisheries Service (NMFS) when an activity, such as forest management, construction of a dam, or other infrastructure projects, might impact the critical habitat for a listed species.<sup>6</sup> This process can take years and disincentivizes investment into critical infrastructure. The USFWS describes the difficulties they are having in conducting Section 7 consultations in a timely manner in its March 2023 Report to Congress.<sup>7</sup>

While the ESA defines the term “critical habitat” it does not define the term “habitat.” In 2018, *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service* created the need for a regulatory definition of the term. The *Weyerhaeuser* case stemmed from a species known as the dusky gopher frog, a rare species that is confined to a few ephemeral (short lasting) ponds in the Mississippi River Delta.<sup>8</sup> In 2010, in response to litigation by the Center for Biological Diversity, the USFWS published a proposed critical habitat designation for the dusky gopher frog.<sup>9</sup> The USFWS proposed to designate as occupied critical habitat about 4,933 acres in Forrest, Harrison, Jackson, and Perry Counties, Mississippi.<sup>10</sup> The USFWS found that those areas possessed the three features that the agency considered

<sup>1</sup> 16 U.S.C. 1533(a)(3)(A)(i).

<sup>2</sup> 16 U.S.C. 1532(5)(A).

<sup>3</sup> “USFWS Threatened & Endangered Species Active Critical Habitat Report.” U.S. Fish and Wildlife Service. 4/3/2023 *USFWS Threatened & Endangered Species Active Critical Habitat Report*.

<sup>4</sup> “Labor market impact of land protection: The Northern Spotted Owl.” Ann E. Ferris and Eyal G. Frank. *Journal of Environmental Economics and Management*, Volume 109, September 2021, 102480. *Labor market impacts of land protection: The Northern Spotted Owl—ScienceDirect*.

<sup>5</sup> “Critical Habitat.” *What is it?* U.S. Fish and Wildlife Service. March 2017. *Critical Habitat fact sheet* (fws.gov).

<sup>6</sup> “Endangered Species Act (ESA) Section 7 Consultation and Infrastructure Projects.” Erin H. Ward, R. Eliot Crafton, Pervaze A. Sheikh. Congressional Research Service. *Endangered Species Act (ESA) Section 7 Consultation and Infrastructure Projects* (everycrsreport.com).

<sup>7</sup> U.S. Fish and Wildlife Service, Report to Congress: Review of the ESA Interagency Section 7 Consultation Process and Recommendations for Improving the Process. March 29, 2023. [https://naturalresources.house.gov/uploadedfiles/fws\\_sect.7\\_report.3.29.2023.pdf](https://naturalresources.house.gov/uploadedfiles/fws_sect.7_report.3.29.2023.pdf).

<sup>8</sup> “Final Rules Amending ESA Critical Habitat Regulations.” Erin H. Ward and Pervaze A. Sheikh. Congressional Research Service. *IF11740* (congress.gov).

<sup>9</sup> Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35129–35131 (2012).

<sup>10</sup> *Id.*

“essential to the conservation” of the frog and that required special protection: ephemeral ponds for breeding, open-canopy forest with holes and burrows for dwelling, and open-canopy forest connecting breeding and dwelling areas.<sup>11</sup>

At the same time, USFWS also determined that there was not enough occupied land to sustain the species and proposed to designate as unoccupied critical habitat 1,544 acres of private lands in St. Tammany Parish, Louisiana.<sup>12</sup> This area only contained one characteristic suitable for the frog, the presence of ephemeral ponds.<sup>13</sup> The landowner, the Weyerhaeuser Company, sued the USFWS.<sup>14</sup> Weyerhaeuser contended that the proposed land was not suitable habitat for the frog and that USFWS inadequately weighed the benefit to the species against the economic impacts.<sup>15</sup>

In 2018, the case reached the Supreme Court of the United States (Supreme Court).<sup>16</sup> In a unanimous opinion, the Supreme Court held that to be designated a “critical habitat” under the ESA, the land must also be habitat for the species.<sup>17</sup> In light of this opinion the USFWS agreed to remove the areas in question from critical habitat designations.<sup>18</sup>

On December 16, 2020, in response to the Weyerhaeuser decision the USFWS and NMFS published a final rule that defined “habitat,” for the purposes of designating critical habitat under the ESA. The rule defined “habitat” as the abiotic and biotic setting that currently or periodically (emphasis added) contains the resources and conditions necessary to support one or more life processes of species.<sup>19</sup> In effect, this rule narrowed the scope by which USFWS and NMFS could designate critical habitat to areas that meet each characteristic needed to sustain the species. A definition of habitat that excludes areas not currently suitable for the species provides greater certainty to stakeholders operating projects with a federal nexus. Over 900 listed species have designated critical habitat associated with them, which accounts for over 107 million acres of land area.<sup>20</sup>

On June 24, 2022, the USFWS and the NMFS announced they were rescinding the Trump administration’s rule defining “habitat” as it relates to designating critical habitat.<sup>21</sup> This action would revert to previous policies that allow the two agencies to designate critical habitat in areas that are not currently occupied by the spe-

<sup>11</sup> *Id.*

<sup>12</sup> *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 586 U.S. \_\_\_\_ (2018).

<sup>13</sup> Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35129–35131 (2012).

<sup>14</sup> “Final Rules Amending ESA Critical Habitat Regulations.” Erin H. Ward and Pervaze A. Sheikh. Congressional Research Service. *IF11740* (congress.gov).

<sup>15</sup> *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 586 U.S. \_\_\_\_ (2018).

<sup>16</sup> U.S. Supreme Court, Granted and Noted List, October Term 2018. <https://www.supremecourt.gov/qp/17-00071qp.pdf>.

<sup>17</sup> *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 586 U.S. \_\_\_\_ (2018).

<sup>18</sup> “Settlement Eliminates 1,500 Acres of Designated Dusky Gopher Frog Critical Habitat.” David Miller. Nossaman LLP. 7/18/2019. *Settlement Eliminates 1,500 Acres of Designated Dusky Gopher Frog Critical Habitat* (endangeredspecieslawandpolicy.com).

<sup>19</sup> “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat.” 87 FR 37757. *Federal Register: Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat*.

<sup>20</sup> “USFWS Threatened & Endangered Species Active Critical Habitat Report.” U.S. Fish and Wildlife Service. 4/3/2023. *USFWS Threatened & Endangered Species Active Critical Habitat Report*.

<sup>21</sup> “U.S. Fish and Wildlife Service and NOAA Fisheries Rescind Regulatory Definition of “Habitat” Under the Endangered Species Act.” Marilyn Kitchell and Lauren Gaches. U.S. Fish and Wildlife Service. 6/23/2022. *Rescind Regulatory Definition of “Habitat” Under the Endangered Species Act* | U.S. Fish & Wildlife Service (fws.gov).

cies in question and in some cases, have not been occupied in decades and may never be occupied.

*Congressional Review Act*

The Congressional Review Act (CRA) was enacted in 1996 and provides Congress with a tool to overturn administrative regulations. If a CRA joint resolution is approved by both the House and Senate and signed by the President, the rule at issue cannot go into effect or continue in effect.

H.J. Res. 46 would repeal the Biden administration's rescission, reinstating the Trump administration's definition of "habitat" as it relates to designating critical habitat.

COMMITTEE ACTION

H.J. Res. 46 was introduced on March 30, 2023, by Rep. Cliff Bentz (R-OR). The resolution was referred to the Committee on Natural Resources, and within the Committee to the Subcommittee on Water, Wildlife and Fisheries. On April 18, 2023, the Subcommittee on Water, Wildlife and Fisheries held a hearing on the resolution. On April 27-28, 2023, the Full Natural Resources Committee met to consider the resolution. The Subcommittee on Water, Wildlife and Fisheries was discharged by unanimous consent. Rep. Jared Huffman (D-CA) offered an amendment designated Huffman #1. The amendment offered by Rep. Huffman was withdrawn by unanimous consent. The resolution was then ordered favorably reported to the House of Representatives by a roll call vote of 17 yeas to 12 nays, as follows:

**Committee on Natural Resources**  
U.S. House of Representatives  
118th Congress

Date: April 28, 2023

Recorded Vote #: 2

Meeting on / Amendment on: **Favorably reporting H.J. Res. 46 (Bentz)**, Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Marine Fisheries Service relating to "Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat"

MEMBERS	Yea	Nay	Pres	MEMBERS	Yea	Nay	Pres
Mr. Westerman, AR, Chairman	X			Mr. Grijalva, AZ, Ranking		X	
Mr. Lamborn, CO				Ms. Napolitano, CA		X	
Mr. Wittman, VA				Mr. Sablan, CNMI			
Mr. McClintock, CA	X			Mr. Huffman, CA			
Mr. Gosar, AZ				Mr. Gallego, AZ		X	
Mr. Graves, LA	X			Mr. Neguse, CO			
Mrs. Radewagen, AS				Mr. Levin, CA		X	
Mr. LaMalfa, CA	X			Ms. Porter, CA		X	
Mr. Webster, FL	X			Ms. Leger Fernandez, NM		X	
Ms. González-Colón, PR				Ms. Stansbury, NM		X	
Mr. Fulcher, ID	X			Mrs. Peltola, AK		X	
Mr. Stauber, MN	X			Ms. Ocasio-Cortez, NY			
Mr. Curtis, UT	X			Mr. Mullin, CA		X	
Mr. Tiffany, WI	X			Ms. Hoyle, OR			
Mr. Carl, AL	X			Ms. Kamlager-Dove, CA			
Mr. Rosendale, MT	X			Mr. Magaziner, RI			
Mrs. Boebert, CO	X			Ms. Velázquez, NY			
Mr. Bentz, OR	X			Mr. Case, HI		X	
Ms. Kiggans, VA	X			Mrs. Dingell, MI		X	
Mr. Moylan, Guam				Ms. Lee, NV		X	
Mr. Hunt, TX							
Mr. Collins, GA	X						
Ms. Luna, FL							
Mr. Duarte, CA	X						
Ms. Hageman, WY	X						
				<b>TOTAL:</b>	17	12	

## HEARINGS

For the purposes of clause 3(c)(6) of House rule XIII, the following hearing was used to develop or consider this measure: hearing by the Subcommittee on Water, Wildlife, and Fisheries held on April 18, 2023.

## SECTION-BY-SECTION ANALYSIS

Congress disapproves the rule submitted by the United States Fish and Wildlife Service relating to “Endangered and Threatened Wildlife and Plants; Endangered Species Status for Northern Long-Eared Bat” (87 Fed. Reg. 73488; published November 30, 2022), and such rule shall have no force or effect.

## COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources’ oversight findings and recommendations are reflected in the body of this report.

## COMPLIANCE WITH HOUSE RULE XIII AND CONGRESSIONAL BUDGET ACT

1. *Cost of Legislation and the Congressional Budget Act.* With respect to the requirements of clause 3(c)(2) and (3) of rule XIII of the Rules of the House of Representatives and sections 308(a) and 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for the resolution from the Director of the Congressional Budget Office:

<b>H.J. Res. 46, a joint resolution providing for Congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Marine Fisheries Service relating to "Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat"</b>			
<b>As ordered reported by the House Committee on Natural Resources on April 28, 2023</b>			
By Fiscal Year, Millions of Dollars	2023	2023-2028	2023-2033
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	*	*	*
Increases <i>net direct spending</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Statutory pay-as-you-go procedures apply? No	
		<b>Mandate Effects</b>	
Increases <i>on-budget deficits</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
* = between zero and \$500,000.			

H.J. Res. 46 would disapprove a rule published in the *Federal Register* on July 24, 2022, by the National Marine Fisheries Service related to “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat.” As a result, the legislation would reinstate

a previous rule, “Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat,” which was submitted by U.S. Fish and Wildlife Service (USFWS) and National Oceanic and Atmospheric Administration (NOAA) and published in the *Federal Register* on December 16, 2020. That rule defined the term “habitat” for regulations concerning critical habitat under the Endangered Species Act (ESA). The ESA requires agencies to consult with USFWS and NOAA on activities that could adversely affect critical habitats.

Using information from USFWS and NOAA, CBO estimates that reinstating the definition of “habitat” would not affect permitting fees or civil and criminal penalties under the ESA. There would be some administrative costs to void the regulation, which CBO estimates would be insignificant; any spending would be subject to the availability of appropriated funds.

The CBO staff contact for this estimate is Lilia Ledezma. The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

PHILLIP L. SWAGEL,  
*Director, Congressional Budget Office.*

*2. General Performance Goals and Objectives.* As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this resolution is to provide for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Marine Fisheries Service relating to “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat”.

#### EARMARK STATEMENT

This resolution does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

#### UNFUNDED MANDATES REFORM ACT STATEMENT

According to the Congressional Budget Office, this resolution contains no unfunded mandates as defined by the Unfunded Mandates Reform Act.

#### EXISTING PROGRAMS

*Directed Rule Making.* This resolution does not contain any directed rule makings.

*Duplication of Existing Programs.* This resolution does not establish or reauthorize a program of the federal government known to be duplicative of another program. Such program was not included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139 or identified in the most recent Catalog of Federal Domestic Assistance published pursuant to the Federal Program Information Act (Public Law 95–220, as amended by Public Law 98–169) as relating to other programs.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

Any preemptive effect of this resolution over state, local, or tribal law is intended to be consistent with the resolution's purposes and text and the Supremacy Clause of Article VI of the U.S. Constitution.

CHANGES IN EXISTING LAW

As reported by the Committee, H.J. Res. 46 makes no changes in existing law.



## DISSENTING VIEWS

H.J. Res. 46 is a resolution of congressional disapproval for a National Marine Fisheries Service (NMFS) rule that revoked the December 2020 definition of “habitat” under the Endangered Species Act of 1973 (ESA). The regulation, jointly issued by NMFS and the U.S. Fish and Wildlife Service (FWS) on June 24, 2022, would be nullified if H.J. Res. 46 is enacted. This resolution will undermine federal agencies’ authority to make informed management decisions based on the best available scientific evidence, as required by the ESA. It also runs counter to the language and intent of the ESA and could impede the agencies’ ability to identify, designate, and restore critical habitats for endangered and threatened species, putting these species at risk of extinction.

Under the ESA, agencies designate “critical habitat” for species recovery. This designation is a crucial component of ESA implementation. The ESA defines critical habitat as areas both occupied and unoccupied by the species at the time of listing. Occupied areas must possess physical or biological features essential to the species conservation and may require unique management. Unoccupied areas need only be “essential for the conservation of the species” to qualify as critical habitat.

A unanimous U.S. Supreme Court decision in 2018 established that an area must meet the requirements to be considered a “habitat” for an endangered species before it can be deemed a “critical habitat.”<sup>1</sup> Building upon this decision, the Trump administration, through FWS and NMFS, issued a final rule on December 16, 2020, defining “habitat” as follows: “For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.”<sup>2</sup>

This 2020 critical habitat rule directly contradicts the ESA’s definition of critical habitat, which includes occupied and unoccupied areas. Unoccupied areas can and should be designated as critical habitat if they are essential for species conservation. During the April 18, 2023, hearing on H.J. Res. 46, Robert L. Fishman, Professor of Law at Indiana University, explained that Congress acknowledged the conservation necessity of creating new habitats for species recovery, recognizing that most species cannot rebound from the brink of extinction without additional habitat to disperse or be relocated to. Therefore, any regulatory definition of habitat that excludes unoccupied areas essential to recovery, as was the case with the 2020 rule, goes against the clear intent of the ESA.

<sup>1</sup>*Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. \_\_\_ (2018), [https://www.supremecourt.gov/opinions/18pdf/17-71\\_omjp.pdf](https://www.supremecourt.gov/opinions/18pdf/17-71_omjp.pdf).

<sup>2</sup>Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat (85 Fed. Reg. 81411). December 16, 2020.

The 2020 definition limited the ability of FWS and NMFS to conserve and restore critical habitat based on the best available science for ESA-listed species recovery. By restricting habitat to areas that currently or periodically support the life processes of a species, the 2020 definition excluded areas requiring restoration or modification to support species. This limitation disregarded the longstanding practice of designating degraded habitats as critical habitat under the ESA and subsequently working toward their restoration to serve as strongholds for species recovery, particularly in ecosystems with depleted habitat and reduced species ranges.

Moreover, the definition failed to account for the flexibility needed by FWS and NMFS in addressing the impact of climate change on species' habitat. As species' ranges shift in response to changing temperatures and rising sea levels or to follow their preferred prey, FWS and NMFS often need to designate areas as critical habitat that species will inhabit in the foreseeable future to ensure their survival. Despite the availability of the best scientific knowledge on wildlife migrations and climate forecasting, the 2020 definition would have limited this opportunity in some areas.

Recognizing these deficiencies, the Biden administration finalized a rule on June 24, 2022, revoking the 2020 definition of "habitat."<sup>3</sup> The administration concluded that restricting habitat to areas currently or periodically supporting species' life processes was inconsistent with the conservation purpose of the ESA. FWS and NMFS also determined that the 2020 definition was unclear and would not provide transparency or reproducible outcomes.<sup>4</sup>

H.J. Res. 46 disapproves the June 24, 2022, rule and restores the 2020 Trump-era definition of "habitat." This resolution undermines the Endangered Species Act by impeding the agencies' flexibility to make well-informed management and recovery decisions based on the best available science and in alignment with the ESA's requirements. Additionally, it forces the agencies to rely on an outdated rule, as using the Congressional Review Act prohibits them from implementing any substantially similar rulemaking in the future. Given the dynamic nature of species' status and range shifts due to climate change and other factors, this limitation on assessing and designating critical habitat would significantly hinder species recovery efforts, which rely on identifying and preserving essential habitats.

RAÚL M. GRIJALVA,

*Ranking Member, House Committee on Natural Resources.*



<sup>3</sup>Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat (87 Fed. Reg. 37757). June 24, 2022. <https://www.federalregister.gov/documents/2022/06/24/2022-13368/endangered-and-threatened-wildlife-and-plants-regulations-for-listing-endangered-and-threatened>.

<sup>4</sup>See also Erin H. Ward & Pervaze A. Sheikh, Congressional Research Service, IF11740, CRS in Focus: Final Rules Amending Critical Habitat Regulations (version two, updated July 11, 2022).