No. 17-71

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,
Respondents.

On Writ of Certiorari to the United State Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* ENERGY AND WILDLIFE ACTION COALITION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Energy and Wildlife Action Coalition ("EWAC") respectfully submits this brief as *amicus curiae* in support of Petitioner Weyerhaeuser Company. EWAC is an unincorporated association headquartered in Washington, D.C. comprised of electric utilities, electric transmission and distribution providers, renewable energy companies, and related trade associations. EWAC members operate throughout the United States.

EWAC's fundamental goal is to evaluate, develop, and promote reasonable environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

The Fifth Circuit's ruling, if affirmed by this Court, would have a significant negative impact on EWAC members. EWAC's members develop, construct, maintain, own, and operate electric generation, transmission, and distribution facilities that are located or proposed to be built on private and public lands, including lands that are not habitable by threatened or endangered species ("listed species"), and yet these areas could be designated as critical habitat for listed species under

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.3(a), Petitioner and Respondents have provided blanket written consent to the filing of amicus briefs in this matter and their written consent is on file.

the criteria upheld by the divided panel of the Fifth Circuit.

Federal agencies are required to consult with the U.S. Fish and Wildlife Service ("Service") under section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), if a proposed facility is located on or crosses federal lands, requires a federal permit or approval, or receives federal financial support and may adversely affect a listed species or critical habitat. In other words, if critical habitat is present in any of these scenarios, section 7(a)(2) triggers additional review.

Thus, for example, many EWAC members have existing facilities on federal lands and will continue to construct new facilities across federal lands, often with few if any practical alternative locations, to meet the electricity needs of their customers. The siting of such infrastructure requires federal authorization and so can trigger section 7 review, including as to impacts on critical habitat. Furthermore, once constructed, electric energy infrastructure is likely to remain on the land for many decades. Critical habitat designations can affect the renewal of authorization for use of the federal lands, affecting existing infrastructure and constraining operation and maintenance of existing facilities on both private and public lands.

Further, many EWAC members' facilities on public or private lands require federal approvals such as Clean Water Act ("CWA") section 404 permits and Federal Energy Regulatory Commission ("FERC") licenses and some receive federally backed financing. Again, these federal actions can trigger section 7. And even absent the need for federal approvals, the existence of critical habitat or the threat of a potential critical habitat designation within a facility's footprint

complicates private financing, as lenders and investors react to the increased costs and risks posed by critical habitat, which can increase the cost of capital or result in financial reserve requirements, bonding or parent company guarantees, all of which make financing more difficult and more expensive and can even result in the demise of the project.

SUMMARY OF ARGUMENT

The Fifth Circuit wrongly upheld a decision by the Service that unlawfully designated an area in Louisiana as "critical habitat" for the endangered dusky gopher frog (*Rana sevosa*) even though there is no occurrence of the species on those lands, that area cannot sustain the species, now or in the foreseeable future, and there is no connection to any area that is actually habitable by that species. *See* Pet. App. 1a-77a.

In reviewing the Service's action, the Fifth Circuit incorrectly limited its analysis to the ESA's definitions of occupied and unoccupied "critical habitat," 16 U.S.C. § 1532(5)(A), and ignored the criteria for critical habitat contained in sections 4 and 7 of the ESA, the statute's operative provisions, which specify that critical habitat is a subset of the habitat of a listed species. 16 U.S.C. §§ 1533(a)(3)(A), 1536(a)(2); Pet. App. 15a, 18a, 23a-32a.

The Fifth Circuit's narrow focus on the ESA's definition of "critical habitat," to the exclusion of the operative provisions of the statute, allowed it to wrongly conclude: "There is no habitability requirement in the text of the ESA or the implementing regulations." Pet. App. 23a.

To the contrary, the requirement that critical habitat be part of the habitat of a species is a plain and unambiguous requirement of the ESA. When the

Service lists a species under the ESA, the statute directs the Service, "to the maximum extent prudent and determinable," to designate by regulation "*any habitat of such species* which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A) (emphasis added). The ESA also requires federal agencies to consult with the Service before undertaking or authorizing an action that is likely to destroy or adversely modify "habitat . . . which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2).

The Fifth Circuit also improperly deferred to the Service's interpretation of the phrase "essential to the conservation of the species" in the ESA's definition of unoccupied critical habitat, 16 U.S.C. § 1532(5)(A)(ii), wrongly concluding that this phrase is the sole test for designating unoccupied critical habitat and accepting a Service interpretation of "essential" that conflicts with the plain and unambiguous requirement of section 4 of the ESA that critical habitat be "habitat of such species." 16 U.S.C. § 1533(a)(3)(A)(i).

As a result of these errors, the Fifth Circuit blessed a standard that allows an area to be designated as "critical habitat" even if it is currently uninhabitable by a listed species and has no prospect of ever becoming habitable by that species. This fails to recognize that "critical habitat" is, first and foremost, habitat for a listed species. Among other consequences, this unlawfully broad reading of critical habitat would impose an unworkable and unreasonable regulatory burden on the development and continuing operation of electric energy infrastructure throughout the country.

Electricity generation, transmission and distribution facilities are located throughout the United States. The total available installed electrical generating capacity in the United States is currently about

1,200 gigawatts from all sources (conventional and renewable).[2] The electric transmission network is the backbone of the nation's energy grid and consists of more than 600,000 circuit miles of lines, 240,000 of which are considered high-voltage lines.[3] There is also a spider web of distribution lines delivering electricity from substations to consumers. Electricity generation, transmission and distribution facilities may be found in every corner of our country. As a result, the electric energy industry frequently interacts with listed species and critical habitat and has a profound interest in the proper designation of critical habitat for listed species.

There are real consequences for the nation's electricity generation, transmission, and distribution infrastructure that will result from designating areas uninhabitable by a listed species as "critical habitat" and from extending the protections of the ESA to those areas. Through this *amicus* brief, EWAC offers the Court a window into how the Fifth Circuit's decision could disrupt the development and ongoing operation of its members' facilities.

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[2] Federal Energy Regulatory Commission, Office of Enforcement, Energy Market Snapshot (June 2017), available at: https://www.ferc.gov/market-oversight/mkt-snp-sht/2017/06-2017-snapshot-national.pdf.

[3] Edison Electric Institute, Transmission, available at: http://www.eei.org/issuesandpolicy/transmission/Pages/default.aspx.

ARGUMENT

I. The ESA dictates that "critical habitat" must be habitable.

A. The operative provisions of the ESA plainly state that critical habitat must be habitable.

One of the purposes of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). The ESA is structured to protect the ecosystems upon which a listed species depends through its provisions for designating and protecting habitat that is determined to be critical for that species – section 4 (the designation of critical habitat) and section 7 (federal interagency consultation). 16 U.S.C. §§ 1533(a), 1536.

By its terms, section 4 of the ESA does not authorize the Service to designate an area that is not habitable by a listed species as "critical" for that species. It directs that, when the Service lists a species, it shall, "to the maximum extent prudent and determinable," designate by regulation "*any habitat of such species* which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). Under this provision, lands that are not "habitat of such species" cannot be "critical habitat."

Section 4's criteria for "critical habitat" also include a temporal element: designation is limited to habitat that is considered critical at the time the species is listed ("then considered to be"). *Id*. The designation of critical habitat may be revised "from time-to-time thereafter as appropriate," *id*. at § 1533(a)(3)(A)(ii), which allows the Service to account for changes in habitat over time. But nothing in section 4 authorizes

the Service to designate as "critical" an area that is not currently habitable by the species, even if it might become habitat at some future date.

Using nearly identical phrasing, section 7 of the ESA also describes critical habitat as a subset of a species' existing habitat:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of *habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical* [pursuant to section 4] . . . .

16 U.S.C. § 1536(a)(2) (emphasis added). Section 7, like section 4, is thus explicit that critical habitat must first and foremost be habitat of the listed species.

The ESA's definitions (section 3 of the Act) supplement the criteria for designating "critical habitat" found in section 4, describing different requirements depending on whether the area was occupied or unoccupied by the species at the time the species was listed. 16 U.S.C. §§ 1532(5)(A)(i) and (A)(ii). The additional criteria contained in these definitions must be read in conjunction with the unambiguous statements in sections 4 and 7 that critical habitat is a subset of the habitat for a listed species. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486, 126 S. Ct. 1252, 1257 (2006) ("Interpretation of a word or phrase

depends upon reading the whole statutory text [and] considering the purpose and context of the statute.").

Although the ESA does not expressly define what constitutes "habitat" for a listed species, the term "critical habitat" is founded on the concept that the area being designated must in fact be habitat – that it is habitable by a listed species. Thus, for example, the ESA states that, absent special circumstances, "critical habitat shall not include the entire geographic area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C). The clear implication is that to be critical habitat for a listed species, an area must be one that "can be occupied" by that species. This directive echoes, and appears intended to be equivalent to, the directive in ESA sections 4 and 7 that critical habitat be a subset of habitat for the listed species.

In the absence of an express statutory definition of "habitat," the Court must look to the ordinary meaning of the word and to the way it is used in the ESA as a whole. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. U.S.*, 444 U.S. 37, 42, 100 S. Ct. 311, 314 (1979).

The Merriam-Webster Dictionary defines "habitat" as "the place or environment where a plant or animal naturally or normally lives and grows," or, as a secondary definition, "the place where something is commonly found." "Habitat," Merriam-Webster Dictionary (11th ed. 2016). These dictionary definitions are consistent with the purposes of the ESA, *see* 16 U.S.C. § 1531(b), as Congress selected the word "habitat" to refer to the ecosystems upon which listed species depend. The dictionary definitions of "habitat" also are consistent

with the concept of an area that "can be occupied" by the species. *See* 16 U.S.C. § 1532(5)(C). The word "habitat," as it is used in the ESA, thus indicates that the area in question must be capable of sustaining a particular species even if that species does not currently occupy the area.

Accordingly, when ESA sections 4 and 7 refer to the designation of "habitat of such species" as "critical habitat," they mean a place where a plant or animal naturally lives and grows; a place that is capable of sustaining the species; a place that is habitable by the species.

B. The Fifth Circuit's analysis ignored the operative provisions of the ESA and the plain meaning of the word "habitat."

The Fifth Circuit panel, as it upheld the designation of lands in Louisiana as unoccupied critical habitat for the dusky gopher frog, limited its analysis to the ESA's definitions of occupied and unoccupied critical habitat. *See* Pet. App. 15a, 18a, 23a-32a (majority opinion analyzes only sections 1532(5)(A)(i)-(ii)). It did so even though those lands cannot sustain the frog today and are not likely to be capable of doing so in the reasonably foreseeable future without significant human manipulation. *Id*.

The ESA's definitions differentiate between occupied and unoccupied critical habitat. Occupied critical habitat, not surprisingly, must be occupied by the species at the time the species is listed as threatened or endangered. 16 U.S.C. § 1532(5)(A)(i). It also must contain physical and biological features that: (1) are "essential for the conservation of the species"; and (2) "may require special management considerations or protection." *Id*. Unoccupied critical habitat is lim-

ited to areas that are not occupied at the time of species listing but nevertheless are deemed "essential for conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

Looking only at these provisions, the Fifth Circuit determined – wrongly – that the sole criterion the ESA provides for designating unoccupied critical habitat is found in section 3(5)(A)(ii), 16 U.S.C. § 1532(5)(A)(ii), and entails a Service determination that the area is "essential" for conservation of the listed species. Pet. App. 15a, 18a, 21a-24a. The Fifth Circuit then ruled that the ESA does not define "essential," that the word is ambiguous, and accordingly that the Service's determination that an unoccupied area is "essential" and so should be designated as critical habitat (without regard to whether the area is habitable) is entitled to *Chevron* deference. Pet. App. 15a, 21a-24a, citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9, 104 S. Ct. 2778 (1984).

The Fifth Circuit found ambiguity by erroneously focusing exclusively on the word "essential" in section 3(5)(A)(ii) and ignoring the additional criteria for critical habitat contained in sections 3(5)(C) and 4, 16 U.S.C. §§ 1532(5)(C) and 1533(a)(3)(A)(i). It also ignored the way the word "habitat" and the phrase "critical habitat" are used in context in ESA sections 4 and 7, 16 U.S.C. §§ 1533(a)(3)(A)(i) and 1536(a)(2), the operative provisions of the statute.

Statutory "[i]nterpretation of a word or phrase depends upon reading the whole statutory text [and] considering the purpose and context of the statute." *Dolan*, 546 U.S. at 486. "A word in a statute may or may not extend to the outer limits of its definitional possibilities." *Id.* "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a

permissible construction of the statute." *Chevron,* 467 U.S. at 843. The ESA must be read and considered as a whole to determine the meaning of "critical habitat."

By their language and structure, ESA sections 4 and 7 make clear that "critical habitat" – including unoccupied critical habitat – is a subset of a species' habitat in existence at the time of the species' listing, and as such it must be capable of supporting that species. The ESA's definition of unoccupied "critical habitat" in section 3(5)(A)(ii) informs the application of sections 4 and 7, but also must be read in harmony with the use of the term "critical habitat" in those operative sections of the statute. If any ambiguity exists in the section 3(5)(A)(ii) definition, then the first source for guidance must be the rest of the statute – here, primarily the operative provisions of section 4 and section 7 that authorize the designation of "habitat of such species" as critical habitat and ensure that the actions of federal agencies are not likely to result in the "destruction or adverse modification of habitat of such species which is determined . . . to be critical." *See* 16 U.S.C. §§ 1533(a)(3)(A)(i), 1536(a)(2).

Further, the Fifth Circuit ignored section 3(5)(C), another element of the ESA's definition of "critical habitat" providing that "critical habitat shall not include the entire geographic area which can be occupied by the threatened or endangered species," except in circumstances determined by the Service. 16 U.S.C. § 1532(5)(C). This provision reinforces the directive in section 4 and the implication of section 7 that "critical habitat" should be a subset of the listed species' habitat – the "geographic area which can be occupied" by the species. No reasonable reading of section 3(5)(C) would authorize the designation of

critical habitat that is *outside* of the geographic area which can be occupied by a listed species.

The Fifth Circuit dismissed the possibility that unoccupied critical habitat must be habitable by the listed species by pointing to differences in the language the ESA uses to define occupied and unoccupied critical habitat, 16 U.S.C. §§ 1532(5)(A)(i) and (A)(ii). Pet. App. 23a-24a. Occupied critical habitat must have "physical and biological features" essential to the conservation of the species, while unoccupied habitat must be in "areas" essential for the conservation of the species. *Id*. The Fifth Circuit ruled that requiring unoccupied areas to contain the essential physical and biological features needed to sustain a listed species "effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land." *Id*. (emphasis in original).

In so holding, the Fifth Circuit placed too much weight on the reference to biological and physical characteristics in section 1532(5)(A)(i), as if this were the only reference to the suitability of an area to the listed species to be found in the ESA. To the contrary, ESA sections 3(5)(C), 4 and 7 plainly state that critical habitat is a subset of the habitat of a listed species or a subset of the area that can be occupied by the species. Occupied critical habitat is distinguished from unoccupied critical habitat by the fact that it was occupied by the species at the time the species was listed. In defining occupied habitat as critical, the ESA points to the presence of physical and biological characteristics that are deemed essential to the conservation of the species, distinguishing "critical habitat" from "all habitat." But the ESA, at its base, requires that both occupied and unoccupied critical

habitat be part of the habitat for a listed species. *See* 16 U.S.C. §§ 1533(a)(3)(A)(i), 1536(a)(2).

The failure to read the term "critical habitat" with an eye to the context in which that term is used in sections 4 and 7 and without referencing the additional criteria for critical habitat found in sections 3(5)(C) and 4 resulted in the Fifth Circuit giving improper *Chevron* deference to a Service interpretation of the ESA's definition of unoccupied critical habitat. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666, 127 S. Ct. 2518, 2534 (2007) (internal quotation omitted). Failure to follow this basic canon resulted in Fifth Circuit deference to and adoption of a mistaken Service interpretation that is patently inconsistent with the plain meaning of the criteria for critical habitat set out in other ESA provisions.

C. The Service's determination that lands may be deemed "essential to the conservation of a species" even though not habitable by that species now or in the reasonably foreseeable future is not entitled to *Chevron* deference.

Any ambiguity the Fifth Circuit perceived in the meaning of "critical habitat" derives from isolating that term and the word "essential" from how "critical habitat" is used in operative provisions of the statute and from the plain meaning of the word "habitat." The Fifth Circuit should not have moved beyond the first step of *Chevron* and should not have extended deference to the Service's interpretation.

Deference to the Service "is appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory text." *Nat'l Ass'n of Home Builders*, 551 U.S. at 665 (2007) (quoting *Chevron,* 467 U.S. at 843).

As this Court has established:

> In making the threshold determination under *Chevron*, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." Rather, [t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context . . . It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.

Id. at 666 (*quoting Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S. Ct. 1291, 1300 (2000)) (internal citations omitted). "A statutory 'provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" *Util. Air Regulatory Grp. v. Envtl. Prot. Agency,* 573 U.S. ___, ___, 134 S. Ct. 2427, 2442 (2014), (*quoting United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 371, 108 S. Ct. 626, 630 (1988)) (ellipsis in original).

Here, congressional intent is clear that critical habitat is a subset of the habitat of a listed species. 16 U.S.C. §§ 1532(5)(C), 1533(a)(3)(A)(i), 1536(a)(2). The Fifth Circuit never considered those provisions. If it had done so, it would not have erroneously claimed

that "there is no habitability requirement in the text of the ESA." Pet. App. 23a.

Consistent with the holdings of this Court, the Fifth Circuit should not have confined itself to examining a particular statutory provision in isolation, as the definition of unoccupied critical habitat in section 3(5)(A)(ii) that may otherwise appear ambiguous in isolation is indeed clarified by the remainder of the statutory scheme, namely sections 3(5)(C), 4 and 7. *See Food and Drug Admin.*, 529 U.S. at 132; *Util. Air Regulatory Grp.*, 573 U.S. at __, 134 S. Ct. at 2442. The only potential meaning of unoccupied critical habitat, as defined by ESA section 3(5)(A)(ii), that is also compatible with the rest of the ESA is that critical habitat – *including* unoccupied critical habitat – must be habitable and thus capable of supporting the species for which it is designated. *See Util. Air Regulatory Grp.*, 573 U.S. at __, 134 S. Ct. at 2442. In light of the statute's unambiguous directive that critical habitat be habitable, the Fifth Circuit should have stopped after the first step in its *Chevron* analysis.

In any event, the Fifth Circuit's *Chevron* step 2 analysis is equally flawed, as it erred in endorsing the Service's unreasonable exclusion of habitability from the criteria for critical habitat. The ESA may not define the term "essential for the conservation of the species," but it has placed boundaries on what may be considered "essential"; Congress has clearly stated that critical habitat must in fact be habitable. *See* 16 U.S.C. §§ 1532(5)(C), 1533(a)(3)(A)(i), 1536(a)(2). "Even under *Chevron*'s deferential framework, agencies must operate 'within the bounds of reasonable interpretation.'" *Util. Air Regulatory Grp.* 573 U.S. at ___, 134 S. Ct. at 2442 (*quoting City of Arlington, Tex. v. Fed. Commc'ns Comm'n,* 569 U.S. 290, 296, 133 S. Ct.

1863, 1868 (2013)). *Chevron* "directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers." *Mich. v. Envtl. Prot. Agency*, 576 U.S. __, __, 135 S. Ct. 2699, 2707 (2015). But an agency's reading of a statute must still remain within the bounds of reasonable interpretation. *Id*.

Reading the ESA to allow an uninhabitable area to be designated as "critical habitat" strays far beyond the bounds of reasonable interpretation and cannot survive judicial scrutiny. *See id.* (EPA wrongly interpreted the word "appropriate" in the Clean Air Act provision as allowing it to ignore costs of pollution controls).

There are limits to the meaning of "essential," and so to the Service's discretion. Here, the Service designated as "essential" an area that currently provides no conservation benefit to the dusky gopher frog and will not do so in the future. To deem an area "essential" to a species that has no connection to the areas in Mississippi that are currently occupied by the species and no foreseeable ability to sustain the species goes beyond the bounds of reason. Even where *Chevron* deference does apply, it has limits, and those limits were exceeded here. *See id.*

II. Designating areas that are not habitable by a listed species as "critical habitat" harms the development and operation of the nation's energy infrastructure.

Critical habitat designation can directly constrain the location of energy generation, transmission, or distribution projects, impose permitting delays, cause higher installation and operating costs, and increase financing costs. This is particularly true if there is no

requirement that the lands in question possess suitable characteristics to sustain listed species, as there is no way a project proponent could foresee and plan for the designation. This, in turn, increases the cost of energy production and transmission, a cost that is passed on to consumers unless the company that is developing or operating the affected facilities is constrained by contract or regulation from doing so. The practical implications of the Fifth Circuit's ruling are evident when applied to the development, operation and maintenance of the nation's electric energy infrastructure.

A. The electric energy industry in the United States is investing heavily in new generation, transmission and distribution facilities and in enhancing the nation-wide electric grid.

The United States is in the midst of an evolution in its electric energy infrastructure. The means of generating electricity have been changing, particularly in the last decade, with planned and completed retirement of a significant number of conventional (mainly nuclear and coal-fired) power plants, the development of new renewable (wind, solar and other sources) and natural gas-fired generation, and noticeable growth in distributed energy resources (rooftop solar, small-scale wind, and net metering), energy storage (battery facilities and electric vehicles) and efficiency. These trends are expected to continue in the coming years.

The U.S. wind industry installed 7,017 megawatts ("MW") of new electric energy generating capacity and repowered 2,136 MW of existing capacity in 2017, bringing the total installed capacity for wind energy generation in the United States to 89,077 MW, or more

than 89 gigawatts ("GW").[4] An additional 28,668 MW of wind generating capacity was under construction or in advance development at the end of 2017.[5]

The U.S. Solar industry installed 10,608 MW in 2017 and now has over 53 GW of total installed solar generating capacity.[6] Solar energy has ranked first or second in new electric generating capacity additions in each of the last five years.[7]

Billions of dollars are also being invested in the nation's electric transmission system – over $20 billion in 2016 and more in 2017.[8] The factors driving these investments include enhancing reliability, grid resiliency and modernization, relieving market congestion, developing smarter energy infrastructure, improving economic and market efficiency, and expanding the transmission system to integrate renewables into an evolving generation mix. The industry also is making significant investments in a more dynamic and secure transmission system. Consistent with federal and state policies, transmission projects are planned through the use of open and transparent processes that include analysis and consideration on a comparable basis of

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[4] American Wind Energy Association, U.S. Wind Industry Fourth Quarter 2017 Market Report, available at: http://awea.files.cms-plus.com/FileDownloads/pdfs/4Q%202017%20AWEA%20Market%20Report%20Public%20Version.pdf.

[5] *Id*.

[6] Solar Energy Industry Association, U.S. Solar Market Through 2017: Key Takeaways, available at: https://www.seia.org/solar-industry-research-data.

[7] *Id*.

[8] Edison Electric Institute, available at: http://www.eei.org/issuesandpolicy/transmission/Documents/bar_Transmission_Investment.pdf.

proposed transmission solutions and alternate, non-transmission solutions. Justification for new-build or upgrades of existing facilities has to be provided to the appropriate regulatory and stakeholder groups.

As discussed below, the understanding of "critical habitat" endorsed by the Fifth Circuit puts these investments at risk. Energy infrastructure projects – both new construction and enhancement of existing facilities – take years to plan and execute. Once constructed, they typically remain in service for decades – 30 or 50 years, or more. Thus, a key consideration in planning and executing these projects is not only recognizing and designing the project to avoid and minimize current potential adverse environmental impacts, but also anticipating and planning for potential changes in regulatory requirements during project development and the operating life of the facility.

The Fifth Circuit has endorsed a regulatory wild card; it is impossible for an energy project developer to anticipate and plan for the costs and delays that are likely to result from the designation of an area that cannot sustain a listed species, now or in the reasonably foreseeable future, as critical habitat for that species. The resulting uncertainty can cause needed energy projects to be delayed or cancelled. And should projects proceed despite being affected by the designation of uninhabitable "critical habitat," the resulting increased costs will likely be passed on to the residential, commercial and industrial consumers of electricity, with no discernible biological benefit from "protecting" an area that cannot sustain the species.

B. Energy projects that could have an adverse effect on critical habitat face significant costs, likely delays, and higher operating costs.

The regulatory impact of a critical habitat designation arises under ESA section 7(a)(2), which requires consultation if some discretionary federal action may affect a listed species or its critical habitat. *See* 16 U.S.C. § 1536(a)(2). When an energy facility is located on or crosses federal lands, requires a federal permit, or receives federal funding, one or more discretionary federal actions are likely to be required for the facility to be developed and additional discretionary federal actions may occur over the operating life of the project. A federal agency also may retain sufficient discretionary control during the operating life of the facility that it is obligated to reinitiate ESA consultation if newly designated critical habitat may be adversely affected by operation and maintenance of the facility. *See* 50 C.F.R. § 402.16(d).

It is common for new and existing energy facilities to prompt one or more of the potential triggers for ESA section 7 consultation: federal lands; federal permits; or federal financing. If critical habitat is present in any of these scenarios, ESA section 7(a)(2) obligates the federal action agency to conduct additional review. If this review results in a finding that the activity may affect critical habitat, then the agency must complete a formal consultation with the Service before the federal action can proceed. 50 C.F.R. § 402.14(a). The consultation process includes preparation of a biological assessment by the project proponent and the federal action agency, *see* 50 C.F.R. §§ 402.12, 402.14(c), and the issuance of an often lengthy and complex biological opinion by the Service, imposing a myriad

of requirements to reduce impacts. *See* 50 C.F.R. §§ 402.14(g) & (h). This additional review and the requirements imposed can result in significant increases in the time and cost for the affected project and changes in the project to minimize and mitigate for habitat impacts.

A few examples amply demonstrate the challenge the ESA can pose for energy projects. In many parts of the country, it is virtually impossible to site electrical infrastructure of any significant length or size and avoid stream crossings and wetlands impacts. If construction includes what the U.S. Army Corps of Engineers (the "Corps") has classified as dredging or filling of waters of the United States ("WOTUS"), then a permit is needed from the Corps under section 404 of the Clean Water Act ("CWA"). 33 U.S.C. § 1344. Many linear projects require section 404 permits for potential WOTUS impacts at multiple crossings along their routes. A utility scale renewable energy project likewise may include a number of Corps-regulated drainages within its project area. The issuance of a section 404 permit triggers the ESA's consultation requirement, which obligates the Corps to consider the potential effect of the activity on critical habitat. *See* 16 U.S.C. § 1536(a)(2).

The Corps has developed a streamlined Nationwide Permit ("NWP") program under CWA section 404 "to regulate with little, if any, delay or paperwork certain activities having minimal impacts." 33 C.F.R. § 330.1(b). EWAC members regularly rely on the NWP program for expedited authorization to construct, operate, and maintain their facilities. For example, NWP 12 authorizes utility line work with limited impacts on wetlands and waterbodies:

> Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.

Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017).

An activity must adhere to a set of general conditions to be authorized under the NWP. In most cases the NWP program allows activities to be "self-certified" without any involvement by the Corps. General Condition 18, however, requires that non-federal permittees (such as EWAC members) notify the Corps if any designated "critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat," so that the Corps can meet its obligations under ESA section 7(a)(2). The Corps has expressly stated that "might affect" is a "low reporting threshold" to trigger notification. 82 Fed. Reg. at 1954.

If the notification requirement of General Condition 18 is triggered, the activity cannot proceed until the Corps has completed its ESA section 7(a)(2) obligations. 33 C.F.R. § 330.4(f)(2). Thus, a project proponent is thrown into a delayed permitting pathway if critical habitat might be affected or is within the vicinity of its NWP activity. *Id*. If the Service does conclude that adverse effects are likely and requires formal consultation, the Service's Biological Opinion likely will require the implementation of measures that add further costs and delays, defeating the NWP objective of regulating "with little, if any, delay or paperwork." 33 C.F.R. § 330.1(b).

Even where the federal nexus arises out of a small portion of a project (for example, a single stream crossing), ESA section 7 analysis can sweep in portions of a project that do not have a federal nexus. While the Corps focuses its 404 permitting decision on the area around NWP-regulated dredging or fill, the Service will look beyond those areas and evaluate the entire project for effects to critical habitat. *See* U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act ("Section 7 Consultation Handbook") at 4-18 (March 1998) ("For example (Figure 4-6), if the proposed action is a wetland fill (requiring a federal permit) to accommodate access to a proposed development (the actual area of impact to the species), then the development is included in the action area.") ("Section 7 Consultation Handbook").[9] The Service's broad analysis effectively means that a small federal activity (involving less than ½ acre of dredge or fill) can federalize the entire project for purposes of the Service's review under ESA section 7(a)(2).

Another example is renewable energy projects sited on federal lands and linear facilities that cross those lands. The federal Bureau of Land Management ("BLM"), an agency within the Department of the Interior, manages about 245 million acres in 12 western states. In several western states, federal lands managed by BLM and other federal agencies comprise the vast majority of the land area, making it

[9] The Service's ESA Section 7 Consultation Handbook (March 1998) is available at: https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.

very difficult to design a project that avoids interacting with federal lands. The siting and construction of new infrastructure, as well as the operation and maintenance of existing infrastructure, on federal lands are subject to rights-of-way ("ROW") obtained from the relevant federal agencies. *See* 43 U.S.C. § 1761. BLM has issued thousands of miles of ROWs for electricity transmission and distribution lines and currently manages almost 16,000 authorizations for electricity transmission and distribution facilities on federal lands.[10] The development and operation of renewable energy generation projects (wind and solar) on federal lands are subject to the same ROW requirements. The last decade in particular saw a number of commercial wind and solar energy projects being permitted and constructed on federal lands. EWAC members will continue to develop and improve electricity generation distribution and transmission facilities on federal lands in the future in order to ensure delivery of safe and reliable electric power across America.

Similar to section 404 permits, ROW grants are discretionary federal actions, and therefore trigger the action agency's obligation to consult with the Service under the ESA. 16 U.S.C. § 1536(a)(2). The action agency must evaluate the effects of granting the ROW on listed species and critical habitat. 50 C.F.R. § 402.02(c). If the ROW has the potential to affect listed species or critical habitat, the approval of the ROW is typically conditioned on a suite of measures, to be undertaken by the entities, that are designed to

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[10] John Ruhs, Acting Deputy Director for Operation, BLM, Statement before the Senate Committee on Energy and Natural Resources (September 19, 2017), available at: https://www.doi.gov/ocl/electric-infrastructure-vegetation-management.

minimize and mitigate for these effects. *See* 50 C.F.R. § 402.14(h) (biological opinions). These conservation measures may force redesign of a project and impose restrictions on ongoing operations and maintenance.

As previously noted, energy infrastructure projects, once established, are likely to remain on the landscape for several decades. In many instances, ESA-compliance is a continuous task and does not end after construction. ROWs and licenses may require renewal and modifications over the course of the infrastructure's lifespan, triggering evaluation of potential impacts on critical habitat designated after the initial ROW or license was approved. Existing federal authorizations also may include provisions requiring that consultation be re-initiated should new critical habitat be designated that may be affected by the authorized action. *See* 50 C.F.R. § 402.16(d) (consultation must be reinitiated where federal discretionary involvement or control has been retained and newly designated critical habitat may be affected). Thus, there are several ways that existing energy infrastructure could be affected by the designation of areas that cannot sustain a species as "critical habitat" for that species.

Critical habitat designations also can create conflicts with other federal standards. For example, the North American Electric Reliability Corporation ("NERC") requires vegetation management near regulated transmission lines to minimize risk of wildfires and outages caused by vegetation contacting or growing too close to lines. *See* NERC FAC-003-4, Transmission Vegetation Management (October 1,

2016).[11] For similar reasons, utilities also practice vegetation management near transmission and distribution lines that are not subject to NERC standards. These required and voluntary vegetation management activities may trigger ESA-related issues if the vegetation along part of a route is within designated critical habitat for a listed species. The activities also may have a federal nexus such as a requirement for a 404 permit or federal land management agency approval prior to conducting vegetation management. Desired vegetation conditions for the listed species also may conflict with NERC requirements in some cases. This could occur, for example, in riparian corridors where tall trees or shrubs could be an essential feature of critical habitat for a listed species, yet NERC standards may not allow taller vegetation near regulated lines. To resolve the conflict between ESA and NERC standards, the utility could be required to conduct surveys to demonstrate species absence prior to initiating work, comply with timing restrictions and provide offsetting mitigation, even though – under the criteria approved by the Fifth Circuit – the area is unoccupied and uninhabitable by the species in question.

Finally, even where an EWAC member's facility is located entirely on private land and does not require any federal permits (and therefore does not trigger the obligations of ESA section 7(a)(2)), financing can be adversely impacted if critical habitat occurs within or adjacent to the facility's footprint. Financiers will often impose more expensive terms for financing based on the existence of critical habitat because of the potential that a future federal authorization or permit

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[11] NERC standard FAC-003-4 is available at: https://www.nerc.com/pa/Stand/Reliability%20Standards/FAC-003-4.pdf.

could be needed, triggering ESA section 7 consultation, resulting in unanticipated costs.

Ultimately, the increased development and operating costs and the impacts of project delays connected to critical habitat for listed species are borne by electric power producers, consumers and taxpayers. Even entirely private projects suffer economic consequences from critical habitat, through adverse impacts on private financing.

C. Energy project developers seek to avoid or minimize the impact of new electricity generation, transmission, and distribution infrastructure within critical habitat.

In the interest of being good stewards of natural resources, and recognizing the additional costs and delays that are likely to result from siting projects in critical habitat, EWAC's members generally seek to avoid affecting critical habitat and to minimize those impacts that are unavoidable. Electricity generation locations and transmission routes are carefully examined, weighing a host of factors that routinely include avoiding and minimizing impacts to sensitive habitats and other natural resources. Indeed, EWAC members often go to great lengths to purposely route and site facilities in unoccupied (and uninhabitable) and often degraded areas, specifically to avoid conflicts with listed species and their habitat.

If routes or potential sites cannot avoid areas containing listed species or critical habitat, then potential impacts on those areas can be evaluated, minimized, and mitigated. During project design and ESA consultation the effects on critical habitat often are roughly estimated based on critical habitat maps.

This initial screening process is typically done at a coarse scale, particularly because electric transmission and distribution systems extend over great distances.

The wind energy industry developed, in coordination with the Service and other stakeholders, the Land-Based Wind Energy Guidelines ("Guidelines").[12] These Guidelines recommend a tiered approach to wind energy development starting first at landscape scale site-screening and proceeding with each tier to more site-specific data collection such as wildlife surveys. This process is designed to screen out potential sites where impacts on species of concern cannot be mitigated. *See* Guidelines at 9 (General Framework of Tiered Approach). Similarly, transmission and distribution companies follow internal siting procedures to identify and address potential impacts and to optimize the time and cost to build a route.

The result of the screening process is that EWAC members can and often do design and plan facilities to avoid or minimize impacts to areas known to support listed species, including occupied and unoccupied critical habitat. For example, a transmission line or wind or solar energy facility may be sited, when feasible, to avoid wooded areas that are suitable for listed bat species or riparian habitat that supports listed salamanders. Once decisions are made about routes and facility locations, it normally takes several years to acquire or access property, obtain permits, and construct the facilities. Many of the required steps for developing a project hinge on site-specific

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[12] U.S. Fish & Wildlife Service, Land-Based Wind Energy Guidelines (March 23, 2012), available at: https://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf.

characteristics and land use requirements. Decisions regarding facility siting and route selection, including design changes, rerouting a segment or relocating facilities, become increasingly expensive and challenging to revisit as the multi-year development process proceeds.

D. Extending ESA "critical habitat" protection to lands that cannot sustain a listed species threatens to disrupt the development and operation of the nation's energy infrastructure.

If the Service can designate areas that are uninhabitable by a listed species as "critical habitat" subject to all of the protections of the ESA, that impacts the development, operation, and maintenance of the nation's energy infrastructure. Further, all of the care a project proponent takes to avoid sensitive habitats will be for naught if the Service can interject, at any point in the development timeline, a determination that lands that do not contain the physical or biological features necessary to sustain an ESA-listed species nevertheless are "unoccupied critical habitat" and subject to the full protections afforded by the ESA.

Similar pressures come to bear on operating facilities. The designation of "unoccupied critical habitat" within the footprint of an existing wind or solar energy facility or overlapping the route of existing transmission or distribution lines is likely to impose unanticipated costs and may force changes in operation and maintenance practices. In addition to the impact on normal operations of the facilities, it is routine for changes to be made to existing facilities during their long operating lives, and those changes can trigger the same federal nexus as a new project. Designating uninhabitable areas as "critical habitat" for a listed

species can disrupt those projects in a myriad of ways. A project developer or facility operator simply cannot anticipate or develop contingencies for the entirely unpredictable risk that land which is not habitable by a listed species can nevertheless be declared by the Service to be "critical habitat," with attendant regulatory consequences.

Returning to the example of the Corps-issued NWP discussed in Section II.B. above, if the Service can designate unsuitable, and indeed uninhabitable, land as critical habitat, then the frequency with which the notification requirements of the NWP's General Condition 18 are triggered will increase drastically. Furthermore, these areas would have no distinguishable characteristics indicating they may support a particular species, making it impossible for project proponents to plan ahead to avoid certain areas since anything could be fair game for a critical habitat designation. For example, consider a wind energy project with a layout carefully designed to avoid woodland habitat that may be suitable for listed bat species and has access road crossings requiring NWP authorization from the Corps. If the project is sited on former woodlands that were logged long ago and converted to other uses, it would suddenly be at risk if the Service were allowed to designate its site as "unoccupied critical habitat" on the premise that the land could one day revert back to forest and grow into suitable bat habitat. Under this scenario, even though the stream crossing regulated by the Corps is outside the newly designated critical habitat, if the project has not yet begun construction then the Corps could be forced to reinitiate consultation, as the Service's expansive review could extend to effects on the former woodlands where turbines will be located. *See* Section 7 Consultation Handbook at 4-17 – 4-18; 50 C.F.R.

§ 402.16(d) (consultation must be reinitiated where federal discretionary involvement or control has been retained and newly designated critical habitat may be affected).

Or consider the transmission line route that carefully avoided salamander habitat on federal lands. If the Service later designated critical habitat near streams that have been converted from native vegetation to agriculture but could, in theory, one day be restored to support listed salamanders, the route could suddenly be subject to section 7(a)(2) requirements for any subsequent discretionary federal actions.

In both cases, infrastructure that had been sited with the specific objective of avoiding sensitive habitat suddenly and unexpectedly would overlap critical habitat. There is no way the project developer could anticipate that this could or would occur, potentially years into the development process or after the project has been constructed and begun operating. No preconstruction survey could reliably identify or quantify this risk and any attempt to do so would be a highly speculative, likely inaccurate and costly guess.

It becomes that much harder (indeed, nearly impossible) for all parties to evaluate future financial risk if the Service has the power to designate land where a project has been proposed or that is occupied by an existing facility as critical habitat even though the land lacks the physical or biological features needed to sustain the listed species. Project developers would no longer be assured of any benefit from avoiding the habitat of listed species in favor of uninhabited and uninhabitable areas. EWAC members simply could not factor such possibilities into their siting and routing decisions and it would be extremely difficult for them to budget for these uncertainties. This affects

not only the potential cost of project development, but also the designation of critical habitat affecting an existing project also can be expected to increase its operating costs. As noted in prior sections, these increased costs are likely to be passed on to electricity consumers in the form of higher rates, although for electrical generation projects that are operating under long-term power purchase agreements the costs may be unrecoverable by the facility owner.

Moreover, as the Service and the Fifth Circuit recognized, the designation of critical habitat could decrease the asset value of any affected electrical infrastructure, due to the stigma of the facility having new, and likely undefined, obligations due to the new critical habitat designation. *See* Pet. App. 13a ("a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions."). It could devalue properties where assets have been retired or are proposed for retirement, as well as land that was purchased in anticipation of future needs and is offered for sale when plans change.

These outcomes are unreasonable, as they will cause delay and increase costs and could prevent projects from being built or maintenance of existing infrastructure, disrupting access to reliable and affordable electric power, all while providing little or no benefit for listed species.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

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