



October 8, 2020

**Via Electronic Submission**

George Wallace, Assistant Secretary  
U.S. Fish and Wildlife Service  
MS: JAO/1N  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

Re: FWS-HQ-ES-2019-0115 – Endangered and Threatened Wildlife and Plants;  
Regulations for Designating Critical Habitat

Dear Secretary Wallace,

GPA Midstream Association (“GPA Midstream”) appreciates the opportunity provided by the U.S. Fish and Wildlife Service (“Service”) to submit comments on its proposed regulations implementing Section 4 of the Endangered Species Act of 1973, as amended (“Act”).<sup>1</sup>

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of approximately 70 corporate members that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as “midstream activities.” Such processing includes the removal of impurities from the raw gas stream produced at the wellhead, as well as the extraction for sale of natural gas liquid products (“NGLs”), such as ethane, propane, butane, and natural gasoline or in the manufacture, transportation, or further processing of liquid products from natural gas. GPA Midstream membership accounts for more than 90% of the NGLs produced in the United States from natural gas processing.

**Summary**

GPA Midstream supports the Service’s proposed rule codifying its process for excluding certain areas from a critical habitat designation under Section 4(b)(2) of the Act. Because the Supreme Court has recently made clear that the Service’s decision *not* to exclude certain areas from a critical habitat designation is subject to judicial review,<sup>2</sup> it is important for the Service to

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<sup>1</sup> Proposed Rule, “Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat,” 85 Fed. Reg. 55398 (Sept. 8, 2020) (to be codified at 50 CFR Part 17).

<sup>2</sup> See *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018).

provide the public with a clear and transparent framework for how such decisions will be made going forward. GPA Midstream believes that the Service's overall approach will enable it to conduct clear and transparent exclusion analyses so that the public is afforded an opportunity to both offer expertise and insight to the Service, as well as understand exactly why the Service has decided to exclude or include a given area.

GPA Midstream particularly supports the requirement in 50 C.F.R. § 17.90(e) (proposed) that if the Service has determined that the benefits of excluding a particular area from critical habitat outweigh the benefits of including the area as part of the critical habitat, "the Secretary shall exclude that area." While such a decision is discretionary, the Service has exercised its discretion by promulgating the subject regulations and, as a part of the exclusion analysis, will apply its discretion to assign weights to the potential benefits of exclusion and inclusion as appropriate. Once the analysis is complete and the factors have been weighed, there are no further considerations for whether or not the area should be excluded. Therefore, requiring that "the Secretary shall exclude that area" is appropriate and serves to give effect to the exclusion analysis process promulgated here.

To that end, GPA Midstream proposes additional enhancements to the Services' proposed regulations that will provide further transparency and ensure that the Service is presented with all necessary information when undertaking an exclusion analysis. GPA Midstream proposes that the Service clarify and expand the meaning of "community impacts" that are considered as a part of evaluating whether "other relevant impacts" warrant exclusion. GPA Midstream also urges the Service to afford weight to the assessment of non-biological impacts provided by project developers regarding any potential exclusion decision, not just those for areas on Federal lands, including those impacts that may have national security or homeland security implications.

Finally, GPA Midstream also supports the Service's proposed determination that a Categorical Exclusion under the National Environmental Policy Act ("NEPA") applies to this rulemaking. The rule would codify and further clarify the Service's existing processes and in no way establishes new requirements that would trigger review under NEPA.

**I. GPA Midstream proposes the Service clarify and expand its exclusion analysis to consider important benefits from infrastructure projects.**

GPA Midstream supports the Service's efforts to further define "other relevant impacts" the Service must consider prior to designating certain areas as a critical habitat under Section 4(b)(2) of the Act. As proposed, the Service intended to define "other relevant impacts" to include public health and safety, community interests, and the environment.<sup>3</sup> The Service also clarified that it may exclude particular areas based on specific "community impacts" to ensure that community development projects, such as schools or hospitals, avoid unnecessary permitting requirements, time delays, or additional costs requirements.<sup>4</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 55403.

GPA Midstream believes that while such considerations are appropriate and useful to include in the preamble, the regulatory language associated with “other relevant impacts” should be expanded and clarified to expressly cover similar development projects that warrant careful weighing of the project’s benefits against the regulatory burdens associated with a critical habitat designation. Therefore, GPA Midstream proposes the Service revise § 17.90(a) as follows:

“Other relevant impacts” may include, but are not limited to, impacts to Tribes, States, local governments, public health and safety, community interests **(such as schools, hospitals, and other infrastructure projects)**, the environment (such as increased risk of wildfire or pest and invasive species management), federal lands, and conservation plans, agreements, or partnerships. . . .”

Similarly, the Service is proposing, under § 17.90(d)(1), to assign weight to benefits of including or excluding a particular area based on “impacts identified by experts in, or by sources with firsthand knowledge of, areas that are outside the scope of the Service’s expertise.” GPA Midstream supports this provision, as it would ensure the Service properly considers non-biological impacts identified by a knowledgeable permittee, lessee, or contractor applicant for a permit, lease, or contract on Federal lands. This provision is necessary so that the Service can fully understand the extent to which the consultation process required under Section 7 of the Act would provide an outcome that has economic or other impacts, such as requiring project modifications and additional conservation measures.

However, GPA Midstream would urge the Service to expand this approach to also consider nonbiological impacts identified by any permittee, lessee, or contractor undertaking development projects on any area subject to a critical habitat designation on non-Federal lands that may have a Federal nexus triggering the Section 7 consultation process. Entities like GPA Midstream that conduct detailed technical and economic analyses as a part of considering development projects possess expertise in, and first-hand knowledge of, how a critical habitat designation may impact a proposed project and can provide the Service with the necessary information required to properly complete the exclusion analysis. The knowledgeable input would be valuable wherever the development at issue is to be sited.

Treating the Federal and non-Federal lands differently is not required by the Act. As the Service recognized in clarifying its position that critical habitat areas on Federal lands may be excluded where appropriate, Section 4(b)(2) of the Act does not distinguish between Federal and non-Federal lands,<sup>5</sup> so only giving weight to nonbiological impacts identified by project developers on Federal lands is unsupported by the statute. Therefore, GPA Midstream requests the Service to expand proposed § 17.90(d)(1)(iv) to cover Tribal, State, and local lands so that the Service may be informed of any potential impacts should consultation under Section 7 of the Act be required.

Relatedly, the final rule should also more expressly recognize that project developers can provide similar insight into nonbiological impacts that may have national security or homeland

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<sup>5</sup> *Id.* at 55402.

security implications. As currently proposed under § 17.90(d)(1)(iii), the Service will solicit expertise on nonbiological impacts with national security or homeland security implications from the Department of Defense, Department of Homeland Security, or any other Federal agency responsible for national security or homeland security. Section 4(b)(2) of the Act requires such national security considerations to be evaluated before making a critical habitat designation; however, the Act does not define what constitutes “national security” or in any way limit from whom the Secretary may solicit advice. Yet, Federal agencies responsible for national security or homeland security often execute their missions with the assistance of private parties contracted to develop and maintain critical infrastructure, including information technology, communications, and energy. In recognition of the valuable insights these contractors may provide, the Service should modify § 17.90(d)(1)(iii) to clarify that nonbiological impacts based on national security or homeland security implications can be identified by “the Department of Defense, Department of Homeland Security, or any other Federal agency responsible for national security or homeland security, as well as contractors that provide support services to these Federal agencies.”

## **II. A Categorical Exclusion under NEPA properly applies to the Proposed Rule.**

GPA Midstream agrees that the Proposed Rule should be given a Categorical Exclusion.<sup>6</sup> Categorical Exclusions apply to categories of actions that would not, individually or cumulatively, have a significant effect on the human environment such that the Service is not required to perform an environmental assessment or environmental impact statement under NEPA. The Proposed Rule merely clarifies and documents the Service’s approach to conducting exclusion analyses under Section 4(b)(2) of the Act. Therefore, the Rule falls within the scope of “[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, *legal*, technical, or procedural nature” under the Service’s NEPA implementing regulations for Categorical Exclusions. *See* 43 CFR § 46.210(i) (emphasis added). Through the Proposed Rule, the Service is only codifying its evaluation process to more fully establish the administrative record should future decisions to forgo an exclusion analysis be subject to judicial review as established under *Weyerhaeuser*.

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<sup>6</sup> The Service is inviting public comment on its initial determination under NEPA. Proposed Rule at 55406.

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GPA Midstream appreciates and welcomes the opportunity to provide these comments. If you have any questions regarding our comments, please contact Matthew Hite, Vice President of Government Affairs, at [mhite@gpamidstream.org](mailto:mhite@gpamidstream.org).

Respectfully Submitted,

A handwritten signature in black ink that reads "Matthew Hite". The signature is written in a cursive, flowing style.

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Matthew Hite  
Vice President of Government Affairs  
GPA Midstream Association