



September 4, 2020

Via Electronic Submission

Gary Frazer
U.S. Fish and Wildlife Service
Department of the Interior
Washington, DC 20240

Samuel D. Rauch III
National Marine Fisheries Service
Office of Protected Resources
1315 East-West Highway
Silver Spring, MD 20910

Re: FWS–HQ–ES–2020–0047 / 200720-0197 – Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat

Dear Messrs. Frazer and Rauch,

GPA Midstream Association (“GPA Midstream”) appreciates the opportunity provided by the U.S. Fish and Wildlife Service and National Marine Fisheries Service (“Services”) to submit comments on the Services’ proposed regulations defining “habitat” as a part of its regulations implementing section 4 of the Endangered Species Act of 1973, as amended (“Act”).¹

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 100 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

¹ Proposed Rule, “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat,” 85 Fed. Reg. 47333 (Aug. 4, 2020) (to be codified at 50 CFR Part 424).

membership accounts for more than 90% of the NGLs produced in the United States from natural gas processing.

Summary

GPA Midstream applauds the Services' efforts to update its requirements in order to promote regulatory certainty, consistency, and transparency. As made clear by the Supreme Court's decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018), regulated entities are in need of additional regulations governing when specific areas outside the geographical areas occupied by a species are considered "habitat" under the Act.

First, GPA Midstream supports the Services' objective to properly define "habitat" in a way that establishes a fundamental standard limiting ambiguity that can spur unnecessary litigation—that standard being whether a species depends upon the geographical area under consideration at the time of listing. Otherwise, that area cannot logically be considered a "habitat" under the Act. As discussed below, GPA Midstream believes that an optimal definition results from a combination of the Services' Proposed and Alternative definitions and requests the opportunity to provide additional comments on the definition the Services ultimately select.

While habitat is not defined in the Act explicitly, the statutory definition of "critical habitat" acknowledges that a critical habitat includes an area within a species' broader habitat: "critical habitat shall not include the entire geographical area which *can be occupied* by the threatened or endangered species." 16 U.S.C. § 1532(5)(C) (emphasis added). When reading this provision along with the Supreme Court's decision in *Weyerhaeuser*, a logical interpretation of 16 U.S.C. § 1532(5)(C) is that "the entire geographical area which *can be occupied* by the threatened or endangered species" is its habitat. Here, the Services are appropriately seeking a definition that places a reasonable limitation on "*can be occupied*" to only include geographical areas that, at the time of listing, can sustain a given species.

Second, GPA Midstream also supports the Services' proposed determination that a Categorical Exclusion under the National Environmental Policy Act ("NEPA") applies to this updated definition. The rule would merely define a term and in no way establishes new requirements that would trigger review under NEPA.

I. GPA Midstream Requests the Services Use This Rulemaking Opportunity to Identify and Propose One Single Definition for Additional Public Comment.

As the Services recognize, the precise wording of the definition of "habitat" must be carefully evaluated to understand all of its associated effects. Therefore, GPA Midstream requests that the Services use this initial round of public comments to align on a single proposed definition—whether the definition GPA Midstream proposes here, the Services' Alternative definition, some combination thereof, or an entirely distinct definition—and then solicit another round of public comments limited to a single, final proposal. Doing so will ensure that all interested stakeholders have an opportunity to opine on the potential impacts the precise language may have on their operations.

II. GPA Midstream Supports a Definition That Takes Elements From Both the Alternative Definition and Proposed Definition.

GPA Midstream believes that a combination of both the Proposed and Alternative definitions, along with a clarification to the purpose of the definition, provides the optimal approach to defining “habitat.”² First, as noted in the Preamble, the Services do not intend to create a new regulatory program surrounding this definition³—therefore, the Services should indicate that the only basis on which to consider the question of whether something is ‘habitat’ is only in the context of determining whether something is ‘critical habitat.’ Put another way: that this definition of habitat will not apply in other contexts or create a new process or requirement outside of the critical habitat determination. Second, the Services’ Proposed definition’s inclusion of the physical places individuals of a species “*depend upon* to carry out one or more life processes” is preferred to the Alternative definition’s inclusion of the physical places individuals of a species “*use to carry out* one or more life processes.” The phrase “*depend upon*” requires that the species actually needs the physical places to persist during one or more stages of its life cycle. As that is what the law is designed to protect, it fits well within the statutory framework. In contrast, the term “*use*” may include a broader range of activities that a species briefly performs in a physical place without actually needing that physical place to persist during one or more stages of its life cycle.

GPA Midstream further believes that the second sentence of the Services’ Alternative definition is necessary to make clear that unoccupied geographical areas can only be considered habitat if, at the time of listing, a given species can survive in the subject area without any additional modification or restoration. Regulated entities need a definition providing this clarity so that developers may predictably forecast risks associated with undertaking development activities in potential habitat areas.

Building upon this second sentence of the Services’ Alternative definition, the Services should first clarify that the ‘necessary attributes’ must presently exist in the area at the time of designation, not simply that some attribute suggests that an uninhabitable area may possibly become habitable at some indefinite time in the future. Second, the Services should clarify that, to be habitat, the area must do more than “support” the species. Because support can be construed as limited to discrete increments of time that may not be relevant for the species’ life history, the Services should determine that the area has the capacity to “support and sustain” the species. Finally, the Services should clarify that the requirements of this sentence apply to both occupied and unoccupied areas. This revision would ensure that, irrespective of occupancy status, the necessary features presently exist in the area and are capable of supporting and sustaining the species.

² The Services’ Proposed definition is: “The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species.” The Services’ Alternative definition is: “The physical places that individuals of a species use to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist.” See Proposed Rule at 47334.

³ 85 Fed. Reg., at 47, 335.

It is not enough that a given species can survive in an unoccupied geographical area at some future date—under the Act, unoccupied critical habitat must meet a more demanding standard than that of occupied critical habitat, which should be reflected in the definition of “habitat” now. *See Home Builders Ass’n of Northern Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010); *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) (for the designation of critical habitats in unoccupied areas, “it is not enough that the area’s features be essential to conservation, the area itself must be essential”); *see also Markle Interest, LLC v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 648 (5th Cir. 2017) (denying rehearing en banc) (Jones, J., dissenting) (“[W]e know from the ESA’s text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be different from and more demanding than an occupied critical habitat designation.” (emphasis in original)). With this in mind, GPA Midstream believes that the Services could further clarify the definition of “habitat” with the inclusion of language that clarifies the purpose of the definition limits the review from a temporal perspective by adding an additional clause as provided in **bold** below:

For purposes of designating critical habitat, habitat is, at the time of designation or revision of designation, the physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist, but presently have the necessary attributes to support and sustain the species, and which individuals of the species are reasonably certain to depend upon in the foreseeable future.

GPA Midstream believes this combination of the Proposed and Alternative language, along with temporal limitations, more fully incorporates the Court’s guidance from *Weyerhaeuser* and better aligns with the concept of “habitat” underlying the Fish and Wildlife Service’s subsequent 2019 amendments to its regulations for designating critical habitat. It accounts for the important “reasonable certainty” standard in 50 CFR § 424.12(b)(2) that applies to areas that are suitable for future use, which is a crucial condition to ensure that the consideration of “habitat” is grounded in what is foreseeable. The first sentence is similar to the corresponding sentence in the Services’ Proposed definition, with a clarification that the definition only applies for the purpose of designating critical habitat. The second sentence is similar to the corresponding sentence in the Services’ Alternative definition with additional revisions to reflect that: (1) habitat informs the designation of both occupied and unoccupied areas as critical habitat; (2) the necessary attributes must presently exist in the area at the time of designation; and (3) the attributes must be in sufficient condition that they have the capacity to support and sustain the species in that area.

III. A Categorical Exclusion Under NEPA Properly Applies to the Proposed Rule.

GPA Midstream agrees that the Proposed Rule should be given a Categorical Exclusion.⁴ Categorical Exclusions apply to categories of actions that would not, individually or

⁴ The Agencies are seeking public comment on its application of a Categorical Exclusion “or any other aspects of NEPA analyses needed for these revisions.” Proposed Rule at 47336-37.

cumulatively, have a significant effect on the human environment such that the Services are not required to perform an environmental assessment or environmental impact statement under NEPA. The Proposed Rule simply defines “habitat,” and therefore qualifies as “[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, *legal*, technical, or procedural nature” under the Services’ NEPA implementing regulations for Categorical Exclusions. *See* 43 CFR § 46.210(i) (emphasis added). Through the Proposed Rule, the Services are acting in accordance with a Supreme Court decision to provide a required legal definition of “habitat.” The Services are not establishing new requirements that may change the scope of “critical habitat” that would otherwise not be suited for a Categorical Exclusion. As the Services explain, “the proposed regulatory definition of ‘habitat’ would not impose any additional procedural steps or change in how we designate critical habitat. . . .”⁵

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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.

Respectfully Submitted,



Matthew Hite
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GPA Midstream Association

⁵ Proposed Rule at 47335.