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Public Comments Processing

Attn: Docket Nos. FWS-HQ-ES-2018-0006; FWS-HQ-ES-2018-0007; FWS-HQ-ES-2018-0009
U.S. Fish and Wildlife Service, MS: BPHC
5275 Leesburg Pike,
Falls Church, VA 22041-3803

National Marine Fisheries Service
Office of Protected Resources
1315 East-West Highway
Silver Spring, MD 20910

Comments by GPA Midstream Association on ESA Implementation – Regulation Revisions

**Proposed Changes to ESA § 4 -- Endangered and Threatened Wildlife and Plants;
Provisions of the Regulations for Listing Species and Designating Critical Habitat**

50 CFR Part 424

Dear Sir or Madam,

The GPA Midstream Association (GPA Midstream) submits the following comments in response to the U.S. Fish and Wildlife Service and National Marine Fisheries Service's (together, "the agencies") jointly-proposed Revision of the Regulations for Interagency Cooperation, 83 Fed. Reg. 35178 (July 25, 2018) and Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35193 (July 25, 2018), as well as the U.S. Fish and Wildlife Service's proposed Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35174 (July 25, 2018) ("Blanket 4(d) Rule"). We applaud the U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA) and Department of Commerce (the agencies) for the reform actions that they are undertaking. The proposed reforms make incremental changes and codify many of the processes and interpretations that are already in place. These changes by no means threaten the purpose of the Endangered Species Act (ESA) - they strengthen the regulations that enact it.

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 100 corporate members of all sizes 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. GPA Midstream members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. Our members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs. GPA Midstream is the primary advocate for a sustainable midstream industry focused on enhancing the viability of natural gas, natural gas liquids and crude oil. We work with legislators and regulators to promote a safe and viable midstream industry. Our member companies have significant experience with the ESA and the ESA consultation and review process.

Rescinding the “Blanket 4(d)” Rule

- GPA Midstream supports rescinding the FWS’s blanket Section 4(d) rule in 50 C.F.R. § 17.31 for all future species listed as “threatened.” Congress clearly established two different tiers of protections for endangered and threatened species, and the regulations should be revised to reflect this intent.
- FWS should evaluate protections for threatened species on a case-by-case basis similar to NMFS. This approach is consistent with the statutory text of the ESA. The ESA prohibits (as a general rule) the killing, capturing, or taking of listed endangered species. 16 U.S.C. § 1538. For threatened species, the ESA authorizes the extension of endangered species protections by regulation “to any threatened species” after the Secretary of Interior or Commerce determines the protections are “necessary and advisable to provide for the conservation of such species.” 16 U.S.C. § 1533(d). Thus, the ESA contemplates that FWS will have to perform a species-specific review to extend ESA protections to threatened species.
- All currently listed species should be re-reviewed after the Blanket 4(d) rule is rescinded within two years of the effective date in order to properly determine whether 4(d) protections are warranted for those listed species.
- The FWS should be precluded from developing a special 4(d) rule after a new species has been listed or reclassified as threatened, unless the agency identifies new information and that new information independently warrants issuance of such a rule.

On the Designation of Unoccupied Areas

- The agencies have proposed to revise their regulations regarding the designation of critical habitat. In general, GPA Midstream supports these revisions as the proposed changes would reinstate the agencies’ proper interpretation of the ESA regarding the designation of “unoccupied areas” as critical habitat that the agencies employed before issuance of the 2016 regulatory amendments. 81 Fed. Reg. 7,413 (Feb. 11, 2016).
- Congress limited the agencies’ ability to broadly designate critical habitat in the ESA, by including within the definition of the term the following limiting provision: “Except in those circumstances determined by the Secretary, 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). When the agencies originally published their regulations in 1984, they

specified a two-step process for designating critical habitat: (1) determine whether occupied areas would meet the species' conservation needs, and if not, then (2) determine whether unoccupied areas are essential to the conservation of the species before designating such areas. Thus, under the original longstanding policy, the agencies could designate unoccupied areas "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." *See* 49 Fed. Reg. 38,900, 38,909 (Oct. 1, 1984) (previously codified at 50 C.F.R. § 424.12(e)).

- EPA's 2016 regulatory amendments abandoned the two-step framework and permitted the agencies to designate unoccupied areas as critical habitat, even designating only the occupied areas as critical habitat would result in the recovery of the species. The 2016 amendments also allowed the agencies to designate as occupied critical habitat those areas that were not actually occupied or lacked the necessary biological or physical features essential to conservation.
- The agencies' proposed rule properly seeks to reinstate the former, legally supported regulatory approach. This is essential, because Congress plainly signaled its intent to treat occupied and unoccupied areas differently. *See Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (the ESA imposes "a more onerous procedure on the designation of unoccupied areas."). The regulations should be revised to clearly indicate that first, only occupied areas will be considered. If the agencies determine that the occupied habitat designations are not sufficient, only then should they consider whether to designate any unoccupied areas as critical habitat. If unoccupied areas are designated as critical habitat, the agencies should make clear findings that these areas are essential to the conservation of the species. *See Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").
- While we support the proposed regulatory revisions, we believe more clarity is needed. The ESA Section 4(a)(3)(A) states that the designation of critical habitat must be made "to the maximum extent prudent and determinable" using the best available and objectively evaluated scientific data. The agencies should integrate this language into the regulations to clarify the requirements for designating critical habitat. We suggest making the changes below to be consistent with the ESA language. In addition, the term "reasonable likelihood" needs to be further clarified. It is open-ended and leaves the regulation up to interpretation by the agencies.

424.12(b)(2) The Secretary will designate as critical habitat ~~determined by the Secretary to be appropriate~~ specific areas outside the geographical area occupied by the species only upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species or would result in less efficient conservation for the species. Efficient conservation for the species refers to situations where the conservation is effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species. In addition, for an

unoccupied area to be considered essential, the Secretary must determine that there is a reasonable likelihood that the area will contribute to the conservation of the species. In designating critical habitat, the Secretary shall make such designations to the maximum extent prudent and determinable using the best available and objectively evaluated scientific and commercial information regarding a species' status.

- GPA Midstream further urges the agencies to amend the definition of “physical or biological features” and “geographical area occupied by the species” to exclude habitat characteristics that support ephemeral or dynamic habitat conditions. The ESA constrains critical habitat designations to “specific areas within the geographical area occupied by the species... on which are found those physical and biological features... essential to the conservation of the species.” 16 U.S.C. § 1532(5)(a)(i). The regulatory definitions should reflect the limitations Congress imposed in the ESA.

Physical or biological features. The features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics.

~~*Features may include habitat characteristics that support ephemeral or dynamic habitat conditions.*~~ *Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.*

*Geographical area occupied by the species. An area ~~may generally be delineated around species' occurrences~~ as determined by the Secretary *to the maximum extent prudent and determinable where a species regularly or consistently inhabits* (i.e., range). Such *portions of the range* may include areas ~~may include those areas~~ used throughout all or part of the species' life cycle, ~~even if not used on a regular basis~~ (e.g., migratory corridors ~~and seasonal habitats, and habitats used periodically,~~ but not solely by vagrant *or outlier* individuals).*

Where Additional Clarity is Required by the Agencies

- GPA Midstream supports the addition of the definition “foreseeable future” when considering a species' threatened or endangered status. This provides regulated entities with greater certainty regarding their regulatory obligations.
- We further support the removal of the phrase “without reference to possible economic or other impacts of such determination” from paragraph 424.11(b). In the proposal, the agencies state that there may be circumstances where impacts are referenced (i.e., economic). We suggest that the agencies should always disclose the potential impacts to the public in order to provide better transparency regarding the decision making process.
- Multiple times within the regulatory text of Part 424, the language refers to either the “best available scientific and commercial information” or “best available data”. This term is vague and historically has caused interpretation problems. For example, in recent listing regulations and recovery planning processes, both proposed and adopted, there has been concern over the use of the precautionary principle. This principle coupled with over reliance on models that

have not been validated can lead to an overly broad application of the statute (i.e. listing of species or habitat that is not warranted). In addition, many times the states have collected detailed information on a species that agencies fail to utilize in the decision making process. When referencing “best available scientific and commercial information” or “best available data” those terms should always include objectively evaluated science and biological opinions including data from both state and federal sources that meets standards submitted by stakeholders.

On Improving State Coordination

- The agencies should add an additional section to 50 C.F.R. § 424.12 in order to increase the coordination and cooperation between the agencies and the affected states. This was proposed by the State of Alaska in their comments to NOAA’s Streamlining Regulatory Processes and Reducing Regulatory Burden, 82 Fed. Reg. 31,576 (August 21, 2017).

424.12 (c) In designating any area as critical habitat, the Secretary shall consult with affected States (those in which the proposed critical habitat is located or those that may be affected by the designation of the habitat) prior to completing the designation, and the face of and findings of such consultation shall be addressed in the final rulemaking for the designation.

Proposed Changes to ESA § 7 -- Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation

50 CFR Part 402

Revised Definition of “Destruction or Adverse Modification”

- The revised definition of “destruction or adverse modification” is a positive change to the regulatory language. It eliminates the expansive language which allowed the agencies to evaluate the effects of a project on habitat that does not and may never exist.
- The agencies also should clarify that federal agencies are not obligated to consult with the agencies under Section 7 where a proposed agency actions is not likely to adversely affect a listed species or adversely affect critical habitat.

Where Additional Clarity is Required

- The agencies should concurrently determine and disclose the “value of critical habitat for the conservation of a species”. The agencies need to use the area’s conservation value to inform critical habitat designation.
- The regulations must clarify that the scope of a consultation under section 7(a)(2) should be limited to the activities, areas, and effects within the jurisdictional control and responsibility of the regulatory agency. A lead agency should defer to cooperating agencies in evaluating potential impacts when the cooperating agencies have jurisdiction over the area being analyzed.

- The regulations should be amended as follows:

402.07 When a particular action involves more than one Federal agency, the consultation and conference responsibilities may be fulfilled through a lead agency. Factors relevant in determining an appropriate lead agency include the time sequence in which the agencies would become involved, the magnitude of their respective involvement, and their relative expertise with respect to the environmental effects of the action. The Director shall be notified of the designation in writing by the lead agency.

(a) When an action involves more than one Federal agency, a lead agency is responsible for preparing a biological assessment, but it may have responsibility only for activities, areas and effects within its jurisdictional control and responsibility. The cooperating agencies will be responsible for preparing the portions of the biological assessment that discusses those areas over which the cooperating agencies have jurisdiction.

Revisions to Handbook and Establishing Precedence of Regulations When In Conflict

- The Section 7 Consultation Handbook is nearly 20 years old and should be updated. Once updated, sections of the handbook should be included as an appendix in the regulations to provide regulatory certainty for applicants.
- The Section 7 Consultation Handbook states that a consultation does not need to be done when the effects of the proposed action are not likely to have any adverse effects on the species. The handbook then clarifies that this includes effects that are “completely beneficial,” “insignificant” or “discountable.” For clarity, this language needs to be incorporated into 402.03 and 402.12(b)(1) as is seen below.

402.03 Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.

(a) Exceptions

(1) When the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat because the effects are completely beneficial, insignificant, or discountable.

402.12 (b) Exceptions. (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under §402.12 or as a result of informal consultation with the Service under §402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat because the effects are completely beneficial, insignificant, or discountable.

On Improving Process for State Involvement in Consultation and Ensuring Continuity across Permitting Programs

- An affected state should be given ample opportunity to comment and participate in the Section 7 consultation process. As was stated in the Western Governors’ Association Policy

Resolution 2017-11, “State agencies often have the best available science, expertise and other scientific and institutional resources such as mapping capabilities, biological inventories, biological management goals, state wildlife action plans and other important data. This wealth of resources is highly valuable; the federal government should recognize, consult, and employ these vast resources in developing endangered species listing, recovery and delisting decisions.” Increased consultation with the states will bring their expertise to the consultation and may result in more implementable solutions and better conservation outcomes. To facilitate this increased cooperation, we propose the following regulatory language:.

*402.14(d) Responsibility to provide best scientific and commercial data available. The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency, **affected state(s)** or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.*

*402.14(g)(5) Discuss with the Federal agency, **affected state(s)** and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency, **affected state(s)** and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency **and affected state(s)** the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency **and affected state(s)**. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.*

- However, GPA Midstream also urges the agencies to adopt a deadline for completing informal consultations. We request that the agencies set a 45-day deadline to mirror the permitting review process for other federal regulatory agencies (e.g., USACE review of some Nationwide Permit Pre-Construction Notifications).

GPA Midstream appreciates the opportunity to submit comments on this important issue. If you have any questions, please contact Matthew Hite.

Sincerely,

A handwritten signature in black ink that reads "Matthew Hite". The signature is written in a cursive style with a large initial "M" and a stylized "Hite".

Matthew Hite
Vice President of Government Affairs
GPA Midstream Association