**November 29, 2021**

Via electronic submission (http://www.regulations.gov)
Attn: FWS-HQ-ES-2019-0115
United States Fish and Wildlife Service
MS: JAO (PRB/3W)
5275 Leesburg Pike
Falls Church, VA 22041-3803

**Re: FWS-HQ-ES-2019-0115; Proposed Rule to Rescind Final Rule Titled "Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat"**

Dear Sir or Madam:

GPA Midstream Association ("GPA Midstream") appreciates this opportunity to submit comments on the U.S. Fish and Wildlife Service's ("Service") proposed rule to rescind its December 18, 2020 final rule[1] titled "Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat" (hereinafter the "Proposed Rule"[2]).

GPA Midstream has served the U.S. energy industry since 1921 and has nearly 60 corporate members that directly employ more than 56,000 employees that are engaged in a wide variety of services that move vital energy products such as natural gas, natural gas liquids ("NGLs"), refined products and crude oil from production areas to markets across the United States, commonly referred to as "midstream activities." The work of our members indirectly creates or impacts an additional 320,000 jobs across the U.S. economy. GPA Midstream members recover close to 90% of the NGLs such as ethane, propane, butane, and natural gasoline produced in the United States from more than 380 natural gas processing facilities. In the 2017–2019 period, GPA Midstream members spent over $50 billion in capital improvements to serve the country's needs for reliable and affordable energy.

GPA Midstream supports sensible regulation that promotes certainty, consistency, and transparency in Service decisions regarding critical habitat exclusions pursuant to section 4(b)(2) of the Endangered Species Act (the "Act"),[3] consistent with the Supreme Court's decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018). The Service's Proposed

[1] 85 Fed. Reg. 82,376 (Dec. 18, 2020) (hereinafter "2020 Final Rule").

[2] 86 Fed Reg. 59,346 (October 27, 2021) (hereinafter "Proposed Rule").

[3] 16 U.S.C. § 1533(b)(2).

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Rule, however, would promote uncertainty, inconsistency, and a lack of transparency by effectively reinstating the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (hereinafter "the 2016 Policy").[4] Moreover, the Service has failed to provide sufficient rationale for arbitrarily rescinding a sensible set of regulations it promulgated just one year ago. For these reasons, GPA Midstream must oppose the Proposed Rule. We urge the Service to reconsider rescission.

## 1. The Proposed Rule Is Inconsistent with *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*

In *Weyerhaeuser*, the Supreme Court definitively held that discretionary decisions to exclude a particular area from a "critical habitat" designation pursuant to section 4(b)(2) of the Act was judicially reviewable.[5] As such, decisions to exclude a particular area *must* be effected in a uniform and transparent manner. Without a transparent and consistent decision-making process in effect, reviewing courts will be unable to discern whether the Service has abused its discretion pursuant to section 706(2) of the Administrative Procedure Act ("APA").[6] The Service's Proposed Rule nonetheless seeks to rescind the exact type of transparent and uniform framework necessary for both a court reviewing the Service's decision and an affected party engaged in the decision-making process.

The Court also specifically addressed the Act's mandate in section 4(b)(2) that the Service consider the economic and other relevant impacts of a proposed exclusion as well as the APA requirement that an agency consider all of the relevant factors, including those mandated by section 4(b)(2).[7] And although *Weyerhaeuser* does not explicitly require a codified regulatory framework like that included in the 2020 Final Rule, *Weyerhaeuser* does require the Service be transparent and provide a rational basis to support its decision. The Proposed Rule is inconsistent with the Court's decision where it fails to provide the type of transparent process, including the factors and impacts the Service must consider, previously codified by the 2020 Final Rule and instead reverts to a policy of blind reliance on the Service's promise to "always explain [its] decisions not to exclude."[8]

Finally, the Proposed Rule would reinstate the 2016 Policy that explicitly provides the opposite of *Weyerhaeuser*: that the Service's "consideration of whether to exclude areas from critical habitat" is discretionary and not subject to judicial review.[9]

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[4] 81 Fed. Reg. 7,226 (February 11, 2016).

[5] 139 S. Ct. at 371.

[6] 5 U.S.C. § 706(2).

[7] 81 Fed. Reg. 7,226, 7,233–7,234; *Weyerhaeuser*, 139 S. Ct. at 371.

[8] Proposed Rule, 59,348.

[9] 81 Fed. Reg. 7,226, 7,233–7,234

## 2. The Proposed Rule Will Promote Uncertainty, Inconsistency, and a Lack of Transparency

It is important for the Service to provide the public and industry stakeholders with a clear and transparent framework for how the Service makes decisions to exclude certain areas from a critical habitat designation pursuant to the Act. But the Proposed Rule rescinds the transparent framework and replaces it with an approach the Agency itself described as "stop[ping] short" of articulating how the Service decides to engage in the discretionary exclusion analysis. Indeed, the Proposed Rule completely fails to articulate the standards for when the Service enters into this discretionary weighing analysis under section 4(b)(2). Without a clear understanding of how the Service makes decisions to engage in this analysis, the public cannot effectively engage the Service in requests for exclusion.

The Proposed Rule also fails to explain how the Service assigns weight to various benefits of inclusion or exclusion of a particular area designated as critical habitat—making it even more difficult for the public to understand and effectively engage in the decision-making process. Stakeholders instead must rely on a noncomprehensive list of factors and impacts that the Service may or may not consider. Such an approach is a step backwards in fostering transparency and keeps stakeholders in the dark regarding the types of information needed by the Service to engage in a thorough exclusion analysis.

Relatedly, the Proposed Rule seeks to treat Federal and non-Federal lands differently despite no such support found in the Act. Rather, Congress declared only that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act."[10] And as the Service has previously recognized:

> [A]ll Federal agencies have responsibilities under section 7 of the Act to carry out programs for the conservation of listed species and to ensure that their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat. However, there is nothing in the Act that states that Federal lands shall be exempted from the consideration of a discretionary 4(b)(2) analysis simply because land is managed by the Federal government.[11]

This inconsistency only limits the Service by disallowing it from even considering an exclusion analysis for lands managed by the Federal government, which can lead to arbitrary application of the Act. In sum, the Proposed Rule weakens the public engagement process for section 4(b)(2) analysis by failing to provide a transparent and consistent framework and instead substitutes an analysis shrouded in agency "discretion" until and unless a party seeks judicial review.

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[10] U.S.C. § 2(c)(1)

[11] 2020 Final Rule, 55,402.

### 3. The Service Failed to Adequately Explain Rationale for Rulemaking

Finally, the Service has failed to adequately explain the basis for the Proposed Rule and provides no detail regarding the changed circumstances that prompted such a quick reversal of its year-old regulations. It is well settled that in changing course the Service must "show that there are good reasons for the new policy."[12] Here, the Service offers only that its opinion has changed. Just one year ago, the Service explained its goal in promulgating the 2020 Final Rule was "to provide clarity to the Service and the public in light of agency experience and current practices, and to respond to the Supreme Court's recent decision in *Weyerhaeuser*."[13]

Today, the Service proposes to rescind that rule because it "unduly constrained the Service's discretion in administering the Act, potentially limiting or undermining the service's role as the expert agency and its ability to further the conservation of endangered and threatened species through designation of their critical habitats."[14] The Service, however, provides *no* example of actual constraint, limited agency ability, or an inability to further the conservation of endangered and threatened species through critical habitat designation. Without any tangible rationale and no change in circumstances beyond an Executive Order to review recent rulemaking, the Service's Proposed Rule is arbitrary and without proper justification.

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GPA Midstream appreciates the opportunity to submit these comments on the Proposed Listing and is standing by to answer any questions you may have.

Respectfully submitted,

Matt Hite
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GPA Midstream Association

[12] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, (2012); *see Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (agency must "provide a reasoned explanation for the change.").

[13] 2020 Final Rule, 82,376.

[14] Proposed Rule, 59, 347.