



November 29, 2021

Via electronic submission (<http://www.regulations.gov>)

Attn: FWS-HQ-ES-2020-0047

United States Fish and Wildlife Service

MS: PRB(3W)

5275 Leesburg Pike

Falls Church, VA 22041-3803

**Re: FWS-HQ-ES-2020-0047; Proposed Rule to Rescind Final Rule Titled
“Regulations for Listing Endangered and Threatened Species and
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 (“Fish and Wildlife”) and National Marine Fisheries Service’s (“NMFS”) (collectively, the “Services”) proposed rule to rescind its December 16, 2020 final rule¹ titled “Regulations for Listing Endangered and Threatened Species and 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 previously supported the Services’ efforts to update its requirements pursuant to the Endangered Species Act (“the Act”)³ to promote regulatory certainty, consistency, and transparency. In particular, GPA Midstream generally supported the Services’ very recent—

¹ 85 Fed. Reg. 81,411 (Dec. 16, 2020) (hereinafter “2020 Final Rule”).

² 86 Fed. Reg. 59,353 (Oct. 27, 2021) (hereinafter “Proposed Rule”).

³ 16 U.S.C. § 1533(b)(2).

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and long overdue—promulgation of the definition of “habitat” under the Act. The Services’ Proposed Rule, however, defies principles of consistency and clarity while spurring unnecessary litigation in the face of conflicting guidance from the Supreme Court in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018). Moreover, the Services have 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 Will Promote Uncertainty, Inconsistency, and a Lack of Transparency

As the Court in *Weyerhaeuser* recognized, the definition of critical habitat “allows the Secretary to identify the subset of habitat that is critical, but leaves the larger category of habitat undefined.”⁴ And without a codified definition of “habitat,” the Services historically applied the criteria from the Act’s “definition of ‘critical habitat’ based on the implicit premise that any specific area satisfying that definition was habitat.”⁵ This led to confusion amongst regulated stakeholders hoping to engage in the critical habitat exclusion process, inconsistent application of the Act by the Services, and lengthy, unnecessary litigation—including *Weyerhaeuser* and its progeny on remand. In *Weyerhaeuser*, the Supreme Court made clear that regulated entities are in need of that additional regulation governing when specific areas outside the geographical areas occupied by a species are considered “habitat” under the Act. Yet the Services propose to do the exact opposite by rescinding the very regulatory definition of “habitat” it promulgated just one year ago in response to *Weyerhaeuser*.

Because the Act does “not authorize the Secretary to designate the area as *critical* habitat unless it is also *habitat* for the species,”⁶ the Services must maintain a codified definition of “habitat.” Regulated entities need a definition providing a sufficient level of clarity so that developers may predictably forecast risks associated with undertaking development activities in potential habitat areas. The public at large needs a definition providing a sufficient level of understanding so that it may effectively engage in the stakeholder processes related to critical habitat designations. And regulated entities—including the Services—need a definition providing for consistent application to avoid unnecessary litigation harping on the meaning of a term the Services could simply define (as they already have). Instead, the Services’ Proposed Rule seeks to rescind the exact type of transparent and uniformly-applied definition necessary for both an affected party engaged in the decision-making process as well as a court reviewing the Service’s decision regarding critical habitat such as that at issue in *Weyerhaeuser*.

Although *Weyerhaeuser* does not explicitly require a codified definition of “habitat” like that included in the 2020 Final Rule, *Weyerhaeuser* implicitly acknowledges the need for such a definition in its conclusion that an area must logically be “habitat” in order for that area to meet

⁴ *Id.* at 369.

⁵ 85 Fed. Reg. 47,333, 47, 334 (August 5, 2020).

⁶ 139 S. Ct. at 368–69 (emphasis in original).

the narrower category of “critical habitat.”⁷ In sum, the Proposed Rule increases uncertainty for regulated entities and weakens the public engagement process for critical habitat by failing to provide a transparent and consistent definition and instead substitutes an analysis shrouded in agency “discretion” until and unless a party seeks judicial review.

2. The Service Failed to Adequately Explain Rationale for Rulemaking

Finally, the Services have failed to adequately explain the basis for the Proposed Rule and provide no detail regarding the changed circumstances that prompted such a quick reversal of its year-old regulation. It is well settled that in changing course the Services must “show that there are good reasons for the new policy.”⁸ Here, the Services offer only that its opinion has changed after “reevaluating.” Just one year ago, the Services explained their goal in promulgating the 2020 Final Rule was “to provide transparency, clarity, and consistency for stakeholders.”⁹

Today, the Services propose to rescind that rule because the definition “inappropriately constrain[s] the Services’ ability to designate areas that meet the definition of ‘critical habitat’ under the Act,” the definition is insufficiently clear, and the definition’s application is “inherently confusing.”¹⁰ The Services, however, provide *no* example of actual constraint, limited agency ability, or confusion regarding the definition of “habitat” and its application by a regulated entity.

Indeed, following the current definition is a sound approach as the term habitat is defined to encompass areas that support one or more life processes of a species. If an area lacks the “resources and conditions necessary to support one or more life processes of a species,”¹¹ then a fortiori it cannot be habitat for the particular species. Revoking the current definition suggests that habitat could include nearly any area—as it would be untethered to whether a species actually inhabits the area or could utilize an area given the availability of resources that could support the species.

Moreover, where the Services could utilize this rulemaking to promulgate a refined definition for “habitat” that considers both the Services’ alleged concerns as well as any other comments expressed by stakeholders, the Services instead choose to rescind the definition altogether. This backwards step only further illustrates the lack of rationale relied upon by the Services for the Proposed Rule. Without any tangible rationale and no change in circumstances

⁷ *Id.*; see also 50 Fed. Reg. 47,333, 47,334.

⁸ *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.”).

⁹ 85 Fed. Reg., 47,334; 2020 Final Rule, 81,418.

¹⁰ Proposed Rule, 59,354–55.

¹¹ 2020 Final Rule, 81,412.

beyond an Executive Order¹² to review recent rulemaking, the Service's Proposed Rule is arbitrary and without proper justification.

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,

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

Matt Hite
Vice President of Government Affairs
GPA Midstream Association

¹² 86 Fed. Reg. 7,037 (Jan. 25, 2021) (“E.O. 13990 of Jan. 2021”).