August 8, 2022

Via electronic submission (http://www.regulations.gov)
Attn: FWS-HQ-ES-2021-0033
United States Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: FWS-HQ-ES-2021-0033**; Proposed Rule to Revise the Regulations Concerning Experimental Populations of Endangered Species and Threatened Species under the Endangered Species Act**

Dear Sir or Madam:

GPA Midstream Association ("GPA Midstream" or "GPA") appreciates this opportunity to submit comments on the U.S. Fish and Wildlife Service's ("Service" or "FWS") proposed rule to revise the regulations concerning experimental populations of endangered species and threatened species under the Endangered Species Act ("ESA") (hereinafter the "Proposed Rule" or "Proposal"[1]).

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 who 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, services that are 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, for example, GPA Midstream members spent over $50 billion in capital improvements to serve the country's needs for reliable and affordable energy.

GPA Midstream members have extensive gas and NGL operations that will be directly impacted by the Proposed Rule. While GPA supports the Service's efforts to protect threatened and endangered species, the Service's Proposed Rule here is beyond the command of the ESA, raises far too many questions and concerns to go on for publication as a final rule, and would, if published, unnecessarily impact different industries engaged in low-impact activities in

[1] 87 Fed. Reg. 34,625 (June 7, 2022) ("Proposed Rule").

contravention of the Infrastructure Investment and Jobs Act. Instead, GPA urges the Service to reconsider the Proposed Rule altogether.

I. The Service Lacks Authority to Impose the Proposed Rule

The Service's Proposed Rule intends to more broadly permit the introduction of experimental populations outside of those species' "historical range" based on the Service learning "that climate change is causing, or is anticipated to cause, many species' suitable habitat to shift outside of their historical range."[2] But this would give the Service regulatory power over nearly the entire geographic area of the United States. With no discernible limit on, or framework against which to assess, the meaning of "areas of habitat outside of the historical range of the affected listed species," the Service has unilaterally granted itself a new and broad power without congressional authorization. But agencies "have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'"[3]

Here, Congress has not given the Service power to exercise regulatory authority over any given geographic area for the purpose of introducing an experimental species—an action that would have innumerable consequences for the existing, ongoing, and future uses of those areas. And, importantly, the Service points to none. Indeed, the Service notes the Proposed Rule is intended to "*more clearly establish*" its own authority—without any new directive from Congress.[4] Moreover, the Service asserts that this authority extends from the *entire text* of the ESA.[5] Citing 16 U.S.C. §§ 1531 *et seq.*, the Service makes no attempt to hide the lack of clear, textual delegation from Congress to expand its authority to introduce experimental populations outside of the species' historic range.[6]

Moreover, the Service is amending its regulations to authorize an unconstitutionally expansive regulatory regime for the intended purpose of combating the effects of climate change on species. But Congress did not enact the ESA in 1973 to respond to the effects of climate change.[7] Congress enacted the ESA to conserve such threatened and endangered species and the ecosystems "*upon which*" those species depend—this language was not altered as part of the 1982 amendments permitting the introduction of experimental populations.[8] Without a "clear congressional authorization," the Service cannot now transform its regulatory authority to so

[2] Proposed Rule, 34,625.

[3] *West Virginia v. EPA*, 597 U.S. __, Slip Op. at 19 (2022) (internal citations omitted).

[4] Proposed Rule, 34,625 (emphasis added).

[5] *Id.*, 34,628.

[6] *See* 50 C.F.R. § 17.81(a).

[7] Pub. L. 93-205, § 2 (Dec. 28, 1973).

[8] 16 U.S.C. § 1531(b) (emphasis added); *see also* Pub. L. 97-304, § 6 (Oct. 13, 1982).

expand beyond its historical limits merely because a new obstacle has arisen.[9] Because no such authorization exists here, GPA submits that the Service must withdraw its Proposed Rule.

II. The Proposed Rule Is Overly Broad and Lacks Clear Direction for Stakeholders

In addition to the Service's lack of authority to promulgate this Proposed Rule, the Proposed Rule suffers from additional flaws as it is overly broad and lacks clarity for stakeholder engagement moving forward. The Proposed Rule—again, without any authorization from Congress—attempts to unilaterally authorize the Service to permit the introduction of experimental populations of threatened and endangered species into virtually *any* "habitat" the Service deems is "necessary to support one or more life history stages."[10] This proposed language only further compounds GPA's previously communicated concerns regarding the Service's decision to rescind the definition of "habitat."[11] This continued layering of phrases such as "necessary to support one or more life history stages" atop the undefined term "habitat" does nothing to clarify the meaning of habitat for stakeholders and affected entities. Instead, the proposed language only further obfuscates how the Service will implement and enforce the ESA in the future.

Taking together the lack of definition for "habitat" and the Proposed Rule's overly broad and undefined language, the Service appears ready to substantially increase the area subject to ESA regulations. As written, and ignoring any threatened or endangered species' historical range, the Proposed Rule would open the door to any and all "habitat" (*read: area*)—in any condition—as potentially suitable for a large number of species. And the Service proposes to do this with little to no explanation or reasoning. Although GPA can presume the Service will revert to conducting its habitat analysis, whether for critical habitat or for suitable experimental habitat, on a case-by-case basis, there is virtually no other indication within the Proposed Rule regarding future implementation. Instead, stakeholders are essentially left in the dark to query how the Service plans to implement the Proposed Rule as written. This absence of direction and clarity for stakeholders not only infringes on their ability to meaningfully comment on the Proposed Rule, but it also leaves stakeholders and affected industries alike to request additional information from the Service regarding the true effects of its Proposed Rule.

First, there is no discussion regarding the Service's current workload, budget, or staffing. As an example, despite over 1,000 project submittals pending review in West Virginia alone, as of February 2022, there is no information from the Service regarding its ability to meet any increased demand of its services as a result of the Proposed Rule. And with informal consultations currently taking well over sixty days already, this is a significant expense (and likely time delay) for stakeholders already engaged in any Service process.

[9] *West Virginia*, Slip Op. at 19–20.

[10] Proposed Rule, 34,626.

[11] 87 Fed. Reg. 37,757 (June 24, 2022); *see also* GPA Midstream Association's Comments on Docket No. FWS-HQ-ES-2020-0047 (2022).

Second, and relatedly, there is no discussion—no commentary on a future plan or scope of such a plan—to guide future implementation of the Proposed Rule. With already-constrained resources, is the Service able to offer insight into which areas or which species may be prioritized by the Service in the future? Stakeholders will need to account for such plans in either their comments or own, independent activities.

Third, stakeholders need to know whether there are future plans to alert or focus on the existing framework to address incidental take permits in these new experimental habitats. A lack of framework here would paralyze both Service field office reviews and the stakeholder permit process. This is especially specious in situations where an experimental habitat is created in an area where field offices or stakeholders are entirely unfamiliar with the experimental population.

Ultimately, in asking and answering these sample questions, GPA submits that the Service will further realize its shortcomings in more fully evaluating the effects of the Proposed Rule.

III. The Proposed Rule Lacks Sufficient Analysis and Violates Various Federal Mandates

Finally, the Service's conclusory statements regarding the Proposed Rule's lack of impacts and compliance with related mandates are in direct conflict with the text of the Proposed Rule. The Service must provide a fuller analysis of these potential impacts to comply with federal requirements and should modify any future proposed rulemaking to mitigate these potential impacts.

First, the Service's conclusory statement that the Proposed Rule is "not expected to affect energy supplies" is deficient pursuant to Executive Order ("EO") 13211.[12] EO 13211 requires agencies to prepare and submit a Statement of Energy Effects where an action may have adverse effects on energy distribution.[13] Despite the obvious implications of potentially opening vast regions of the country to experimental populations as habitat subject to ESA regulations for the first time, the Service makes zero effort to explain how it considered these effects or how it will mitigate such effects in the future. Relatedly, such conclusory statements pursuant to EO 13211 also fail to illustrate how the Proposed Rule meets the expectations of the Infrastructure Investment and Jobs Act, including those federal commitments to various infrastructure projects affected by any newfound habitat supporting an experimental population. Indeed, the Service has essentially failed altogether to meaningfully assess the Proposed Rule's likely material impacts on the economy, energy production and distribution, and especially midstream activities. In response to this particular deficit, GPA recommends—at the very least—modifying 50 C.F.R. § 17.81(d) to include relevant stakeholders, such as those with potential property interests and ongoing development projects, in the consultation and agreement phases of any experimental population introduction. And if experimental populations are being introduced outside of an area within that

[12] Proposed Rule, 34,626.

[13] 66 Fed. Reg. 28,355 (May 22, 2001).

species' historic range, a public meeting should be required as "appropriate," rather than left to the Service's discretion to determine whether appropriate (as the regulation is currently written).

Second, the Service's conclusory statement that the Proposed Rule would neither pertain to taking of private property interests nor directly affect private property is somewhat misleading.[14] The contemplated introduction of a threatened or endangered species—even as experimental—has the potential to "effectively compel a property owner to suffer a physical invasion of property" as well as "deny all economically beneficial or productive use of the land or aquatic resources."[15] This potential for a future taking is fairly obvious where the Service is contemplating limitless jurisdiction over potential "habitat," as outlined above. The Service must offer more in terms of its analysis of potential effects on the public.

Third, and finally, the Service's conclusory statement regarding its compliance with the National Environmental Policy Act ("NEPA") is similarly suspect.[16] The Service currently relies on a categorical exclusion, 43 C.F.R. § 46.210(i),[17] to shield itself from environmental review. But this position ignores the possibility that an "extraordinary circumstance" applies.[18] Such circumstances likely to apply to the Proposed Rule include the Proposed Rule's potential to have "highly controversial environmental effects"—such as the various concerns raised by the introduction of experimental populations already;[19] having highly uncertain and potentially significant environmental effects or involving unique or unknown environmental risks; having a direct relationship with other actions with individually insignificant but cumulatively significant environmental effects; having significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places; or, most importantly, contributing to the introduction, continued existence, or spread of non-native invasive species[20] known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species.[21]

As the Service continues to blur the line between native and non-native species as species' ranges change over time—whether due to climate or human introduction of experimental populations—the Service does not even bother to engage in meaningful contemplation of these

[14] Proposed Rule, 34,627.

[15] *Id.* (citing Executive Order 12630).

[16] Proposed Rule, 34,627.

[17] "Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case."

[18] *See* 43 C.F.R. § 46.215.

[19] *See, e.g.*, Etta Pettijohn, *Sierra County Sentinel*, Wolves Previously Removed From Wild For Depredations Now Killing Cattle On Ladder Ranch's Neighboring Properties (Apr. 7, 2022) (available here).

[20] *See, e.g.*, Aristos Georgiou, *Newsweek*, How Burmese Pythons Invaded Florida With 100,000 Now Roaming the Everglades (June 29, 2022) (available here).

[21] 43 C.F.R. § 46.215 (c), (d), (f), and (l).

actions and potential effects. In particular, the Service nowhere responds to the pressing issue of how the introduction of an experimental population to an area it never previously existed could result in adverse impacts to endemic species and, thus, increase the number of species subject to ESA protection. Such introduction would also impact the human environment—such as the ranchers in Wyoming, New Mexico, and Idaho, whose livelihood depend on the absence of such experimental populations—and would likely spur new litigation regarding these under-analyzed consequences.[22]

By ignoring altogether the possibility that any number of extraordinary circumstances applies here, the Service has failed to support its conclusory assertion that a categorical exclusion automatically applies. Taken with the above, the Service must consider these issues and provide a more meaningful opportunity to comment prior to promulgating any final rule.

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GPA urges the Service to withdraw its Proposed Rule or otherwise modify it in accordance with the Service's actual authority and consistent with the comments above. GPA Midstream appreciates the opportunity to submit these comments on the Proposed Rule and is standing by to answer any questions you may have.

Respectfully submitted,

Matt Hite
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GPA Midstream Association

[22] Catherine Archibald, *Mich. St. Univ. C. of Law*, Overview of the Recovery of the Gray Wolf Under the Endangered Species Act (2005) (available here).