



August 21, 2023

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

Attn: FWS–HQ–ES–2021–0104

United States Fish and Wildlife Service

MS: JAO/3W

5275 Leesburg Pike

Falls Church, VA 22041-3803

National Marine Fisheries Service

Office of Protected Resources

1315 East-West Highway

Silver Spring, MD 20910

**Re: FWS–HQ–ES–2021–0104; Proposed Rule to Amend Portions of Regulations
Implementing Section 7 of the Endangered Species Act**

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 amend portions of its regulations that implement section 7 of the Endangered Species Act of 1973 (“the Act”) (hereinafter the “Proposed Rule”¹)—specifically, interagency consultation pursuant to section 7.

GPA Midstream has served the U.S. energy industry since 1921 and has over 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 396,000 jobs across the U.S. economy. GPA Midstream members gather over 77% of the natural gas and recover more than 80% 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 2019–2021 period, GPA Midstream members spent over \$100 billion in capital improvements to serve the country’s needs for reliable and affordable energy.

GPA Midstream previously supported the Services’ efforts to clarify and improve the consultation process and continues to support the Services’ efforts to the extent they are consistent with the 2019 rule.²

¹ 88 Fed. Reg. 40,753 (Jun. 22, 2023) (hereinafter “Proposed Rule”).

² 84 Fed. Reg. 44,976, 44,979 (Aug. 27, 2019).

1. The Services Should Reconsider Revised Language.

The Services' Proposed Rule is largely a series of revised definitions and minor clarifications to the language. GPA Midstream generally supports those clarifications to the extent they clarify or maintain the intent of the revisions made by the 2019 rule³ and opposes them to the extent they do not.

- “Effects of the action” is overly broad and will unnecessarily restrict future projects requiring section 7 consultation. The Services' proposed definition would have detrimental effects on proposed actions given the expansive authority it provides for both the Services and any Federal action agency to analyze a wide array of effects that are unrelated or only tangentially related to the proposed action subject to the section 7 consultation. In 2019, the Services published a rule that better clarified the limited review of section 7 consultation—to those effects or activities reasonably like to occur *as a result of the project*. But the Proposed Rule abandons this recent clarification and raises the bar for any future review of the effects of a proposed action—without any rationale as to why such a higher bar is needed. GPA Midstream supports the Services' retention of the definition as written in the 2019 rule.⁴
- “Other provisions,” as set forth in 50 C.F.R. § 402.17, should remain part of the Services' regulations. These “other provisions” further define and narrow the concepts of “activities that are reasonably certain to occur” and “consequences caused by the proposed action.” Although GPA Midstream agrees with the Services that the new section may cause areas of potential confusion, GPA Midstream encourages the Services to reconsider the proposed removal of 50 C.F.R. § 402.17 and instead incorporate the 2019 rule's original intent elsewhere in the regulations—in a manner that will not cause potential confusion as to the Services' intent. Whether, for example, a “consequence” is “reasonably certain to occur” should *not* be dictated by an unenforceable guidance document that can escape public notice and comment requirements. This type of quasi-rulemaking only further highlights the expansive authority the Proposed Rule may offer the Services, at the expense of all regulated entities and stakeholders.
- “Reinitiation of consultation” is rightfully the responsibility of the Federal Agency Action and GPA Midstream supports this clarification.

2. The Services Should Not Import New Mitigation Obligations.

Reversing longstanding policy, the Services propose for the first time an explicit requirement for project permittees engaged in a section 7 consultation to accept mitigation obligations in exchange for an incidental take statement (“ITS”). This provision has the potential to greatly expand the Services' authority—indeed the Services would be authorized to prescribe mitigation measures—so long as “reasonable and prudent”—to minimize any impact identified by

³ 84 Fed. Reg. 44,976, 44,979 (Aug. 27, 2019).

⁴ *Id.*

the consulting Service.⁵ GPA Midstream requests additional clarification for this particular proposal. Specifically, the Proposed Rule broadly asserts that any prescribed mitigation measures would “need to be appropriately scaled” but offers little other guidance.⁶ For example, the Service offers the consolation that “[a]s always, the Services must determine the extent of [reasonable and prudent measures] that are ‘necessary or appropriate.’”⁷

Although GPA Midstream opposes any required mitigation in exchange for an ITS as contrary to the statutory language and the Services’ authority, GPA Midstream does support the proposed revisions to the related definition of “reasonable and prudent measures” (“RPMs”). GPA Midstream supports narrowing the scope of RPMs to include only those actions “necessary or appropriate to minimize the impact of the incidental take *on the species*” as opposed to the broader category of impact of the incidental take.⁸

In sum, GPA Midstream respectfully requests the Services maintain the intent of its 2019 regulations related to interagency consultation. 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

⁵ Proposed Rule at 40,758.

⁶ *Id.*

⁷ *Id.*

⁸ Proposed Rule at 40, 763.