



**Statement
On Behalf of the
American Road and Transportation Builders
Association**

**Submitted to the
United States Senate
Committee on Environment & Public Works**

**Hearing on Oversight: Modernization of the Endangered Species
Act**

February 15, 2017

Chairman Barrasso and Ranking Member Carper thank you for holding this hearing on Oversight: Modernization of the Endangered Species Act (ESA). ARTBA, now in its 115th year of service, provides federal representation for more than 6,000 members from all sectors of the U.S. transportation construction industry. ARTBA's membership includes private firms and organizations, as well as public agencies that own, plan, design, supply and construct transportation projects throughout the country. Our industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs.

Because of the nature of their businesses, ARTBA members undertake a variety of activities that are subject to ESA regulations. ARTBA's public sector members adopt, approve, or fund transportation plans, programs, or projects which are all subject to multiple federal regulatory requirements. ARTBA's private sector members plan, design, construct and provide supplies for federal-aid transportation improvement projects.

The ESA is a valuable tool in helping to deliver transportation projects in a manner that is most beneficial to both the environment and the communities served by those projects. In its current state, however, the ESA has achieved less than a one percent rate of success for species recovery. At the same time, it has resulted in multi-year delays for transportation construction projects. Delayed transportation improvements contribute to greater congestion on existing roads which leads to detrimental public health and safety effects, including reduced air quality and increased motor vehicle accidents.

ARTBA urges the committee to pursue ESA reform with the intent to allowing the ESA to be used where it is truly needed, rather than as a tool to delay and stop transportation projects. To that end, ARTBA offers the following general ESA reforms for the committee's consideration:

- Remove the ESA's critical habitat provisions and replace it with a less expansive habitat preservation system that focuses on preserving essential species habitat without imposing unnecessary and excessive restrictions on development.
- Establish a standard to define the "best available" scientific data in decisions concerning endangered or threatened species. This standard should provide for independent peer review of all ESA determinations.
- Reform the species listing process to discourage listing of species not actually threatened. Specifically, species should not be able to be listed based on potential threats, only actual impacts. Also, the de-listing process should be streamlined to allow for easier removal of species once they are no longer threatened.
- Curb unnecessary ESA litigation by disallowing litigation based on possible development occurring as the result of a proposed transportation project. Only disputes involving the effects of the potential project itself should be considered.

One specific area which ARTBA would direct the committee's attention to is the determination of critical habitat under the ESA. Proper determination of critical habitat is a very important issue for state and local governments, as well as businesses located in areas impacted by ESA activity. A determination of critical habitat can literally remove hundreds of miles from the possibility of any type of development. Currently, regulatory agencies can even make this designation based on the "historical" presence of a species, years in the past. In the transportation arena, the critical habitat designation is especially relevant as states promulgate transportation plans years, if not decades, in advance. If a regulatory agency summarily declares an area "off limits" through an overly broad critical habitat designation, then it can unnecessarily jeopardize carefully designed plans for economic development. At a minimum, all economic analysis necessary for a critical habitat determination should be based on the best data available and incorporate an area's planned transportation improvements.

Recently, the need for reform of the critical habitat process was spotlighted by regulatory proceedings involving the long-eared bat. In the case of the long-eared bat, the United States Fish & Wildlife Service (FWS) determined the habitat to be:

"The range of the northern long-eared bat includes much of the eastern and north central United States, and all Canadian provinces from the Atlantic Ocean west to the southern Yukon Territory and eastern British Columbia. Within the United States, this area includes the following 37 States and the District of Columbia: Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio,

Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.¹”

Thus, the area potentially impacted by the “critical habitat” of the northern-long eared bat could have potentially been a majority of the land in the continental United States.

Further, the main concern leading to FWS leading to the ESA being applied to the long-eared bat was a condition known as “white nose syndrome.” While this disease has caused a significant impact on the long-eared bat’s population, it has not been linked to any specific type of human activity. Thus, by listing the long-eared bat under ESA, FWS took the risk of hindering development for a vast portion of the country without any direct benefit for the species the critical habitat was meant to protect.

While FWS ultimately decided that it was “not prudent” to place severe development restrictions on long-eared bat habitat, the episode demonstrates the need for ESA reform to prevent broad-based unintended consequences that can arise under the current system. ARTBA looks forward to working with the committee in a manner to constructively update the ESA in a manner which effectively balances species protection with responsible transportation development.

¹ United States Fish and Wildlife Service, *Northern Long-Eared Bat*, available at: <http://www.fws.gov/midwest/endangered/mammals/nlba/nlbaFactSheet.html>, last updated January 22, 2015.