



September 24, 2018

Public Comments Processing

Attn: Docket No. FWS-HQ-ES-2018-0006
Docket No. FWS-HQ-ES-2018-0007
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U.S. Fish and Wildlife Service
MS:BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants; and Revision of Regulations for Interagency Cooperation

On behalf of the more than 8,000 members of the American Road & Transportation Builders Association (ARTBA), I respectfully offer comments on the U.S. Fish and Wildlife Service's (FWS) recent proposed rules concerning various aspects of the Endangered Species Act (ESA).

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.

ARTBA commends the FWS for examining multiple aspects of the ESA in response to President Trump's Executive Order (EO) 13777, "Enforcing the Regulatory Reform Agenda." When President Trump first unveiled his regulatory reform efforts, ARTBA released a report highlighting multiple areas, including the ESA, we felt should be reviewed as part of the regulatory reform process. Thus, we are supportive of the FWS efforts to examine the following areas of ESA regulation: listing species, designating critical habitat, prohibitions to threatened wildlife and plants and interagency cooperation.

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. ARTBA urges

FWS to pursue ESA reform with the intent of allowing the act to be used where it is truly needed, rather than as a tool for unnecessary delay. In its current state, the ESA has achieved less than a 1 percent rate of success for species recovery. At the same time, it has resulted in multi-year delays for transportation improvement projects. Delayed transportation benefits 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.

The area perhaps most in need of reform 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 develop transportation plans years, if not decades, in advance.

To address this concern, the FWS has asked whether the phrases “geographical area occupied by the species” and “physical or biological features” need to be modified. ARTBA answers this question in the affirmative. Both phrases are key elements of determining the scope of an area determined to be critical habitat for a species. They should be read in a way that is limiting in scope to ensure that the habitat preserved is actually “critical” to the species in question and not simply being preserved for preservation’s sake.

Determining true critical habitat will help to ensure a regulatory agency does not summarily declare an area “off limits” through an overly broad designation, unnecessarily jeopardizing 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 include an evaluation of 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 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.

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.

Further, the main concern 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, the FWS took the risk of hindering development for a vast portion of the country without any proof of direct benefit for the species the critical habitat was meant to protect.

While the FWS ultimately decided that it was “not prudent” to place severe development restrictions on long-eared bat habitat, the episode demonstrates the need for common-sense ESA critical habitat reform to prevent overly broad-based and unintended consequences that can arise under the current system.

The FWS has also asked whether the process of how species are listed should be reformed. Listing a species as “endangered” or “threatened” is arguably the most important decision of the ESA as it triggers which, if any, regulatory burdens will be realized. Thus, ARTBA urges the FWS to 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. Similarly, the de-listing process should be streamlined to allow for easier removal of species once documentation shows they are no longer threatened or endangered.

Additionally, the FWS has invited comments on interagency cooperation. This is a subject that has been addressed in multiple surface transportation reauthorization laws. Specifically, in order to reduce delay, there has been a movement towards designating a “lead agency” on projects. The “lead agency” then sets a schedule to be followed by “cooperating agencies.” Deadlines are set and reviews are conducted concurrently, rather than sequentially. The goal is to have multiple regulatory reviews being conducted at the same time in order to reduce delay, as opposed to having multiple agencies waiting on one another. ARTBA has seen the concept of “lead agency” lead to improvements in the transportation project review and approval process and believes it should be embraced by the FWS as well. Specifically, the FWS should seek to time its reviews concurrently with other agencies working on the same overall project to the maximum extent possible.

Finally, the FWS has also requested comment on revisions to the regulations for prohibitions to threatened wildlife and plants. In this area, ARTBA urges the FWS to establish a standard to define the “best available” scientific data in decisions concerning endangered or threatened wildlife and plant species. This standard should provide for independent peer review of all ESA determinations to ensure there is no bias in any of the research being used for listing decisions.

Additionally, while not addressed specifically by any of the FWS proposals, ARTBA also believes it is necessary to curb unnecessary ESA litigation by disallowing litigation based on possible development occurring as the result of a proposed project. Only disputes involving the effects of the potential project itself should be considered. To go beyond the scope of actual project impacts would be speculative, resulting in additional delay without accomplishing anything in terms of species protection.

ARTBA appreciates the FWS starting this essential conversation on the ESA and looks forward to working with them to constructively update the ESA in a manner which effectively balances species protection with responsible transportation development.

Sincerely,

A handwritten signature in black ink that reads "T. Peter Ruane". The signature is written in a cursive style with a large, stylized initial "T".

T. Peter Ruane
President & C.E.O