



August 21, 2023

Hon. Martha Williams
Director
U.S. Fish and Wildlife Service
1849 C Street NW, Room 3331
Washington, D.C. 20240-0001

VIA ELECTRONIC SUBMISSION

Re: Regulations concerning endangered and threatened species and designation of critical habitat. (Docket Nos.: FWS-HQ-ES-2021-0104; FWS-HQ-ES-2021-0107; FWS-HQ-ES-2023-0018).

Dear Director Williams:

The American Road & Transportation Builders Association (ARTBA) respectfully submits the following comments on the U.S. Fish and Wildlife Service's amendments to listing endangered and threatened species and designating critical habitat. ARTBA members remain committed to species conservation, but the Service's proposals are burdensome and create significant regulatory uncertainty. These changes will result in broad agency overreach and inconsistent applications. ARTBA therefore recommends the Service rescind specific portions of the rules. Additional comments are below.

Background:

ARTBA represents 8,000 members in all components of the transportation construction industry. Our diverse membership includes both public and private sector members who engage in the planning, design, construction, and maintenance of our nation's roadways. ARTBA members are committed to balancing the need for species conservation while ensuring that our nation maintains and improves a safe, efficient, and reliable transportation infrastructure system.

Both public and private sector ARTBA members engage with the Endangered Species Act (ESA). State transportation agencies that adopt, approve, and manage federal funds for construction projects must comply with specific federal environmental reviews and permitting requirements including those imposed by the ESA. Our private sector members must ensure that project activities do not violate ESA prohibitions.

Critical habitat designations remove areas of land from development activities to conserve habitat necessary for a species to survive. When properly applied, areas are only designated where there is evidence that the species will rehabilitate. When misapplied, these designations postpone or prohibit critical repairs and infrastructure improvements, without demonstrating any benefit to the endangered species. It is vital that areas designated by the Service as critical habitat contribute to a species' recovery before triggering strict prohibitions on activities.

ARTBA's comments:

A. ARTBA members need transparency about how critical habitat decisions are made.

Critical habitat is defined as habitat of the species that at the time of designation contains "physical or biological features"¹ necessary for the species to survive. The U.S. Supreme Court in its *Weyerhaeuser*² decision affirmed that for habitat to be "critical" it had to first be habitat of the species. Based on the law and the Court's decision, the Service currently uses a two-part test when deciding what areas to designate. The test requires that (1) the area will contribute to the conservation of the species; and (2) the area includes biological features necessary for the species to survive. This proposed rule would remove the test. Instead, the Service would have broad discretion without a proper and transparent procedure. This would result in a case-by-case scenario where instead of relying on a clear definition of habitat, the Service could create different tests for each individual species.

In our consultations, ARTBA members expressed concern that removing this test creates too many unknowns. They will not be able to anticipate and incorporate species conservation implications into their project plans. This open-ended approach may also allow uninhabitable areas to be included. Examples include parking lots, roadways, and commercial areas where a species does not exist and where chances of rehabilitation are low. ARTBA strongly urges the Service to keep the two-part test in the rule. This test offers clear guidance and less room for misapplication and overreach. Furthermore, the test ensures the Service is responsive to the Supreme Court's interpretation.

B. In designating critical habitat, the Service cannot rely on broad global-scale events that have no nexus or endpoint.

When an area is designated as critical habitat, certain activities such as maintenance, repair, and construction are limited. Because of these prohibitions, there should be clear mechanisms to determine when not to designate critical habitat. The Service proposes to eliminate language

¹ 16 U.S.C. § 1532 5 (a) (i).

² *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018).

that would help determine when it is “not prudent” to designate critical habitat.³ This language ensures that critical habitat is not designated when there are no additional benefits to the species. For example, when the species is threatened with disease as opposed to a human-made threat. The current mechanism ensures that there is a nexus between the decline of the species and a loss of the species’ habitat. The Service’s proposal removes these factors and replaces them with vague open-ended language. The Service states it is making this change to capture impacts to habitat caused by climate change. However, those impacts are large-scale, and are not captured by specific, current, human actions. Therefore, the Service’s attempt to limit activities for which large-scale impacts cannot be measured does not align with the spirit of the ESA.

ARTBA, in previous comments, noted that it was inappropriate to list the long-eared bat as an endangered species when the sole source of aggravation was a disease with unknown causes. ARTBA argued that because habitat loss was not a key stressor to its decline, the bat should not be listed, nor should critical habitat be designated. The current “not prudent” language within the regulations addresses scenarios such as the long-eared bat. Removing the language makes the rule vague and could result in misapplications when direct human-made causes are not threatening the species.

Additionally, the proposal removes language clarifying the timeline used to determine whether a species is likely to become extinct. The Service uses “foreseeable future” as its test.⁴ This timeline extends “only so far” into the future as the Service can reasonably determine threats to the species.⁵ Now, the Service wants to remove this language and instead “reasonably rely on information” to inform its decisions.⁶ Reasonably relying on information is speculative at best. The Service needs to clarify that it will not base decisions on unreliable predictions. By retaining the current definition of “foreseeable future,” the Service avoids fortune-telling and instead relies on the best available data at the time.

C. ARTBA members face significant economic impacts from regulatory uncertainty.

Federal agencies must consult with the Service when funding, permitting, and approving a project proposal. During this consultation, the Service must determine if there will be impacts to endangered species. If the likelihood of impacts is low, formal consultation is not required. If the likelihood is high, formal consultation is required. This process takes approximately 135 days. During this time, the Service must issue a biological opinion that includes suggested ways to minimize harming the species.

³ Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat, 88 Fed. Reg. 40764, 40768 (June 22, 2023).

⁴ 88 Fed. Reg. 40764, 40766.

⁵ *Id.*

⁶ *Id.*

Due to the Service's regulatory whiplash, one of ARTBA's state transportation agency members waited six months longer than necessary to obtain a final opinion from the Service for their roadbuilding project. The agency relied on the Service's initial determination that no formal consultation was required, only to be told later a formal consultation was needed. Instead of picking up the existing review timeline once formal consultation was initiated, the Service restarted the review clock, resulting in significant delays for the agency. Partway through the formal consultation process, the Service once again decided no formal consultation was needed. The agency was not able to open the project for bids during this entire time.

In its rules, the Service states that there are no direct costs to regulated entities. This is incorrect. Given the scale of transportation construction projects, even a few months of delay can imply millions of dollars in increased costs. Delayed project starts can result in significantly higher procurement costs. Regulatory delays that occur after a project's groundbreaking can trigger an additional set of costs, including payments for extra work hours, overtime compensation, equipment charges, and traffic delays. These are quantifiable costs resulting from regulatory actions. It is imperative that the Service maintain portions of the rules that provide regulatory clarity.

The Federal Highway Administration's National Highway Construction Cost Index, which measures the average bid price for various highway construction projects, has grown at a compound annual growth rate of 5.5 percent since 2003. During the highly inflationary environment of 2022, this index rose at an even higher rate, making delays more costly. Similarly, over the last decade, hourly earnings for highway and street construction workers have risen 3.8 percent per year on average, and as high as seven percent in a year, based on data from the Bureau of Labor Statistics. These persistent increases demonstrate that delays can not only lengthen the time frame for delivering a project but carry quantifiable costs as well. Moreover, contractors will "price" these risks into their bids, resulting in higher overall price tags for projects. Thus, misguided regulations can undercut the economic benefits expected from the record federal investment found in the Infrastructure Investment and Jobs Act and other federal programs.

D. The Service should transparently disclose how it calculates mitigation and should not impose unnecessary additional measures.

During the formal consultation process, the Service provides recommended conservation measures to reduce harm to species, often in the form of mitigation. While not required under current regulations, the reality is that ARTBA members engage in mitigation, nonetheless. The proposed revisions would affirmatively require mitigation measures and expand them beyond the current scope. ARTBA members are concerned that the Service does not currently disclose how it calculates required amounts of mitigation. This leads to inconsistency and makes it

impossible for the industry to prepare accordingly. Requiring mitigation without offering transparency about how it is calculated creates greater uncertainty for ARTBA members. Given that violations of the ESA carry a criminal penalty, the Service must either revise this portion of the rule or rescind it entirely. Most project plans already include mitigation. Additionally, these projects are subject to mitigation requirements under other federal permitting programs that may also protect endangered species. Instead of imposing additional layers of regulatory burdens here, the Service can work with other permitting agencies to ensure that prescribed mitigation also addresses its concerns. This will ensure that construction project proponents are not complying with multiple – and often redundant – mitigation mandates.

Conclusion:

ARTBA members already work to minimize or eliminate the impacts of their projects on endangered or threatened species and their habitat. The Service's three proposed rules do not serve to enhance the current regulations nor make them any less burdensome. In fact, the rules would allow the Service overly broad discretion and provide insufficient public transparency. This leads to unenforceable rules that are not durable. Proposals that eliminate straightforward tests in favor of subjective language should be rescinded. Furthermore, well-established regulatory principles should not be removed in favor of placing them in guidance. These documents are unenforceable by law. Guidance documents result in rampant misapplications, with no oversight or options to challenge the document. The Service should retain current language within all three rules that offer clarity and predictability to the regulated public. ARTBA strongly recommends the Service revisit these proposals and rescind portions of the rules that offer little to no additional benefit to species conservation. These revisions are detrimental to ARTBA members who work to ensure the safety and performance of our nation's transportation infrastructure while balancing environmental concerns.

Should you have any questions or require additional information please do not hesitate to contact Prianka Sharma, Vice President and Counsel for Regulatory Affairs, at psharma@artba.org.

Sincerely,

Prianka Sharma

Prianka P. Sharma
Vice President and Counsel for Regulatory Affairs
American Road & Transportation Builders Association