



June 20, 2025

VIA ELECTRONIC SUBMISSION

Hon. Doug Burgum
Secretary
U.S. Department of the Interior
1849 C St. NW
Washington, DC 20240

RE: Regulatory Reform (Docket No. DOI-2025-0005).

Dear Secretary Burgum:

The American Road & Transportation Builders Association (ARTBA), representing over 8,000 members in the transportation construction industry, respectfully submits comments on the U.S. Department of the Interior's request for information on regulatory reform priorities. ARTBA members work tirelessly to ensure that people and goods get to where they need to go. Federal regulations should support—not hinder—the transportation construction industry's mission to complete projects safely, efficiently, and cost-effectively. **With that in mind, ARTBA's key recommendations are below.**

Background

ARTBA represents members of all sizes from every sector of the transportation construction industry, including contractors, materials suppliers, planning and design firms, state and local transportation agencies, and safety and equipment manufacturers. Our members are responsible for building and maintaining the nation's highways, bridges, and other critical infrastructure.

Both public and private sector ARTBA members must comply with the Endangered Species Act (ESA).¹ State transportation agencies that adopt, approve, and manage federally-funded projects must follow ESA requirements as part of broader federal environmental reviews and permitting processes. Private sector members are likewise required to ensure their activities do not violate ESA prohibitions. Across the industry, ARTBA members implement voluntary conservation and mitigation measures to protect wildlife and habitats within their project areas.

Despite these proactive efforts, the ESA in its current form is proving unworkable. It is failing to deliver meaningful conservation outcomes while placing significant burdens on infrastructure development. To address this imbalance, ARTBA offers the following recommendations to streamline ESA policy and ensure that wildlife protection and transportation construction can successfully coexist.

¹ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544.

ARTBA's Recommendations

I. FWS should revise the Biden-era rulemakings concerning critical habitat and listing species.

In April 2024, the Fish and Wildlife Service, at the direction of the Biden administration, finalized three rulemakings under the Endangered Species Act (ESA) that adopt broad and ambiguous criteria for designating critical habitat and for listing and delisting species.² These actions represent a significant departure from longstanding ESA interpretations and undermine much-needed certainty regarding when and how contractors can proceed with infrastructure projects. In many cases, the new requirements impose costly and disproportionate burdens without demonstrable environmental benefits. ARTBA previously submitted comments³ warning that the rules would create regulatory uncertainty and impose unnecessary compliance obligations. Nonetheless, the administration finalized the rules.

ARTBA now urges the agency to revisit these rulemakings and take steps to ensure they better align with the text and intent of the ESA. Key recommendations include reinstating a clear and workable definition of “critical habitat” consistent with the U.S. Supreme Court’s decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*.⁴ The agency should also strengthen the economic balancing provisions in the ESA and create a mechanism to demonstrate, based on science, when proposed critical habitat areas would not meaningfully support species recovery.

Additional recommendations include requiring that critical habitat designations reflect only the known range of a species; grounding future regulatory actions in demonstrable, evidence-based outcomes; expanding categorical exclusions for low-impact activities; establishing binding timelines for Section 7 (Interagency Cooperation)⁵ consultations; and shortening the statute of limitations for legal challenges. ARTBA has outlined further concerns and specific problematic provisions of the three final rules in its previously submitted comments, which are appended to this document.

II. FWS should reinstate its rule pertaining to incidental take of migratory birds.

In a significant policy shift, the Fish and Wildlife Service in late 2021 revoked a rule that limited the scope of the Migratory Bird Treaty Act (MBTA) to exclude incidental take.⁶ The MBTA prohibits the taking or killing of migratory birds, and under the broader interpretation reinstated by the agency, even

² See, *Endangered and Threatened Wildlife and Plants; Regulations for Listing, Delisting, and Critical Habitat under Section 4*, 89 Fed. Reg. 19,648 (Apr. 5, 2024) (to be codified at 50 C.F.R. pt. 424); *Endangered and Threatened Wildlife and Plants; Interagency Cooperation Procedures Under Section 7*, 89 Fed. Reg. 19,653 (Apr. 5, 2024) (to be codified at 50 C.F.R. pt. 402); *Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Protections for Threatened Species (Blanket 4(d) Rule)*, 89 Fed. Reg. 19,660 (Apr. 5, 2024) (to be codified at 50 C.F.R. pt. 17).

³ American Road & Transportation Builders Association, *Comment Opposing Changes Proposed by Fish & Wildlife Service to Endangered Species Act Regulations* (Aug. 21, 2023), <https://www.artba.org/resource/comment-opposing-changes-proposed-by-fish-wildlife-service-to-endangered-species-act-regulations/>.

⁴ *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 586 U.S. ___, 139 S. Ct. 361 (2018).

⁵ *Endangered Species Act of 1973* § 7, 16 U.S.C. § 1536.

⁶ See, *Regulations Governing Take of Migratory Birds*, 86 Fed. Reg. 1134 (Jan. 7, 2021) (codifying that MBTA does not prohibit incidental take); *Regulations Governing Take of Migratory Birds; Revocation of Provisions*, 86 Fed. Reg. 54642 (Oct. 4, 2021) (revoking the January 7 rule and returning to MBTA's prohibition on incidental take).

unintentional harm can trigger enforcement.⁷ Among ARTBA members, this could include circumstances where construction contractors take all reasonable precautions to avoid harm, yet incidental impacts still occur due to factors beyond their control. The agency's action reintroduced a broad reading of the statute, exposing infrastructure projects to potential liability for accidental interactions with protected species. It also revived longstanding regulatory uncertainty for contractors, where incidental take may be unavoidable despite adherence to best practices. ARTBA submitted comments opposing the revocation,⁸ emphasizing that the prior rule struck a practical balance between environmental protection and infrastructure delivery. Nonetheless, the administration moved forward with the reversal.

ARTBA now urges the Service to initiate a new rulemaking that reinstates the core principles of the 2021 MBTA rule, which reasonably excluded incidental take from enforcement. A renewed regulatory framework should reflect the fact that contractors already implement extensive avoidance and mitigation measures. Any incidental impacts are a function of unpredictable environmental conditions—not negligence or disregard. Reestablishing a clear, intent-based approach to MBTA compliance would restore regulatory certainty, reduce the risk of arbitrary enforcement, and allow essential infrastructure projects to advance without compromising conservation objectives.

Conclusion

ARTBA members take their environmental responsibilities seriously. Many engage in voluntary, innovative efforts to conserve wildlife, and numerous state DOT partners lead or contribute to federally recognized habitat conservation plans while complying with stringent state-level natural resource laws. Unfortunately, federal regulations have not provided the consistency and predictability needed to ensure clear compliance, creating uncertainty across the project delivery process.

ARTBA appreciates the opportunity to provide this input and encourages the agencies to give the enclosed recommendations full and thoughtful consideration. We remain available to collaborate on these matters. For additional information, please contact Prianka Sharma at psharma@artba.org.

Sincerely,

//s//

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

Enclosures (3)

⁷ *Migratory Bird Treaty Act of 1918*, Pub. L. No. 65-186, 40 Stat. 755 (1918), codified as amended at 16 U.S.C. §§ 703–712 (2018).

⁸ *American Road & Transportation Builders Association*, Comment Opposing Revocation of MBTA Incidental-Take Rule, Docket No. FWS-HQ-MB-2018-0090 (June 7, 2021), <https://www.artba.org/wp-content/uploads/2021/06/ARTBA-Comments-Re-Docket-No-FWS-HQ-MB-2018-0090-Revocation.pdf>



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



June 7, 2021

Public Comments Processing
ATTN: FWS-HQ-MB-2018-0090
U.S. Fish and Wildlife Service
MS: JAO/1N
5275 Leesburg Pike
Falls Church, VA 22041-3802

**Re: Docket No. FWS-HQ-MB-2018-0090, Regulations Governing Take of Migratory Birds;
Proposed Rule**

Today ARTBA respectfully offers comments **opposing** the May 7 announcement by the U.S. Fish and Wildlife Service (FWS) that it plans to revoke a final rule clarifying Migratory Bird Treaty Act (MBTA) regulations governing the take of migratory birds.

Relevance to Transportation Construction

ARTBA members seek to build and maintain transportation improvement projects in as safe, timely and cost-effective a manner as possible. Migratory bird habitats can appear on these project sites, so the issue is quite relevant to the industry we represent. Affected species can appear virtually overnight as birds build new nests, making conditions on the job site that much more unpredictable. A broad interpretation of the MBTA requires industry professionals to utilize potentially extraordinary, costly and time-consuming measures to avoid accidental harm to or takings of any such birds. Moreover, if unintended incidents occur despite preventative steps, the firm is subject to an economic penalty. These are all potential causes of delays and increased costs for the project, at a time when transportation investment must yield maximum economic benefits.

In one example on an Interstate bridge replacement project, a contractor completed work on a Friday and returned Monday to undertake a beam replacement, a critical point in the project. However, it discovered nests built over the weekend. All bridge replacement activities stopped, with the work crew building temporary protections for the nests with plywood. Ultimately, taxpayers and motorists pay the price for project delays like this, especially those so unexpected.

The Revised Rule Improved the MBTA Regulatory Process

In the revised rule, the FWS clarified the MBTA does not prohibit the “incidental taking” of migratory birds. An “incidental take” is the killing of a migratory bird resulting from an accident or other scenario where there is no specific intent to harm them. Therefore, under the new

interpretation, the MBTA only applies to “actions directed at migratory birds, their nests, or their eggs,” codifying a previous legal opinion from the Department of the Interior.

As ARTBA described in our comments submitted on March 19, 2020 (incorporated by reference), the revised rule addressed a clear need for this regulatory improvement. Despite the MBTA’s specific prohibitions on activities which “pursue,” “hunt” or “capture” migratory birds, both federal courts and regulatory agencies have broadened interpretation of the statute and applied penalties when there was no proven intent to take a migratory bird. Exceeding the Act’s scope in this way has resulted in a regulatory environment that is inconsistent at best and overreaching at worst.

Revoking the Rule Will Lead Back to Confusion and Project Delays

The revised rule was published on Jan. 7 and has been in effect for exactly five months as of today. This is not adequate time to justify withdrawing the revisions. At a minimum, FWS should allow the MBTA clarifications to remain in effect long enough to evaluate whether targeted modifications or total revocation is preferable. ARTBA members could provide feedback for this purpose, but only after at least one complete construction season.

Additionally, should FWS proceed to withdraw the rule, there will once again be confusion over the distinction between incidental and intentional harm to bird species. The transportation construction industry is not asking for impunity to harm or take migratory birds. It remains committed to minimizing impact on wildlife and other natural resources. In this regard, the recent clarifications to the MBTA represented a significant improvement, balancing 1.) the risk of incidental and unpreventable contact with these birds on transportation construction job sites against 2.) the excessive project costs and delays required to prevent any such contact.

For the reasons described in these comments and those from last year, ARTBA urges FWS not to revoke this much-needed regulatory improvement. However, regardless of the agency’s decision, FWS should work with the regulated community to better understand – and effectively address – the underlying uncertainties and risks we have outlined.

Thank you for considering the views of the transportation construction industry on this important policy matter.

Sincerely,



David Bauer
President & CEO



September 4, 2020

Public Comments Processing
Attn: FWS–HQ–ES–2020–0047
U.S. Fish & Wildlife Service, MS: PRB(3W)
5275 Leesburg Pike
Falls Church, VA 22041– 3803

Re: Docket No. FWS-HQ-ES-2020-0047; Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat

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 & Wildlife Service’s (FWS) recent proposed rule regarding regulations for listing endangered and threatened species and designating critical habitat.

ARTBA’s membership includes private and public-sector members that are involved in the planning, designing, construction and maintenance of the nation’s roadways, waterways, bridges, ports, airports, rail and transit systems. Our industry generates more than \$500 billion annually in U.S. economic activity and sustains more than 4 million American jobs.

Because of the nature of their businesses, ARTBA members undertake a variety of activities that are subject to Endangered Species Act (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.

FWS has undertaken an effort to clarify the definition of critical habitat under the ESA “in order to provide transparency, clarity, and consistency for stakeholders.” ARTBA supports this effort and specifically agrees with FWS that any definition of critical habitat should explicitly exclude “areas that have no present capacity to support individuals of the species.”

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 applauds FWS for recognizing the need to reform the ESA, which 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.

FWS seeks to reform the “critical habitat” designation process by “limiting the need to evaluate whether an area is ‘habitat’ to only those cases where genuine questions exist.” 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, FWS can even make a critical habitat 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.

The FWS proposal is well timed. On September 1, FWS determined critical habitat designation was not prudent for the rusty patched bumble bee. A critical habitat designation for the bee would have limited development in 13 states with the potential for adding up to 15 more states. In Illinois, confusion over the bee’s habitat while this decision was being considered resulted in litigation temporarily stopping the \$115 million Longmeadow Parkway Bridge Corridor project.

Similar to the aforementioned rusty patched bumble bee, the need for reform of the critical habitat process was also spotlighted by regulatory proceedings involving the long-eared bat. In the case of the long-eared bat, FWS determined the proposed 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-

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.

based unintended consequences that can arise under the current critical habitat designation system.

Both the rusty-patched bumble bee and long-eared bat scenarios demonstrate the need for a reform of the critical habitat designation process. ARTBA looks forward to continuing to work with FWS on efforts defining critical habitat in a manner which achieves both species protection and an efficient regulatory structure.

Sincerely,

A handwritten signature in cursive script that reads "David Bauer".

David Bauer
President & C.E.O