

December 22, 2025

VIA ELECTRONIC SUBMISSION

John Terpak
U.S. Fish and Wildlife Service, Division of Conservation and Classification
U.S. Department of the Interior
5275 Leesburg Pike
Falls Church, VA

Re: Endangered and Threatened Wildlife and Plants¹; Designating Critical Habitat²; Listing Endangered and Threatened Species³; Interagency Cooperation⁴ (Docket Nos.: FWS-HQ-ES-2025-0029, FWS-HQ-ES-2025-0039, FWS-HQ-ES-2025-0044, FWS-HQ-ES-2025-0048).

Dear Mr. Terpak:

On behalf of the American Road & Transportation Builders Association (ARTBA) and our more than 8,000 members in the transportation construction industry, we support the U.S. Fish and Wildlife Service's (FWS) efforts to restore commonsense principles to the implementation of the Endangered Species Act (ESA). ARTBA is encouraged to see several prior definitions and policies return through these proposals. Collectively, these reforms better align ESA implementation with the statute, relevant case law, and real-world project delivery, while maintaining protection for listed species.

Background

ARTBA represents all components of the transportation construction industry, including contractors, materials suppliers, planning and design firms, public agencies, and equipment manufacturers. Our members build and maintain the nation's roads, bridges, airports, ports, transit systems, and other critical infrastructure that support economic activity, public safety, and mobility.

Both public and private-sector ARTBA members regularly engage with the ESA. State transportation agencies that plan, approve, and manage federally funded construction projects must comply with ESA review and consultation requirements. Private-sector members must ensure that construction activities meet ESA restrictions and any applicable conservation measures. As a result, ESA implementation directly affects project planning, permitting

¹ Endangered and Threatened Wildlife and Plants: Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 90 Fed. Reg. 52,587 (Nov. 21, 2025).

² Endangered and Threatened Wildlife and Plants: Listing Endangered and Threatened Species and Designating Critical Habitat, 90 Fed. Reg. 52,607 (Nov. 21, 2025).

³ Endangered and Threatened Wildlife and Plants: Regulations for Critical Habitat, 90 Fed. Reg. 52,592 (Nov. 21, 2025).

⁴ Endangered and Threatened Wildlife and Plants: Interagency Cooperation Regulations, 90 Fed. Reg. 52,600 (Nov. 21, 2025).

timelines, costs, and construction sequencing. At the same time, ARTBA members are committed to preserving natural resources, and many already undertake voluntary conservation efforts exceeding government mandates.

Congress enacted the ESA in 1973 to protect species likely to become endangered.⁵ Although the ESA has not been significantly amended since 1988, its implementation has evolved through regulatory interpretation. During the first Trump administration, significant changes were made to the ESA to address ambiguities and long-standing practices not already within the regulations.⁶ Subsequently, the Biden administration reversed many – if not all – of these improvements.⁷ The current administration now seeks to restore many of these principles that are grounded in law.

For ARTBA members, these swings of the regulatory pendulum do not represent mere academic exercises or political skirmishes. Continued and conflicting rule changes can disrupt project schedules and planning, while potentially triggering project costs increases and delays. The newly-proposed rules represent an important opportunity to restore regulatory stability and predictability.

ARTBA's Comments on the Proposals

A. Critical habitat designations should focus on areas that meaningfully support species recovery.

ARTBA supports FWS's proposed revisions restoring clearer standards and guardrails for how and where critical habitat may be designated. In particular, the proposal moves designation decisions back toward best available science, identifiable conservation features, and demonstrable recovery value, rather than speculative or overly expansive interpretations.⁸

For transportation construction projects requiring federal approvals, clearer standards are essential to long-term planning, risk management, and timely project delivery.

Some ARTBA members have contended with critical habitat designations extending to fully developed areas, such as roadways, parking facilities, and commercial sites, where a species does not exist and where realistic recovery potential is minimal. When applied this way, critical habitat designations can delay or prevent necessary transportation safety improvements and system repairs without demonstrable benefit to the species. By refocusing critical habitat on areas that contain or support the physical or biological features essential to conservation, the proposed revisions help ensure that designation decisions are tied to real-world ecological value, rather than abstract geographic scope.⁹

⁵ 16 U.S.C. § 1531 *et seq.*

⁶ See Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020 (Aug. 27, 2019); Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019); Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44,753 (Aug. 27, 2019).

⁷ See, e.g., Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 87 Fed. Reg. 37,757 (June 24, 2022) (final rule); Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 88 Fed. Reg. 40,742 (June 22, 2023) (final rule).

⁸ *Supra* note 2.

⁹ *Supra* note 3 at 52, 592-95.

The Supreme Court's decision in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*¹⁰ confirmed that an area must first qualify as habitat before it may be designated as critical habitat, reinforcing that designation authority is not unlimited. ARTBA supports the direction of the proposed rules, which align more closely with this principle by narrowing the circumstances under which areas may be designated. ARTBA further encourages FWS, in a future rulemaking, to consider restoring the prior regulatory definition of "habitat," which provided a clear threshold inquiry consistent with the Court's guidance.¹¹ A defined starting point improves predictability for project sponsors and reduces the risk of inconsistent or ad hoc application across regions and administrations.

ARTBA also supports the proposed revisions to the Section 4(b)(2) exclusion framework, which governs when FWS may exclude areas from critical habitat designations after weighing conservation benefits against economic, infrastructure, and public interest impacts.¹² The proposal strengthens this balancing process and reaffirms that exclusions are an integral part of ensuring effective and reasonable critical habitat designations. For transportation construction projects, this framework would allow FWS to avoid designating areas that provide limited conservation value while significantly disrupting or delaying critical infrastructure investments.¹³ Clarifying and reinforcing this exclusion process helps ensure that critical habitat designations remain targeted, recovery-focused, and balanced against the real-world benefits provided by transportation projects.

B. The listing of a species as endangered or threatened should be grounded in best available science and reasonably foreseeable conditions.

ARTBA supports FWS' proposed revisions to the listing regulations, including clarifying the "foreseeable future" standard used to determine whether a species is likely to become endangered. When determining whether a species should be listed as endangered or threatened, FWS is required to consider several statutory factors, including whether the species is likely to become endangered within the foreseeable future based on the best available scientific information.¹⁴

Listing decisions often serve as the gateway to additional regulatory requirements, including critical habitat designation and consultation obligations. For transportation construction projects that depend on long-range planning and coordinated federal approvals, predictability at the listing stage is essential.

In recent years, the "foreseeable future" concept has been applied too expansively, in some cases reaching speculative or highly uncertain future conditions. This approach makes it difficult for transportation agencies and project sponsors to anticipate compliance obligations and incorporate species considerations early in project development. By confirming that "foreseeable future" extends only so far as impacts can reasonably be determined using available data,¹⁵ the proposed rule restores an objective, science-based framework for listing

¹⁰ *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018).

¹¹ See Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 85 Fed. Reg. 81,411 (Dec. 16, 2020) (final rule) (adopting a regulatory definition of "habitat" for purposes of critical habitat designation).

¹² See *supra* note 3.

¹³ *Id.*

¹⁴ Endangered Species Act § 4(a)(1), (b)(1)(A), 16 U.S.C. §§ 1533(a)(1), (b)(1)(A).

¹⁵ See *supra* note 2.

decisions. This clarification improves transparency, reduces subjectivity, and promotes more consistent and defensible outcomes.

ARTBA supports this clarification as an important step toward regulatory stability. Many transportation projects are planned and delivered over multi-year timelines, and uncertainty at the listing stage can cascade into later delays during permitting and consultation. As ARTBA has previously documented, even short delays in transportation project delivery can result in millions of dollars in increased costs due to inflation, labor escalation, procurement timing, and extended traffic impacts, costs ultimately borne by taxpayers and project sponsors.¹⁶

C. Interagency coordination should promote efficiency and avoid unnecessary project delays.

ARTBA supports FWS's proposed revisions to the interagency consultation regulations, which restore clearer standards governing when and how federal agencies must consult on transportation projects. Under the ESA, consultation is triggered when a federal agency authorizes, funds, or carries out a project that may affect a listed species or its habitat. For transportation projects, the federal agency providing funding or approvals, such as the Federal Highway Administration, typically leads this consultation with FWS and may require project adjustments or conservation measures to minimize impacts to species or habitat. Over time, these consultations have become increasingly complex and lengthy, resulting in confusion, shifting expectations, and project delays.¹⁷

ARTBA members have experienced delays caused by consultation determinations changing mid-review, including situations where agencies initially concluding that formal consultation was not required, only to reverse that determination months later. In some cases, consultation timelines were restarted rather than continued, despite substantial prior review. These disruptions can stall projects that are otherwise ready to advance, undermining carefully sequenced planning, procurement, and construction schedules.

FWS' proposed revisions better align consultation obligations with an agency's statutory authority and practical ability to influence project outcomes, rather than extending consultation to speculative or indirect effects beyond an agency's control. For transportation projects that require coordination among multiple federal agencies, state partners, and funding programs, clear consultation boundaries are essential to maintain efficient and predictable review processes.

The proposal helps address these challenges by reaffirming that consultation should focus on effects that are reasonably attributable to the federal action under review and within the agency's control.¹⁸ By reducing uncertainty and limiting unnecessary re-initiation or expansion of consultation, the proposed revisions promote more efficient coordination among agencies and help keep transportation projects moving forward. Clear, consistent consultation standards ultimately allow agencies and project sponsors to manage risk, control costs, and deliver critical infrastructure improvements in a timely manner.

¹⁶ ARTBA previously commented on the Biden administration's regulations that revised or rescinded these principles. Those comments provide background and context as to why these current changes are necessary. See Comments by the American Road & Transportation Builders Association (August 21, 2023) available at, <https://www.artba.org/resource/comment-opposing-changes-proposed-by-fish-wildlife-service-to-endangered-species-act-regulations/>.

¹⁷ See generally *supra* note 4.

¹⁸ *Id.*

Conclusion

ARTBA appreciates FWS's efforts across these proposals to restore clearer, more durable standards that align ESA implementation with statutory authority, best available science, and practical control over project outcomes. Transportation projects frequently involve multiple federal agencies, state partners, and funding sources. Predictable, consistently applied rules are essential so project sponsors can plan responsibly, manage risk, and deliver critical safety and mobility improvements on schedule.

ARTBA members have experienced project delays caused by shifting determinations mid-review, including instances where consultation requirements changed after months of work had already occurred. Even short delays can result in substantial cost increases due to inflation, labor escalation, and procurement timing. ARTBA therefore supports these proposed reforms as an important step toward improving transparency, consistency, and efficiency while continuing to protect listed species and their habitat.

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
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American Road & Transportation Builders Association