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August 21, 2023

Public Comments Processing
Attn: FWS–HQ–ES–2021– 0107
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041–3803

RE: Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat (88 *Federal Register* 40,764; June 22, 2023)

Dear Sir/Madam:

AGC welcomes the opportunity to provide feedback to the U.S. Fish and Wildlife Service, National Marine Fisheries Service (NMFS), and National Oceanic and Atmospheric Administration (NOAA) (jointly, the “agencies”) on the *Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat* (88 *Fed. Reg.* 40,764). The proposal revisions would apply to the procedures and criteria used for listing, reclassifying and delisting species and for designating critical habitat.

AGC of America is the nation’s largest and most diverse trade association in the construction industry. The association represents more than 27,000 members through a network of chapters in all 50 states, the District of Columbia, and Puerto Rico. Our commercial construction firms are engaged in building, heavy, civil, industrial, utility, and other construction for both public and private property owners and developers. Collectively, AGC member firms build much if not most of the nation’s public and private infrastructure. The construction industry is the delivery vehicle for building a greener, more climate-friendly future. Our nation faces many challenges that require the delivery of timely infrastructure projects to help address them.

The successful management of threatened and endangered wildlife and plants within the scope of a project is of great importance to the construction industry. AGC members perform many construction activities on land and water, which range from large infrastructure projects that require a breadth of lengthy environmental reviews to small projects that may be covered, in part or in full, by general permits. Even small projects (e.g., that disturb as little as one acre of land) must consider the impact of the construction activities on ESA-listed species (threatened or endangered), and the habitat of listed species.

In addition to specific changes discussed below, the agencies are accepting feedback on all aspects of the 2019 rule, including whether any provisions should be revised or rescinded. In general, AGC of

America supported the agencies' efforts in 2019 to improve to clarify and refine the procedures and criteria used for listing or removing species from the lists of endangered or threatened wildlife and plants as well as the designation of critical habitat.¹ The prior process had proven unpredictable, costly, and time consuming for the permitting and construction of infrastructure projects nationwide. At the time the agencies proposed the changes, AGC members shared that implementation of the Act lacks a requisite threshold of reliable data and species-specific knowledge, such as in the listing process. AGC expressed concern that the critical habitat requirements were overly expansive and ripe for more efficiency and transparency. With the 2019 reforms, the agencies sought to address, in part, some of these challenges; however, we have not had time to experience the impact of improvements to this regulatory policy.

In the 2023 proposal, the agencies are accepting feedback on wording and other changes within the rule. Notable changes that have raised concerns among AGC's membership include:

- Revision and possible rescission of the definition of “foreseeable future” – The agencies propose to amend the time horizon used for listing a species as threatened and are favoring the use of “a reasonable degree of confidence in the prediction” that would “extend[] as far into the future as the Services can reasonably rely on information” when determining if their listing decisions are supported.

AGC was concerned that the 2019 reforms did not go far enough to help avoid speculation over hypothetical situations or outcomes and illogical results. AGC encourages the Services to further clarify what qualifies as “best available scientific and commercial data” and use data that meet those specifications in its listing decisions.

- Replace the imperative to delist a species by replacing “shall” delist with “it is appropriate to delist, if...”

AGC contends that this minor wording change, without deadlines or timeframes for initiating action for delisting, opens the door to delaying the delisting of species.

- Revise the process for determining when and whether to designate unoccupied areas as critical habitat.

AGC is concerned that these changes remove safeguards against the designation of vast, expansive areas of unoccupied critical habitat. The agencies would no longer have to consider occupied areas first nor only consider unoccupied areas when those that are occupied are not adequate to ensure the conservation of the species. In fact, the wording changes appear to introduce a process whereby both occupied and unoccupied areas are identified as a matter of course.

- Removes the requirement that designated unoccupied habitat contain one or more of the physical or biological features essential to the conservation of the species.

¹ Incorporating by reference AGC's letter to the agencies in response to the related 2018 proposal, available in the docket at: <https://www.regulations.gov/comment/FWS-HQ-ES-2018-0006-54771>.

AGC is concerned that the agencies continue to downplay the U.S. Supreme Court’s decision in *Weyerhaeuser Co. v. U.S. FWS* (2018) that critical habitat must first be habitat. AGC strongly encourages the agencies to rely on scientific data critical habitat designation decisions that unoccupied areas are in fact habitable by the species.

Economic Impacts in Classification Process

Lastly, AGC would like to respond to the proposed reversal on transparency related to economic impacts. The proposed rule would direct the agencies to make species listing determinations “without reference to possible economic or other impacts of such determination.” The 2019 reforms make it clear that the agencies continue to make listing decisions based solely on biological considerations. However, information on economic and other impacts presents a more thorough presentation of the proposed listing and better informs the public and policymakers. It also increases the transparency of the determination process. Obscuring the economic impacts does a disservice to the evaluation of the efficacy of the agencies’ programs that implement the Act.

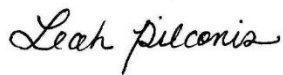
Conclusion

AGC appreciates this opportunity to respond to the agencies’ proposal on behalf of its construction industry member companies. If you have any questions, please contact Melinda Tomaino directly at melinda.tomaino@agc.org or (703) 837-5415.

Respectfully Submitted,



Melinda L. Tomaino
Senior Director, Environment and Sustainability



Leah Pilconis
General Counsel