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Public Comments Processing  
Attn: FWS–HQ–ES–2021– 0104  
U.S. Fish and Wildlife Service  
MS: JAO/3W  
5275 Leesburg Pike  
Falls Church, VA 22041–3803

RE: Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation (88 *Federal Register* 40,753; 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; Revision of Regulations for Interagency Cooperation* (88 *Fed. Reg.* 40,753). This proposal relates to the procedural regulations that govern interagency cooperation under section 7 of the Endangered Species Act, which requires Federal agencies to ensure their actions (authorized, funded, or carried out by them) will not jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of its 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. Indeed, section 7 consultation is generally triggered when a federal agency is involved in a proposed action that may affect a species listed as threatened or endangered under ESA or their critical habitat.

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 the interagency consultation process to make it more efficient and consistent.<sup>1</sup> 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, and it continues to be the case, that many permit delays stem from related inter-agency permissions, authorizations, and/or certifications required before a "lead" agency will approve an application. 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. AGC does not recommend turning back the clock to an open-ended, confusing process that produced costly analysis and delays without documented resulting gains for protected species.

In the 2023 proposal, the agencies are accepting feedback on changes to key definitions used within the rule.

- Revision to definition of "effects of the action" – Expands the definition to include not only the consequences of the proposed action but also other activities that are caused by that action but not part of the action.
- Revision to definition of "environmental baseline" – Changes the word "consequences" to "impacts," removes the term "ongoing" and adds the term "Federal" in two locations.
- Removal of "reasonably certain to occur" language to a guidance document – Removes the requirement that a consequence should be "reasonably certain to occur" (thereby lowering the degree of certitude in the 2019 reforms).

Individually, the changes may appear minor; collectively, however, they signal a concerning trend that the agencies are undermining the safeguards that serve to bookend the consultation process and reduce uncertainty and unwarranted speculation in the process. Again, AGC generally supported the 2019 rule and the rationale the agencies provided at that time to justify the collection of reforms they advanced. The 2023 proposed changes appear unjustified and arbitrary in comparison. Furthermore, the agencies' assertions that the backtracking and modifications will provide clarity are unfounded. To the contrary, AGC members report concerns that the agencies are creating regulatory uncertainty by proposing unnecessary changes. The regulated community is left guessing at the significance of the excised words as well as the reframing and repositioning (i.e., deleting or moving to guidance) of key concepts.

Lastly, AGC would like to respond to the proposed expansion in the scope and location of the "reasonable and prudent measures" (RPM), which are provisions that project proponents must undertake to reduce and minimize incidental take. AGC cautions the agencies against layering on new requirements to an already beleaguered process. The agencies propose new requirements for additional steps for the Federal agency or applicant to fully mitigate or offset those impacts that are unavoidable. The agencies would have significant discretion to specify offsetting measures—on a

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<sup>1</sup> 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-2018-0009-58105>.

case-by-case basis. This mitigation could include offsets that would occur off-site. Its discretionary application introduces uncertainty and potential for inconsistency to the process. Furthermore, the addition of a requirement for mitigation as a “reasonable and prudent measure” is at odds with the long-held practice that these measures remain onsite and the requirement that these measures may only involve minor changes and not alter the action (including timing). Mitigation introduces significant costs and delays to projects, especially where there are few viable mitigation options.

Notably, AGC members report a lack of confidence in the availability of species-related mitigation banks, in general, even more so in remote areas. Although this provision could be considered as a quick way to move projects forward that may result in “take,” this scenario has not played out in the compensatory mitigation schemes associated with water permitting. Banks for wetlands and streams continue to be in short supply and other time-consuming options must make up the shortfall (i.e., in lieu fee programs and permittee responsible mitigation) often at great cost.

## 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](mailto:melinda.tomaino@agc.org) or (703) 837-5415.

Respectfully Submitted,



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