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U.S. Fish and Wildlife Service
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Samuel Rauch, III
National Marine Fisheries Service
Office of Protected Resources
1315 East-West Highway
Silver Spring, MD 20910

Re: "Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat," 83 *Fed. Reg.* 35,193 (July 25, 2018) **Docket ID No. FWS-HQ-ES-2018-0006**

Dear Ms. Fahey and Mr. Rauch:

The Associated General Contractors of America (AGC) appreciates the opportunity to comment on the U.S. Fish and Wildlife Service's (FWS) and National Marine Fisheries Service's (NMFS) (jointly, the Services) request for comment on the proposal¹ to revise portions of the regulations that implement section 4 of the Endangered Species Act.

In general, AGC of America supports the Services' efforts 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. Listings of species and critical habitat designations have the potential to significantly impact existing and planned infrastructure work. In the course of their business operations, AGC members have found that the current implementation of the Act lacks a requisite threshold of reliable data and species-specific knowledge, such as in the listing process. AGC is concerned that the existing critical habitat requirements are overly expansive and are ripe for more efficiency and transparency. The determinations process adds delay and cost to the permitting and construction of infrastructure projects nationwide. AGC supports the Services' proposed actions to improve that process and offers the following comments to clarify points of confusion or concern.

Introduction

AGC is the nation's leading construction trade association. It dates back to 1918, and today, the association represents more than 26,000 construction contractor firms, suppliers and

¹ See 83 *Fed. Reg.* 35,193 (July 25, 2018), <https://www.gpo.gov/fdsys/pkg/FR-2018-07-25/pdf/2018-15810.pdf>.

service providers across the nation, and has members involved in all aspects of nonresidential construction. Through a nationwide network of chapters in all 50 states, DC and Puerto Rico, AGC contractors are engaged in the construction of the nation's public and private buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

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. Project proponents need to assess the impacts on listed species as early as possible in the construction process to avoid project delays.²

The penalties for non-compliance with environmental rules, in general, are steep and can result in reputational damage, the inability to compete for certain projects, financial loss, or even risk of criminal or civil liability.

Summary of the Proposal

In brief, the Services are recommending changes to their regulations governing the listing of species and designating of critical habitat. The Services propose:

- To remove language from the current regulations that prevents the services from referencing "possible economic or other impacts" in listing decisions, but retain the current approach of making determinations based on biological considerations.
- To establish a framework for and limit the scope of the definition of "foreseeable future" to mean, in lieu of a specific time frame, "the extent to which they can reasonably

² For example, EPA's Construction General Permit (CGP) for stormwater is applicable to sites that disturb an acre or more of land, including smaller sites part of a common plan of development. Eligibility procedures relating to threatened and endangered species are found in appendix D of the permit.

(https://www.epa.gov/sites/production/files/2017-02/documents/2017_cgp_final_appendix_d_-_endangered_species_reqs_508.pdf) In addition, if a federal agency is funding (either fully or partially) a construction project, or if a federal permit (other than the CGP) is required for a construction project, the federal agency taking the action (i.e., funding or permitting) must fulfill the requirements of the ESA. If the agency determines that the project would impact listed species and/or critical habitat, and develops plans to mitigate these impacts, it likely will be the obligation of the contractor to implement these plans. If a construction activity is not covered by the CGP (e.g., if the stormwater permit is issued by a delegated state agency), and if no federal funding or other federal permits are associated with the construction activity, project proponent still must evaluate if the project will incidentally cause a take of a listed species and/or critical habitat. If the project will result in a take, an Incidental Take Permit under ESA section 10 is required to authorize the take.

determine that both the future threats and the species' responses to those threats are probable."³

- To streamline the delisting process for species.
- To revise when, and under what circumstances, it may not be prudent to designate habitat.
- To prioritize those areas that are occupied by the species when considering which areas to establish as critical habitat.

AGC's Response to Key Points in the Services' Proposal

1. *ECONOMIC CONSIDERATIONS IN LISTING:* *Discussion of economic and other factors is not specifically prohibited in the statute and increases transparency*

AGC supports the Services' proposed change to remove language from 50 CFR section 424.11(b) that prohibits the Services from discussion or description of economic or other impacts resultant from the listing determination.⁴ The Services state that this action would align the text more closely with the statutory language. The statute does not reference economic or other impacts and indicates that the Secretary make determinations based "solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species."⁵ The Services affirm that they would continue to make listings decisions based solely on biological considerations. AGC further agrees with the Services that 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.

2. *FORESEEABLE FUTURE:* *Definition of 'foreseeable future' remains unclear and continues to rely on models and predictions*

In general, AGC supports the Services' effort to clarify "foreseeable future" related to determinations to list a threatened species if it is "likely to become endangered within the foreseeable future throughout all or a significant portion of its range."⁶ However, AGC members have expressed concern that the term would continue to remain unclear: The Services do not propose a specific period of time and propose to continue to "describe" the term on a case-by-case basis.⁷

As "foreseeable future" is not defined nor further described in the Act, the Services propose to apply the term "only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable." Later explained again as, "the extent to which they can reasonably determine that both the

³ See 83 Fed. Reg. 35,195 (July 25, 2018).

⁴ See 83 Fed. Reg. 35,194 (July 25, 2018).

⁵ See 16 USC Section 1533(b)(1)(A).

⁶ See 16 USC Section 3(20).

⁷ See 83 Fed. Reg. 35,195 (July 25, 2018).

future threats and the species' responses to those threats are probable." AGC agrees that the Services need a framework to guide their approach to defining the term "foreseeable future" to help avoid speculation over hypothetical situations or outcomes and illogical results.⁸ However, once again, what is "probable" is not definitive nor always clear. Under the proposal, the determination would be based on "reliable" predictions, which means sufficient to provide a reasonable degree of confidence. Qualitative and quantitative determinations could be used in this calculation, as further discussed below. AGC urges the Services to go a step further to provide more clarity and to establish an appropriate range/parameters for these terms.

AGC members have raised specific concerns regarding what the "best available scientific and commercial data" the Services will use to establish a probable foreseeable future, as it relates to listing determinations. Members have indicated that data is not always readily available or transferrable project-to-project, even between those similarly situated; and on infrastructure projects it is not uncommon for project proponents to have to commission expensive surveys and studies to form a biological record that spans many seasons and even years. Members are also concerned what the Services could or would use if ample data were not available and what measures are in place to maintain the integrity of the listing determinations. The Services state that—

Depending on the nature and quality of the available data, predictions regarding the future status of a particular species may be based on analyses that range in form from quantitative population-viability models and modelling of threats to qualitative analyses describing how threats will affect the status of the species. In some circumstances, *such analyses may include reliance on the exercise of professional judgment* by experts where appropriate.⁹ [Emphasis added.]

There is a concern that models are not always reliably predictive and that subjectivity and opinion would take the place of data where gaps exist in the available science. 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.

3. DELISTING CONSIDERATIONS: *The Services should streamline the delisting process*

AGC supports the Services' proposal to establish a process for delisting a species that mirrors the process for listing a species. If the species does not meet the listing requirements for an endangered or threatened species, then it should not be listed or should be delisted as appropriate. The statute includes five factors for determining whether a species is endangered, making the determinations to delist a species based on the same five factors will streamline the process. This will also work to alleviate concerns that the Services' prioritize listing and up-listing petitions over delisting and down-listing petitions.

⁸ For example, the Ninth Circuit has recently upheld the listing of a Pacific bearded seal due to its "likely" extinction approximately 100 years from the time of listing. *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671 (9th Cir. 2016).

⁹ See 83 *Fed. Reg.* 35,195 (July 25, 2018), <https://www.gpo.gov/fdsys/pkg/FR-2018-07-25/pdf/2018-15810.pdf>.

4. CRITICAL HABITAT DESIGNATIONS: *Make the critical habitat designation process more efficient by clarifying the situations where such designation is not prudent*

When a species is listed, the Services generally must also designate “critical habitat” for the species. Critical habitat designations for listed species include areas, occupied or not, that are deemed essential to species survival and recovery. However, there are cases where it would not be prudent to designate habitat. Currently only two situations exist wherein the Services would find it not prudent to designate critical habitat. The Services propose additional context and circumstances (and thus clarity) as to when the designation of critical habitat would generally not be prudent. For instance, in cases where—

- Identification of habitat would increase the threat to the species;
- The species is impacted by threats (e.g., disease) unrelated habitat concerns and/or habitat designation would not serve its intended function to conserve the species;
- No areas meet the definition of critical habitat in the Act; or where
- Critical habitat areas under the jurisdiction of the United States provide negligible conservation value for a species that primarily occurs in areas outside of U.S. jurisdiction and where no areas under U.S. jurisdiction contain features essential to the conservation of the species.

AGC supports these proposed changes as they will serve to make the critical habitat designation process more efficient. In addition, it may also be helpful for the Services to consider criteria for the removal of critical habitat. For example, whether critical habitat should be revised or removed should be included in the five-year review of listed species required by 50 CFR 424.21. This is discussed more in the “Other Considerations” section below.

5. OCCUPIED VS. UNOCCUPIED HABITAT: *Prioritize occupied habitat in designations*

AGC supports the Services’ prioritization of occupied habitat and the Services’ rejection of the approach finalized in 2016 that loosened the safeguards *against* designating unoccupied habitat as critical except where “its present range would be inadequate to ensure the conservation of the species.” However, AGC members have expressed concern that the proposal still provides a route to “designate as critical habitat expansive areas of unoccupied habitat,” as the Services acknowledge is a perception of the 2016 approach. While the proposed changes are important and helpful, the factors that the Services have proposed to guide designation of unoccupied habitat do not go far enough to sufficiently limit the unnecessary reliance on unoccupied habitat, as explained in the discussion below.

In the preamble to the proposal, the Services clarify that, in designating unoccupied habitat, the “Secretary must determine that there is a *reasonable likelihood* that the area will contribute to the conservation of the species.” One of the factors of that decision would be whether the “area is currently *or is likely to become* usable habitat for the species...”. [Emphasis added.] However, the preamble elaborates that in some instances, “*a lower threshold than ‘likely’* may be appropriate.” [Emphasis added.] And further into the preamble: ... [T]he Services may reasonably classify that area as essential even in the face of a *low likelihood* that the area

would contribute to species conservation.” [Emphasis added.] Within a few paragraphs of the preamble, the Services drastically lowered the threshold for the unoccupied habitat that would be considered for designation to areas which have a low likelihood to contribute to species conservation.

The discussion of thresholds appears in the proposed language of the rule where the Secretary has discretion to designate unoccupied habitat not only when the occupied habitat is “inadequate to ensure the conservation of the species” but also when occupied habitat would result in “less efficient” conservation. The concept of “less efficient conservation” goes beyond conservation and, together with the preamble language, suggests that the Services will indeed look to “designate as critical habitat expansive areas of unoccupied habitat” in order to provide as much habitat as possible, regardless of whether the area has a low likelihood to contribute to the species conservation, in an attempt to provide for a more efficient conservation.

The proposed regulatory language also emits reference to using “best available scientific and commercial data” in making the determination to designate unoccupied areas as critical habitat — language that is included in the Act. The Services should clarify in the regulatory text that the Secretary would be making designation decisions based on “best available scientific and commercial data.”

AGC recommends that the Services prioritize occupied habitat in critical habitat designations in all cases. If unoccupied habitat is to be considered, which is not AGC’s recommendation, then it should only occur in rare circumstances, the threshold should be set high and based on the “best available scientific and commercial data” that any unoccupied area being considered for “critical habitat” designation is in fact essential or *critical* to ensure the conservation of the species.¹⁰

Other Considerations

AGC members have expressed the need for the Services to establish criteria for “delisting” or reverting a critical habitat designation. The proposal does not address changes in range that may occur as species migrate. AGC members have mentioned instances where they must establish plans to protect habitat for species that have not been spotted in that area for decades. It would be helpful, for example, if the Services required a review of critical habitat during the review of listed species required by 50 CFR 424.21. At this time, the Services could also determine whether critical habitat should be revised.

¹⁰ This additional level of detail is needed to help guide designations of unoccupied habitat and to avoid designations of critical habitat like the designations for the dusky gopher frog, which is currently being considered by the Supreme Court in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, No. 17-71 (critical habitat designated for dusky gopher frog even though it did not currently contain the physical and biological features necessary to survive and was not likely to develop them in the future absent additional measures taken by the private landowner).

In conclusion, AGC supports the Services' proposed actions to improve the process for listings and critical habitat determinations. AGC recommends the Services establish an appropriate range/parameters for "foreseeable future" and "probable," clarify what qualifies as "best available scientific and commercial data" and use data that meet those specifications in its listing decisions, and prioritize occupied habitat in critical habitat designations in all cases.

AGC appreciates this opportunity to provide recommendations on behalf of its construction industry member companies. If you have any questions, please contact Melinda Tomaino directly at tomainom@agc.org or (703) 837-5415.

Respectfully,


Melinda Tomaino
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