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September 24, 2018

Bridget Fahey  
U.S. Fish and Wildlife Service  
Division of Conservation and Classification  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

Re: "Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants," 83 *Fed. Reg.* 35,174 (July 25, 2018)  
**Docket ID No. FWS-HQ-ES-2018-0007**

Dear Ms. Fahey:

The Associated General Contractors of America (AGC) appreciates the opportunity to respond to the U.S. Fish and Wildlife Service's (FWS or the Service) request for comment on its proposal to revise the Service's regulations that extend most of the prohibitions for activities involving endangered species to threatened species. The Service is proposing, pursuant to section 4(d) of the Endangered Species Act (ESA), "to determine what, if any, protective regulations are appropriate for species that the Service in the future determines to be threatened."<sup>1</sup>

AGC of America supports the Service's proposal to take a species-specific look at the protective regulations for threatened species. The current practice of extending the same protections of endangered species to threatened species ignores the statutory distinction between the two classifications. The practice of crafting tiered, and tailored regulations is well-established within the framework of the nation's major environmental laws. In particular, tiered protections, in the long run, will enable the Service to prioritize its resources on endangered species. And tailored protections consider factors unique to individual species and circumstances.

However, FWS will need additional resources to be able to timely develop 4(d) rules. As AGC discusses below, the Service should commit to a timeframe for the species-specific rules. Without this assurance in the regulation itself, not merely in the preamble to the rule, infrastructure projects in areas with a newly listed threatened wildlife or plant species could remain in a holding pattern until FWS issues a final protective rule for that species.

## **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

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<sup>1</sup> See 83 *Fed. Reg.* 35,174 (July 25, 2018) <https://www.gpo.gov/fdsys/pkg/FR-2018-07-25/pdf/2018-15811.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.<sup>2</sup>

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, FWS seeks to align its approach to applying protections for threatened species with that of the National Marine Fisheries Service (NMFS). FWS is proposing to stop its practice of automatically applying "endangered species-level protections once a species is listed as threatened by amending its regulations to remove the "blanket" extension of protections to threatened species (that otherwise only apply to endangered species). Instead, if finalized as proposed, the Service would promulgate a species-specific (or tailored) protective regulation for species that are listed as threatened after the effective date of the final rule, which has been NMFS's approach for the last 40 years. The ESA permits the Secretary to develop protective regulations for threatened species; however, it does not obligate the Service to provide

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<sup>2</sup> 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](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.

section 9 (take prohibitions for endangered species) to threatened species. This proposal would give FWS discretion to determine what protections if any, are appropriate for each listed or reclassified threatened species. The FWS extended blanket protections in 1978; whereas, the NMFS chose to develop species-specific protective rules for threatened species.

Further, FWS is requesting comment on its intention to "finalize the species-specific rule concurrent with the final listing or reclassification determination."<sup>3</sup> FWS also is requesting feedback on whether the Service should include "any binding requirement in the regulatory text to do so, such as setting a timeframe for finalizing species-specific rules after a final listing or reclassification determination."<sup>4</sup>

## **AGC's Response to the Service's Proposal**

### ***1. PROTECTIONS TAILORED TO SPECIES AND CIRCUMSTANCES: FWS should take a tailored approach to future protections for species listed as threatened***

AGC supports FWS's proposal to use a tailored approach to develop species-specific protective rules for newly classified threatened species *determining what is necessary and advisable for each species on a case-by-case basis*. These changes are prospective, so there would be no change in protections for species currently listed as threatened. Treating endangered species and threatened species the same ignores the statutory distinction between the two classifications. As indicated in the proposal, the ESA supports the distinction between threatened and endangered wildlife and plants. Protective measures should be tailored to the level of concern or potential harm to a species, to avoid out-sized regulations.

Further, major environmental laws commonly employ approaches tailored to address a specific potential for environmental harm as well as tiered approaches that balance requirements with any potential damage that could occur. For example, the Clean Air Act elevates criteria pollutants to a higher priority and places more stringent conditions on areas that are out of conformity with air quality standards. The rules implementing the CAA contain varying requirements tailored to that program: for large versus small emitters or for various engine types and sizes, as an example. The Clean Water Act distinguishes between point and nonpoint sources, as well as places more stringent conditions for effluents discharged to an impaired waterbody. Rules controlling stormwater runoff allow for general permits versus individual permits. Other rules have tiered requirements based on the size capacity for oil storage on a site/facility. Consider also the federal requirements for reporting hazardous materials, if/when above a threshold. The U.S. Army Corps of Engineers also provides individual permits and "general permits" called nationwide permits. And, for example, the National Environmental Policy Act allows for categorical exclusions, environmental assessments, as well as environmental impact statements dependent on the potential for environmental impact.

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<sup>3</sup> See 83 *Fed. Reg.* at 35,175 (July 25, 2018) <https://www.gpo.gov/fdsys/pkg/FR-2018-07-25/pdf/2018-15811.pdf>.

<sup>4</sup> *Ibid.*

These administrative and regulatory strategies allow an agency – or service – to better use their staff and budgetary resources. A similar approach should help FWS prioritize resources to focus on the recovery of endangered species.

**2. *TIMELY DEVELOPMENT OF 4(D) RULES:*** *FWS should commit to a timeframe for development of species-specific rules*

In the proposed rule, FWS stated a goal of issuing the 4(d) rule at the time the listing decision is made. While AGC supports this goal, our contractor members are concerned that FWS is not committing to a timeline. AGC urges the Service to commit to a timeframe for the species-specific rules. AGC members have shared that a construction project will be unable to proceed if the listing is finalized without protective measures in place. At a minimum, they recommend an explicit and short timetable combined with a streamlined process for the species-specific rules. In this regard, AGC recommends that FWS act jointly with NMFS. AGC expounds on this recommendation below.

Further, AGC firmly encourages the Service to include a binding requirement for a timetable (again, preferably finalized jointly with NMFS) in the regulatory text. Including this language will hold the Service(s) accountable and give project proponents more confidence that their investment will be able to proceed in a timely manner.

**3. *NATIONAL POLICY FOR DEVELOPMENT OF 4(D) RULES:*** *FWS should streamline the process for development of species-specific rules*

In an effort to assist FWS staff in developing species-specific 4(d) rules, AGC recommends that FWS outline the process and expectations for the development of such a rule.

AGC acknowledges that it will take more staff resources upfront for FWS to develop species-specific rules for threatened wildlife and plants, without simply defaulting to the endangered species protections to save time. Although, in the long-run, a tiered approach should free up resources to prioritize and focus on endangered species. To reduce the up-front effort, AGC members recommend the Service streamline the process for developing the species-specific rules. As the major environmental laws discussed above, the Service could provide a framework of such a rule to assist FWS staff and put in place provisions that offer a right-sized approach in a routine format. This framework could take the form of guidance, example management practices, and programmatic tools. Such resources may also help to protect 4(d) rules from legal challenges.

In conclusion, AGC supports the Service's proposal to take a species-specific look at the protective regulations for threatened species. AGC urges the Service to release any protective rules with the final listing and to streamline the process to aid FWS staff in managing the additional responsibilities before the listing and rule are finalized.

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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](mailto:tomainom@agc.org) or (703) 837-5415.

Respectfully,

*Melinda Tomaino*  
Melinda Tomaino  
Director, Environmental Services