



October 8, 2020

Public Comments Processing
Attn: FWS–HQ–ES–2019– 0115
U.S. Fish and Wildlife Service, MS:JAO/1N
5275 Leesburg Pike
Falls Church, VA 22041–3803.

Re: Docket No. FWS-HQ-ES-2019-0115; Endangered and Threatened Wildlife and Plants; Regulations Designating Critical Habitat

On behalf of the more than 8,000 members of the American Road & Transportation Builders Association (ARTBA), I respectfully offer comments on the U.S. Fish & Wildlife Service’s (FWS) recent proposed rule regarding regulations for designating critical habitat.

ARTBA’s membership includes private and public-sector members that are involved in the planning, designing, construction and maintenance of the nation’s roadways, waterways, bridges, ports, airports, rail and transit systems. Our industry generates more than \$500 billion annually in U.S. economic activity and sustains more than 4 million American jobs.

Because of the nature of their businesses, ARTBA members undertake a variety of activities that are subject to Endangered Species Act (ESA) regulations. ARTBA’s public sector members adopt, approve, or fund transportation plans, programs, or projects which are all subject to multiple federal regulatory requirements. ARTBA’s private sector members plan, design, construct and provide supplies for federal-aid transportation improvement projects.

FWS has undertaken an effort to clarify the definition of critical habitat under the ESA “to provide greater transparency and certainty for the public and stakeholders.” ARTBA supports this effort and specifically agrees with FWS that any definition of critical habitat should be made “on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact.”

The ESA is a valuable tool in helping to deliver transportation projects in a manner that is most beneficial to both the environment and the communities served by those projects. ARTBA applauds FWS for recognizing the need to reform the ESA, which has achieved less than a one percent rate of success for species recovery. At the same time, it has resulted in multi-year delays for transportation construction projects. Delayed transportation improvements contribute to greater congestion on existing roads which leads to detrimental public health and safety effects, including reduced air quality and increased motor vehicle accidents.

FWS seeks to reform the designation process by clarifying how the agency determines the benefits of including or excluding an area as “critical habitat.” Proper determination of critical habitat is a very important issue for state and local governments, as well as businesses located in areas impacted by ESA activity. A determination of critical habitat can literally remove hundreds of miles from the possibility of any type of development.

Currently, FWS can even make a critical habitat designation based on the “historical” presence of a species, years in the past. In the transportation arena, the critical habitat designation is especially relevant as states promulgate transportation plans years, if not decades, in advance. If a regulatory agency summarily declares an area “off limits” through an overly broad critical habitat designation, then it can unnecessarily jeopardize carefully designed plans for economic development.

The FWS proposal is well timed. On September 1, FWS determined critical habitat designation was not prudent for the rusty patched bumble bee. A critical habitat designation for the bee would have limited development in 13 states with the potential for adding up to 15 more states. In Illinois, confusion over the bee’s habitat while this decision was being considered resulted in litigation temporarily stopping the \$115 million Longmeadow Parkway Bridge Corridor project.

Similar to the aforementioned rusty patched bumble bee, the need for reform of the critical habitat process was also spotlighted by regulatory proceedings involving the long-eared bat. In the case of the long-eared bat, FWS determined the proposed habitat to be:

“The range of the northern long-eared bat includes much of the eastern and north central United States, and all Canadian provinces from the Atlantic Ocean west to the southern Yukon Territory and eastern British Columbia. Within the United States, this area includes the following 37 States and the District of Columbia: Alabama, Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.¹”

Thus, the area potentially impacted by the critical habitat of the northern-long eared bat could have potentially been a majority of the land in the continental United States.

Further, the main concern leading to FWS leading to the ESA being applied to the long-eared bat was a condition known as “white nose syndrome.” While this disease has caused a significant impact on the long-eared bat’s population, it has not been linked to any specific type of human activity. Thus, by listing the long-eared bat under ESA, FWS took the risk of hindering development for a vast portion of the country without any direct benefit for the species the critical habitat was meant to protect.

While FWS ultimately decided that it was “not prudent” to place severe development restrictions on long-eared bat habitat, the episode demonstrates the need for ESA reform to prevent broad-based unintended consequences that can arise under the current critical habitat designation system.

¹ United States Fish and Wildlife Service, *Northern Long-Eared Bat*, available at: <http://www.fws.gov/midwest/endangered/mammals/nlba/nlbaFactSheet.html>, last updated January 22, 2015.

Both the rusty-patched bumble bee and long-eared bat scenarios demonstrate the need for a reform of the critical habitat designation process. ARTBA looks forward to continuing to work with FWS on efforts defining critical habitat in a manner which achieves both species protection and an efficient regulatory structure.

Sincerely,

A handwritten signature in cursive script that reads "David Bauer".

David Bauer
President & C.E.O