

# Endangered Species Act/Proposed Revisions: Associated General Contractors of America Comments



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The Associated General Contractors of America (“AGC”) submitted three separate sets of comments to the United States Fish and Wildlife Service and National Marine Fishery Service in regards to proposed rules related to the federal Endangered Species Act (“ESA”).

AGC describes itself as the nation’s leading construction trade association which includes 26,000 construction contractor firms, suppliers and service providers with members involved in all aspects of nonresidential construction.

AGC Arkansas is a state chapter of this organization.

The three proposed rules for which AGC is submitting comments include:

- 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)
- 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)
- Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. 35,178 (July 25, 2018)

The proposed rules address both the applicability and various aspects of the implementation of the ESA. For example, they address the listing and delisting of species and plants along with the designation of critical habitat and interagency consultations.

By way of introduction, AGC states in the comments that it supports what it characterizes as 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.” The organization expresses concern about various aspects of the current program, such as critical habitat requirements (described as overly expansive), need for efficiency and transparency, and potential impacts on the construction industry in terms of delay and cost.

AGC notes the ESA procedures are not limited to large infrastructure projects. It states:

Even small projects (e.g., that disturb as little as one acre of land) must consider the impact of 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.

Points raised in the comments include:

- Discussion of economic and other factors is not specifically prohibited in the statute and such discussion would increase transparency
- Definition of “foreseeable future” remains unclear and continues to rely on models and predictions
- The delisting process should be streamlined
- Make the critical habitat designation process more efficient by clarifying the situation where such designation is not prudent
- Prioritize occupied habitat and designations
- Fish and Wildlife Service should take a tailored approach to future protections for species listed as threatened
- Fish and Wildlife Service should commit to a timeframe for development of species-specific rules
- Fish and Wildlife Service should streamline the process for development of species-specific rules
- Revise the definition of “destruction or adverse modification”
- Revise the definition of “effects of the action”
- Revise the definition of “programmatic consultation”
- Exclude from consultation activities that are “far removed from any potential for jeopardy or adverse modification of critical habitat”
- Support a prescribed deadline for the informal consultation process (30 day timeline)
- Support proposal to revise the regulations to describe the set of information, commonly called an “initiation package,” that is necessary to initiate consultation
- Support the codification that the Fish and Wildlife Service will give (appropriate consideration to any beneficial actions as proposed or taken by the federal agency or applicant, including actions taken prior to the initiation of the consultation
- Support proposal of a provision authorizing expedited consultations

A copy of AGC’s three sets of comments can be found below.

<http://newsmanager.commpartners.com/agcleg/downloads/FINAL%20AGC%20Comments%20Listings%20and%20Critical%20Habitat%2009-24-18.pdf>

<http://newsmanager.commpartners.com/agcleg/downloads/FINAL%20AGC%20Comments%20Threatened%20Species%2009-24-18.pdf>

<http://newsmanager.commpartners.com/agcleg/downloads/FINAL%20AGC%20Comments%20Interagency%20Cooperation%2009-24-18.pdf>