

October 5, 2017

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Re: DOI-2017-0003-0009, Evaluation of Existing Regulations, Fish and Wildlife Services

The National Stone, Sand and Gravel Association (NSSGA) thanks the Department of the Interior, Fish & Wildlife Services (FWS) for the opportunity to comment on burdensome regulations and requirements. We are heartened by the current administration's vision and leadership on transportation infrastructure and regulatory reform, particularly this effort to collect information on regulations to be updated or eliminated.

NSSGA is the leading advocate for the aggregates industry which employs more than 100,000 highly-skilled men and women. Our members are responsible for the essential raw materials found in every home, road, runway and public works project from schools to hospitals. Our industry generates \$27 billion in annual sales and supports \$122 billion in national sales in affiliated industries. For every job created in the aggregates industry, an additional 4.87 jobs are supported throughout the economy. Additionally, environmental applications such as erosion control, wastewater, sewage, and air pollution control, and drinking water purification systems also use these materials. Aggregate companies extract, crush and sort rock, without using chemical processing. When aggregate producers are finished using the stone, sand, or gravel in the area, they return the land to other productive uses such as residential communities, parks, nature preserves, and drinking water reservoirs. Many members perform voluntary wildlife projects including habitat restoration, invasive species removal and other projects to protect and enhance species in their area.

NSSGA believes that the protection of endangered species is an important public policy issue, and supports a scientific approach to protection, while balancing the need for continued economic growth. During the previous administration, several changes with questionable environmental benefit made an already difficult process even more challenging and costly, such as the expansion of critical habitat beyond statutory limits. Furthermore, the Endangered Species Act (ESA) consultation process is unreasonably open-ended and needs to be improved so that important conservation projects are not delayed.

Previous Administration Definitional Changes Unlawfully Expanded the Scope of the Endangered Species Act and Should be Revised

In 2016, two definitional changes were finalized that are unreasonable and should be revised. These include Definition of Destruction or Adverse Modification of Critical Habitat (81 FR 7214) and Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat (81 FR 7413). As NSSGA commented during the review period, these changes are unnecessary, overly broad, are unclear to the regulated community, and expand agency discretion beyond what was intended in the Endangered Species Act.

Specifically, when changes to the Definition of Critical Habitat and Adverse Modification (81 FR 7214) were proposed, NSSGA was concerned that the level of discretion granted on a case by case basis would lead to a lack of clarity by both regulators and the regulated public. Businesses require clarity and certainty to operate and for informed resource allocation. NSSGA strongly disagreed with the assertion that these changes were minor and would not impact businesses. This expansion of the scope of an “adverse modification” to simply “noticeable” rather than “significant” creates the uncertainty and risk that relatively minor impacts may be deemed “adverse.” This further limits regulatory resources, forcing the consideration of *de minimis*, non-existent, or speculative impacts and exponentially increases uncertainty for the regulated community.

Other changes granted regulators far greater discretion to expand what is considered a “critical” habitat (81 FR 7413). This sort of expansion has considerable impacts on landowners, developers and resource extraction operations. Expanding the scope of “critical habitat” risks losing what is actually critical, by focusing on speculative occupation of a species. This would result in entire regions being considered “critical” even though the species occupy very small portions of the region.

The agencies showed no cases where the existing definitions are inadequate, or that this expansion of federal authority was necessary in order for agencies to properly protect endangered species. Finally, there was no Regulatory Flexibility Act analysis done on these alterations, even though these changes could result in significant costs for operators. For these reasons, FWS should re-evaluate and re-propose these rules.

Endangered Species Act Consultation process is Open-Ended with No Required Response Times by the Fish and Wildlife Service

ESA consultation can stop projects in their tracks and add enormous costs to permitting job-creating new operations. Sometimes members agree to unreasonable conditions rather than accept long delays. One small business agreed to \$125,000 of mitigation at a site in order to proceed with a project rather than have the project put on hold indefinitely by having a permit application be put into pending status.

Another NSSGA member has faced a delay of eight years waiting for the issuance of a Biological Opinion. This project involved an open engagement process involving meetings between Federal agencies and local wildlife groups. The permitting process and mitigation requirements for species compensation have reduced the project size from 1,100 acres to now less than 400 acres. This process led to a finalized group consensus years ago, but the assigned FWS biologist has repeatedly delayed finalization of the Biological Opinion. This is a project that has met relevant criteria, and has cost significant investment in money, time and other resources by the member company, which in turn has affected vital transportation and infrastructure projects reliant upon the future material from this operation.

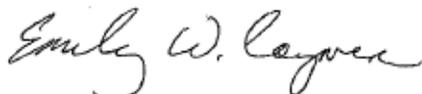
In a case highlighted during a House Small Business Committee hearing (September 6, 2017), NSSGA member Louis Griesemer of Springfield Underground expounded on what impact an unreasonable delay can have on a small business:

Small businesses like mine that have projects stalled over the ESA sometimes don't even involve the presence of endangered species, and can create a domino effect that hurts other businesses and citizens alike. In our case, we had approved plans from our city for an expansion of our tractor-trailer parking lot. When a state road contractor needed a place to dispose of crushed pavement from repaving MO Highway 65 in Springfield, we contracted with them to take the material as fill for this parking lot. This material had to be removed from the road so that repaving of an important artery in Springfield could occur. Highway 65 not only is the major commuter highway to Christian County (fastest growing county in Missouri), it is the tourist route to Branson from Interstate 44. The Missouri DOT put incentives in place for rapid completion. We applied for a land disturbance permit that was delayed, first by FWS, but then even longer by the Missouri Department of Conservation, who both required a study to determine if we were in a breeding area for the endangered bat. The habitat that we would potentially destroy amounted to a dozen trees and some brush. The permit was delayed by four weeks. It seems reasonable that this small area could have been excluded in a shorter period of time, while balancing the need for retaining habitat. That's an eternity for a state highway project like this. Finally, after all this, the Missouri Department of Conservation determined that we are not in a bat breeding zone. This may not seem like a long delay, but consider that lanes were closed and a major long-term road improvement could have been unnecessarily delayed, creating a ripple effect that impacts nearly all other businesses and citizens in the area due to commuting delays.

In another example, a member has faced a delay of over a year waiting for an incidental take permit for a facility expansion. These delays harm not only the companies producing building materials and the infrastructure projects that rely on them, but also delay important conservation efforts.

In summary, NSSGA members work diligently to protect the wildlife and the environment, but the ESA should change unreasonable rules and develop an improved, more transparent process where FWS personnel must follow deadlines. Thank you for your consideration of these comments. I can be reached at (703) 526-1064 or at ecoyner@nssga.org.

Sincerely,



Senior Director, Environmental Policy