



NATIONAL STONE, SAND
& GRAVEL ASSOCIATION

August 21, 2023

Attn: FWS–HQ–ES–2021–0107

U.S. Fish and Wildlife Service
MS: PRB/3W, 5275 Leesburg Pike
Falls Church, VA 22041–3803

Re: Comments on the Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat, Docket No. FWS–HQ–ES–2021–0107, 50 CFR 424

To Whom It May Concern:

The National Stone, Sand and Gravel Association (NSSGA) is pleased to submit these comments on proposed U.S. Fish and Wildlife Services (FWS), National Marine Fisheries Service and National Oceanic and Atmospheric Administration (the agencies) Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat under the Endangered Species Act (ESA). In general, NSSGA finds much of the proposed changes unjustifiably add to confusion and the scope of the ESA.

NSSGA represents the aggregates and industrial sand industry of our country, with over 9,000 facilities and more than 100,000 employees in high-paying jobs. This industry procures 2.5 billion tons of aggregates annually, which are crucial in sustaining our lifestyle and constructing our nation's infrastructure and communities. The products sourced by this industry are fundamental components required for building roads, airports, transit, rail, ports, clean water, and energy networks.

Our industry exists side-by-side with nature, and many of our members voluntarily set aside areas of their property for wildlife habitats. However, we are concerned about the level of discretion granted on a case-by-case basis and the lack of clear guidelines on how this discretion will be applied. Businesses need to understand what is and is not regulated in order to comply and require clarity to operate and for informed resource allocation. NSSGA believes that the protection of endangered species is important, and supports a consistent, transparent and scientific approach to protection, while balancing the need for continued economic growth.



These Amendments Trigger Regulatory Flexibility Act Analysis

While certain edits may appear to be minor, other alterations may significantly enhance agencies' discretion to broaden the definition of a "critical" habitat. Such expansions can wield substantial influence over landowners, developers, and resource extraction endeavors. Broadening the scope of "critical habitat" jeopardizes the preservation of truly vital areas, as it fixates on speculative species occupation. The changes permit the services to label areas as critical even in the absence of past or current species occupancy, founded solely on the supposition of future occupation. This approach could lead to the classification of entire regions as "critical," even if the species occupy only minute portions of said regions. The proposal fails to provide substantiated evidence for the necessity of such modifications.

Economic Impact Information is Not Prohibited by the ESA

NSSGA does not support the proposal to restore the removal of economic and other information. The more economic data and information available for reference, the better comments can be provided, which in turn can improve overall rulemaking. The inclusion of costs in other regulatory programs that similarly cannot base decisions on economic factors such as the Environmental Protection Agency's National Ambient Air Quality Standards, can provide a more accurate picture of the impacts of a proposed agency action. While it is clear that the agencies can not base their decisions on this factor, the information is not prohibited by the ESA, and should not be prohibited by rulemaking.

"Foreseeable Future" Remains Dangerously Open-Ended

NSSGA does not support the changes to the "Foreseeable Future" framework. Such changes can allow for inaccurate and biased models to be used as factual. The further into the future this is projected, the less accurate the data will be. This change allows subjective information to guide the agencies, rather than science. At a minimum, a time limit to such projection with an estimate of its accuracy, should be provided by the agencies.

Standards for Delisting Should Consist of Recovery or Extinction

Delisting criteria should only include extinction or recovery. There should be no other vague factors considered. Many species that have had successful recoveries have remained on the endangered species list, because of unclear criteria and opposition unsupported by data. Species no longer endangered need to be delisted so that resources can go towards those that are actually endangered and are capable of being successfully recovered. This change does not add clarity, rather causes more confusion, by not requiring a recovered species on the endangered list to be removed, or at a minimum justification by agencies why such a removal would be detrimental to the species.



Changes to Non-Designation of Habitat are Prudent

NSSGA agrees with the agencies that in some cases denoting critical habitat are not helpful for species retention or recovery. The proposed changes are needed to ensure that the agencies have the authority to not designate critical habitat when it is either not beneficial or possibly harmful to species.

Areas Not Currently Occupied by a Species Should Not be Considered Critical Habitat

Having critical habitat include areas not occupied by species by will of the Secretaries' authority has the potential to significantly impact landowners, developers, and resource extraction operations.

Unoccupied areas should face an extremely high bar, and the agencies should be required to make a strong case for inclusion. Merely being based on the "best scientific data available" is not an adequate standard, as the "best data" could be poor and speculative. The gauge for focusing on speculative critical habitat based on "...a scale determined by the Secretary to be appropriate" could result in entire regions being considered "critical," with no technical evidence offered that such changes were necessary to properly protect endangered species. Unlike habitated areas, which have a variety of physical evidence of occupation that stakeholders can identify, uninhabited areas requires speculation, meaning stakeholders have no readily ascertainable way to know if an area could be critical habitat.

In summary, NSSGA does not support the proposed definition of designation changes, including amendments constitute mere "minor adjustments to the scope and purpose", the restoration of the phrase "without reference to possible economic or other impacts of such determination", the new delisting actions and its criteria and the Secretary's ability to designate unoccupied areas as critical.

Thank you for your consideration of these comments. I can be reached at (703) 526-1064 or at ecoyner@nssga.org.

Sincerely,



Emily W. Coyner, P.G.

Senior Director, Environmental Policy

