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Gina Shultz
Acting Assistant Director, Ecological Services
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Rescinding the Definition of Harm under the Endangered Species Act, FWS-HQ-ES-2025-0034

We, the Associated General Contractors of America (AGC), appreciate the opportunity to provide feedback on the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the Services) proposal to rescind the regulatory definition of “harm” in the Services’ Endangered Species Act (ESA) regulations. “Harm” is one of the prohibited activities under the ESA collectively referred to as “take” that also include harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect. The ESA obligates contractors to avoid the “take” of protected species while constructing projects of all types.

AGC is the nation’s leading construction trade association. It dates to 1918, and it today represents more than 28,000 member firms representing construction contractor firms, suppliers and 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, D.C., 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 developments.

The proposal to rescind the definition of harm, understood as “to kill or injure”, does not remove the prohibition of those actions against protected wildlife. The Services offer that the definition of harm through regulation “expanded the ESA’s reach in ways that do not reflect the best reading of the statute, to prohibit actions that impair the **habitat** of protected species” [emphasis added]. (90 [Fed. Reg. April 17, 2025](#), at 16103) The FWS and NMFS’s existing harm definitions both refer to “significant habitat modification” that actually “kills or injures” wildlife. The Services assert that the definitions “do not accord with the single, best meaning of the statutory text” nor are they consistent with the dissent in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (in which the regulation was upheld under *Chevron* deference). The Services proceed to refer to Justice Scalia’s dissent in *Sweet Home* that framed harm as an affirmative act, not an indirect or accidental cause of injury. (*Ibid.*) To quote:

“... [U]nder the *noscitur a sociis* canon, the definition of “harm,” like the other nine verbs in the definition, should be construed to require an “affirmative act[] . . . directed immediately and intentionally against a particular animal—not [an] act[] or omission [] that indirectly and accidentally cause[s] injury to a population of animals.” (515 U.S. at 719–20.)

In the normal course of activities on a construction site, contractors seek to avoid and minimize disruption or negative interactions with protected wildlife. By its nature, construction activities modify the landscape and habitat through, for example, site preparation, ground clearing, and earth moving activities. The prospect of take (including incidental take) of a species or destruction of habitat is a significant risk and concern for construction contractors. In order to comply with ESA requirements, contractors will conduct surveys, restrict access, stage/time work appropriately, provide buffers, along with additional measures. The protective measures can be quite complex and robust, necessitating coordination with other agencies and commonly incorporating controls to address other environmental concerns (e.g., for stormwater or waters of the United States).

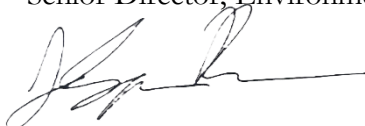
AGC appreciates the administration’s efforts to reduce unnecessary regulatory burdens—especially for the recognition that take or harm implies an intention or affirmative act. Due to the complexity of compliance with the ESA, the interconnectedness with other regulatory programs, and considerable compliance risk, AGC requests that **the Services provide written guidance on compliance within this updated framework.**

AGC appreciates this opportunity to provide feedback on behalf of its construction industry member companies. If you have any questions, please contact Melinda Tomaino directly at melinda.tomaino@agc.org or (703) 837-5415.

Respectfully,

Melinda Tomaino

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