

ENDANGERED SPECIES ACT

Support Reform & Streamlining of Endangered Species Act (ESA)

Action Needed:

Support modernization and future streamlining of the Endangered Species Act.

Provide direction and boundaries to the federal agencies in their implementation of the Act.

Require disclosure of economic impacts associated with the Act's implementation to improve transparency and efficacy of efforts.

Background:

The Endangered Species Act has been criticized for its ineffectiveness in recovering the very species it is intended to aid. Instead, the Act has been a costly tool to delay and halt major federal infrastructure projects and shape even local land use decisions. The U.S. Fish and Wildlife Service recently reversed prior AGC-supported, needed reforms that had improved the implementation of the Act in key areas related to project permitting: listings, critical habitat, and consultations.

The Act prohibits adverse modification to the “critical habitat” of listed species but does not define “habitat.” In 2018, the U.S. Supreme Court decided a case over disputed unoccupied critical habitat and concluded “critical habitat” must first be habitat (*Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361 (2018)).

The Biden administration reversed the 2019 streamlining rules, redefined key terms in a way that encourages excessive speculation, diminishing the *Weyerhaeuser* decision, and changed longstanding practices to require additional steps and mitigation.

AGC Message:

- **Support ESA Streamlining Reforms.** Congress must work with the Administration to craft an approach that helps to recover threatened and endangered species without compromising our ability to meet the nation's infrastructure needs. As we have seen, an agency-driven approach to reform is unlikely to be successful and species policies have become widely divergent from administration to administration.
- **Ensure Areas Designated as “Critical Habitat” for a Species Are Habitat.** Critical habitat designations are overly expansive and ripe for more efficiency and transparency. A definition of habitat would help developers and contractors identify and avoid those areas, which would better inform ESA consultations during the planning and permitting process for projects. Designations of critical habitat should be limited to areas that are in fact habitable by the species, in line with *Weyerhaeuser*.
- **Improve Regulatory Transparency and Reduce Speculation.** Congress should require the agencies to provide an accounting of the economic impact of their listing determinations and critical habitat designations in order to evaluate the effectiveness of the agencies' implementation of the Act. Congress should provide direction and boundaries to define key terms to reduce federal agencies' speculation and overreach.