PACIFIC LEGAL FOUNDATION

April 13, 2023

VIA ELECTRONIC DELIVERY

The Honorable Richard Revesz
Administrator
Office of Information and Regulatory Affairs,
Office of Management and Budget
725 17th St. NW
Washington, DC 20503

Re: Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants (RIN 1018-BF88); Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat (RIN 1018-BF95); Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (RIN 0648-BK47)

Dear Administrator Revesz:

Pursuant to Executive Order 12866, Pacific Legal Foundation (PLF) respectfully submits these written materials discussing the following three proposed rules presently under review at the Office of Information and Regulatory Affairs:

1. Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants (United States Fish and Wildlife Service, RIN 1018-BF88)

2. Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat (United States Fish and Wildlife Service, RIN 1018-BF95)

3. Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat (National Oceanic and Atmospheric Administration, RIN 0648-BK47)

PLF is grateful for the opportunity to discuss the above rules with OIRA staff and for the opportunity to submit these written materials. For any questions or follow-up please contact Charles T. Yates at cyates@pacificlegal.org, or (916) 419-7111.

Introduction and Executive Summary

OIRA is currently reviewing proposals to repeal and/or revise the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service's (NMFS) (together, the "Services") 2019 revised regulations for implementing the Endangered Species Act (ESA).[1] PLF submits these written materials to encourage consideration of certain legal and policy matters, prior to the proposed rules' publication.

The ESA mandates that certain provisions of the 2019 Rules be retained without change. Specifically, the 2019 4(d) Rule, codified at 50 C.F.R. §§ 17.31, 17.71, and the provisions of the 2019 Section 4 Rules pertaining to the designation of unoccupied critical habitat, codified at 50 C.F.R. § 424.12(b)(2), are required by the plain text of the ESA and must be retained.

First, for FWS to rescind the 2019 Section 4(d) Rule and return to its prior "blanket" approach to ESA section 4(d) would violate the plain requirements of the ESA. Moreover, the plain requirements of section 4(d) give effect to policy considerations related to effective cost-benefit analysis and federalism. These policy considerations also counsel strongly in favor of retaining the 2019 Section 4(d) Rule.

Second, the provisions of the 2019 Section 4 Rules pertaining to the designation of unoccupied critical habitat give effect to the plain requirements of the ESA and controlling Supreme Court authority. To rescind or revise these provisions would thrust the Services into immediate noncompliance with the requirements of the ESA's text.

Pacific Legal Foundation

Pacific Legal Foundation is the nation's leading public interest organization advocating, in courts throughout the country, for the defense of private property rights and other constitutional freedoms. Protecting the environment is a legitimate policy goal but, like any other policy goal, it cannot override citizens' fundamental liberties. As a nonprofit law firm concerned about the rights of property owners burdened by overreaching environmental regulation, PLF attorneys have extensive experience with the ESA. They have been counsel of record in many cases related to the interaction of the ESA, property rights, and the separation of powers.[2] They have also produced substantial scholarship

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[1] *See* 84 Fed. Reg. 44,753 (Aug. 27, 2019) (the "2019 4(d) Rule"); 84 Fed. Reg. 44,976 (Aug. 27, 2019) (the "2019 Section 7 Rules"); 84 Fed. Reg. 45,020 (Aug. 27, 2019) (the "2019 Section 4 Rules") (together, the "2019 Rules").

[2] *See, e.g.*, *N.M. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, No. 1:21-cv-03263-ACR (D.D.C. filed Dec. 13, 2021) (representing ranching association in a challenge to FWS' denial of a petition to

on these subjects.[3] PLF attorneys often provide their expertise to policy makers through congressional testimony[4] and rulemaking petitions.[5]

As specifically relevant to the 2019 Rules, PLF attorneys submitted a rulemaking petition advocating for repeal of the prior "blanket" approach to ESA Section 4(d);[6] were counsel of record for the family landowners in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*;[7] commented in support of certain provisions of the 2019 Rules;[8] and represented a

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delist the southwestern willow flycatcher on taxonomic grounds); *Skipper v. U.S. Fish & Wildlife Serv.*, No. 1:21-cv-00094-JB-B (D. Ala. filed Feb. 26, 2021) (representing private landowners in a challenge to the designation of critical habitat for the black pinesnake); *N.M. Farm & Livestock Bureau v. Dep't of Interior*, 952 F.3d 1216 (10th Cir. 2020) (representing a group of New Mexico ranchers in a challenge to the designation of critical habitat for the endangered jaguar).

[3] *See, e.g.*, Damien M. Schiff, *Judicial Review Endangered: Decisions Not to Exclude Areas From Critical Habitat Should Be Reviewable Under the APA*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10,352 (2017); Jonathan Wood, *Take it to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 PACE ENVTL. L. REV. 23 (2015); Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence*, 37 ENVIRONS: ENVTL. L. & POL'Y J. 105 (2014).

[4] *See, e.g.*, Hearing on the Modernization of the Endangered Species Act before the House Natural Resources Committee (Sept. 26, 2018); Hearing on ESA Consultation Impediments to Economic and Infrastructure Development before the House National Resources Committee, Subcommittee on Oversight and Investigations (Mar. 28, 2017).

[5] *See, e.g.*, Damien Schiff, *A petition to resolve the Endangered Species Act taxonomy debate*, PacificLegal.org (Nov. 13, 2017), https://pacificlegal.org/a-petition-to-resolve-the-endangered-species-act-taxonomy-debate/; *Petitions to Repeal 50 C.F.R. § 17.31*, https://pacificlegal.org/case/national-federation-of-independent-businesses-v-fish-and-wildlife-service-1-1502-washington-cattlemens-association-v-fish-and-wildlife-service-1-1514/.

[6] *See* Nat'l Fed'n of Independent Business' Petition to Repeal Title 50 of the Code of Federal Regulations' Section 17.31, https://pacificlegal.org/wp-content/uploads/2016/03/NFIB-petition-1.pdf.

[7] 139 S. Ct. 361 (2018).

[8] Pacific Legal Foundation Comments on Proposed Revision of the Regulations for Prohibitions to Take of Threatened Wildlife and Plants, Federal Comment ID No. FWS-HQ-ES-2018-0007-61502 (Sept. 24, 2018), https://www.regulations.gov/comment/FWS-HQ-ES-2018-0007-61502; Comments of Pacific Legal Foundation, et al., Federal Comment ID No. FWS-HQ-ES-2018-0006-56412 (Sept. 24, 2018)., https://www.regulations.gov/comment/FWS-HQ-ES-2018-0006-56412.

coalition of landowners and private property rights advocates as intervenors to defend the 2019 Rules and ensure their continued effectiveness during the present rulemaking.[9]

Statutory Background

Section 4(a) of the ESA authorizes the Services to list any "species" as "endangered" or "threatened," based on the risk of extinction the species faces.[10] A "species" includes any "subspecies of fish or wildlife or plants," as well as any "distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature."[11] An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range."[12] A "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[13] Private property is regulated under the ESA in two significant ways.

First, as an additional safeguard for endangered species, befitting their greater risk of extinction, section 9 of the ESA prohibits "take" of such species.[14] The Services interpret their authority to regulate take broadly to include not only intentional actions to harm or capture species, but also common land use activities that might incidentally affect species through the modification of their habitats.[15] This take prohibition is backed by severe civil and criminal penalties.[16] Under certain circumstances a landowner may seek a permit to allow for incidental take of a species.[17] However, the process for obtaining such a permit is time consuming, costly, and burdensome.[18] To receive such a permit, a

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[9] *See Ctr. for Biological Diversity v. Haaland*, No. 4:19-cv-05206 (N.D. Cal. filed Aug. 21, 2019). *See also In re Washington Cattlemen's Ass'n*, No. 22-70194, 2022 WL 4393033, at *1 (9th Cir. Sept. 21, 2022) (granting petition for writ of mandamus and reinstating 2019 Rules).

[10] 16 U.S.C. §§ 1532(6), (20), 1533(a)(1).

[11] *Id.* § 1532(16).

[12] *Id.* § 1532(6).

[13] *Id.* § 1532(20).

[14] *Id.* §§ 1532(19), 1538(a).

[15] *See* 50 C.F.R. § 17.3 (defining "harm" for purposes of the take prohibition to include habitat modification). *See also Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 696–704 (1995) (upholding the Services' broad definition of "harm").

[16] *See* 16 U.S.C. § 1540. *See also* 88 Fed. Reg. 5796 (Jan. 30, 2023).

[17] *See* 16 U.S.C. § 1539(a)(1)(B). *See also* 50 C.F.R. § 17.32.

[18] *See* 16 U.S.C. § 1539(a)(2).

landowner must create a conservation plan and will generally be required to agree to significant project modifications and costly mitigation.[19]

Recognizing the take prohibition's stringency—and concerned with its implications for landowners and businesses—Congress expressly limited its application to endangered species, explaining that it should "be absolutely enforced *only* for those species on the brink of extinction."[20] In section 4(d) of the ESA, Congress permitted that the take prohibition could be extended to particular threatened species, but only if "necessary and advisable" for the conservation of that species.[21] But the take of threatened species would be presumptively unregulated because Congress wished for states to take the lead on regulating these species.[22]

Second, the ESA authorizes the designation of land—including private land—as critical habitat for threatened and endangered species.[23] Critical habitat can include habitat areas "occupied" by a species at the time of its listing, as well as areas "unoccupied" by the species.[24] Areas occupied by a species can be designated as critical habitat if they contain the physical or biological features essential to the conservation of the species and which may require special management considerations or protection.[25] The statute imposes a

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[19] *See id. Cf.* Robert Gordon, "Whatever the Cost" of the Endangered Species Act, It's Huge, Competitive Enterprise Institute OnPoint No. 247, Competitive Enter. Inst., at 9 (Aug. 21, 2018), https://cei.org/studies/whatever-the-cost-of-the-endangered-species-act-its-huge/.

[20] Congressional Research Service, A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980 (hereafter, "ESA Legislative History") at 357 (1982) (statement of Sen. Tunney) (emphasis added). *See also* 16 U.S.C. § 1538(a) (prohibiting take only "with respect to any endangered species").

[21] *Id.* § 1533(d). *See also* S. Rep. No. 93-307, at 8 (1973) ("[O]nce he has listed a species of fish or wildlife as a threatened species," the Secretary may prohibit take "as to the particular threatened species."). ESA Section 4(d) reads in relevant part:

> Whenever any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a) (1) . . . or section 1538(a)(2) . . . with respect to endangered species . . . .

[22] *See* ESA Legislative History, *supra* note 20, at 357 (statement of Sen. Tunney) ("States . . . are encouraged to use their discretion to promote the recovery of threatened species . . . .").

[23] *See* 16 U.S.C. § 1533(b)(2).

[24] *Id.* § 1532(5).

[25] *Id.*

"more onerous procedure on the designation of unoccupied areas."[26] For these areas, the specific site must be "essential" for the conservation of the species.[27]

Critical habitat designations have numerous effects on private landowners. Principally, they reduce the value of any private property within the designation because prospective buyers recognize the burdens that flow from such designations.[28] Moreover, if activities performed on the designated land should ever require federal funding or approval, the designation will trigger greater scrutiny of that permit, resulting in limitations on land use and costly mitigation requirements.[29] Cognizant of these harmful effects, Congress mandated that critical habitat designations be based on "the best scientific data available and [take] into consideration the economic impact . . . and any other relevant impact."[30] Emphasizing its desire to strike a balance between regulatory costs and benefits, Congress expressly authorized the Services to exclude areas of critical habitat if the benefits of exclusion would exceed the benefits of inclusion, unless the exclusion would result in the extinction of a protected species.[31]

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[26] *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010).

[27] 16 U.S.C. § 1532(5).

[28] *Cf. Weyerhaeuser*, 139 S. Ct. at 368 n.1. It is now well recognized that critical habitat designations reduce the value of the land so designated. *See* Maximilian Auffhammer, et al., *The Economic Impact of Critical-Habitat Designation: Evidence from Vacant-Land Transactions*, 96 LAND ECON. 188 (2020); Jonathan Klick & J.B. Ruhl, *The Costs of Critical Habitat or Owl's Well That Ends Well*, Inst. L. & Econ. Research Paper No. 20-57 (Sept. 11, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3691269.

[29] 16 U.S.C. § 1536. *See also Weyerhaeuser*, 139 S. Ct. at 366.

[30] 16 U.S.C. § 1533(b)(2).

[31] *Id.*

Regulatory History

A summary of the regulatory history leading up to OIRA's present review of the above-captioned rules is necessary to provide context for PLF's discussion.

I. The "blanket" 4(d) rule

In 1975, FWS issued a regulation, commonly known as the "blanket" 4(d) rule.[32] That rule prohibited the take of all threatened species, including any subsequently listed threatened species, unless it issued a separate rule to relax the prohibition for a particular species.[33] Under that regulation, endangered and threatened species were generally regulated in the same manner, despite the differences in the threats they face and despite Congress's choice to explicitly distinguish between these two categories for purposes of regulating take. NMFS has never had a rule like the blanket 4(d) rule. Instead, NMFS has always followed the statute's approach of leaving take of threatened species unregulated unless it determines that such regulation is necessary and advisable for the conservation of the particular species.[34]

II. The Services' historical approach to designating unoccupied critical habitat

Prior to 2016, both FWS and NMFS honored the statutory distinction between occupied and unoccupied critical habitat, by first considering occupied areas and only turning to unoccupied areas where the designation of occupied areas would be insufficient for the conservation of the species.[35] In 2016, the Services reversed thirty years of agency practice and eliminated this rule.[36] Under the 2016 regulations, unoccupied areas were more likely to be designated than ever before because, among other things, the Services also took the position that unoccupied areas could be "essential" even if: (1) they lacked the physical and biological features necessary for the species to be able to occupy the area, (2) there was no reasonable likelihood the area would develop such features, and (3) such features would never exist in quantities necessary for the area to serve an essential role in the species' conservation.[37]

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[32] *See* 40 Fed. Reg. 44,412, 44,414, 44,425 (Sept. 26, 1975), *codified at* 50 C.F.R. § 17.31 (2018).

[33] *See* 50 C.F.R. § 17.31 (2018).

[34] *See* 84 Fed. Reg. at 44,753.

[35] *See* 49 Fed. Reg. 38,900, 38,909 (Oct. 1, 1984); 50 C.F.R. § 424.12(e) (2015).

[36] *See* 81 Fed. Reg. 7414 (Feb. 11, 2016).

[37] *Id.* at 7420.

III. The 2018 Proposed Rules

On July 25, 2018, the Services publish a packet of proposed updated regulations for implementing the ESA.[38]

Under the 2018 Proposed 4(d) Rule, all species currently listed as threatened would remain regulated absent further rulemaking.[39] But all species listed as threatened in the future, including those upgraded from endangered to threatened, would not be subject to the blanket rule.[40] Instead, take of these species would be regulated only if and to the extent the agency determined necessary and advisable, as reflected in a species-specific regulation.[41]

Under the 2018 Proposed Section 4 Rule, FWS and NMFS proposed various revisions to the regulations for listing species and designating critical habitat.[42] Among other things, the Services proposed to revise their regulations for designating unoccupied critical habitat, to restore their historic preference for considering all occupied areas before turning to unoccupied areas.[43] The Services similarly proposed to limit the designation of unoccupied areas to situations where there is a reasonable likelihood that the area will contribute to the species' conservation, reasoning that this better reflected the statute's requirement that an unoccupied area be essential for conservation, than did the 2016 regulation.[44]

Under the 2018 Proposed Section 7 Rules, the Services proposed various revisions to the regulations for conducting interagency consultations pursuant to section 7 of the ESA.[45]

III. *Weyerhaeuser Company v. United States Fish & Wildlife Service*

On November 27, 2018, the Supreme Court decided *Weyerhaeuser v. United States Fish & Wildlife Service*, holding unanimously that the ESA limits the designation of "critical

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[38] *See* 83 Fed. Reg. 35,174 (the "2018 Proposed 4(d) Rule); 83 Fed. Reg. 35,178 (the "2018 Proposed Section 7 Rules"); 83 Fed. Reg. 35,193 (the "2018 Proposed Section 4 Rules") (together, the "2018 Proposed Rules").

[39] *See* 83 Fed. Reg. at 35,174.

[40] *See id.*

[41] *See id.*

[42] *See* 83 Fed. Reg. 35,193.

[43] *See id.*

[44] *Id.* at 35,198.

[45] 83 Fed. Reg. 35,178.

habitat" to areas that currently constitute "habitat" for the species.[46] In that case, FWS designated 1,500 acres of private property—the majority of which was owned by PLF clients the Poitevent family—as unoccupied critical habitat for the dusky gopher frog even though the frog did not live there and could not survive there unless the land was substantially modified.[47]

IV. The 2019 Rules

On August 27, 2019, the Services finalized their proposed ESA regulatory reforms.[48] In doing so, FWS finalized its prospective repeal of the blanket 4(d) rule, as proposed.[49] Under the 2019 4(d) Rule, take of species listed as threatened will be regulated only if and to the extent that FWS determines it necessary and advisable for the conservation of that species, and issues a regulation to that effect.[50]

The Services also finalized their Proposed Section 4 and Section 7 rules,[51] making minor changes based on the *Weyerhaeuser* decision and public comments.[52] Among other things, the 2019 Section 4 Rules reinstated the Services' longstanding preference for considering all occupied areas before turning to unoccupied areas.[53] And responding to *Weyerhaeuser*, the Services confirmed that they will only designate unoccupied areas if that area contains one or more of the physical or biological features essential to the conservation of the species.[54] The rationale being that an area not containing at least one essential physical or biological feature cannot constitute "habitat" as required by the ESA.[55]

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[46] 139 S. Ct. at 368–69.

[47] *Id.* at 366.

[48] *See* 84 Fed. Reg. 44,753 (2019 4(d) Rule); 84 Fed. Reg. 44,976 (2019 Section 7 Rule); 84 Fed. Reg. 45,020 (2019 Section 4 Rule).

[49] *See* 84 Fed. Reg. 44,753, *codified at* 50 C.F.R. §§ 17.31, 17.71.

[50] *See id.*

[51] 84 Fed. Reg. 44,976; 84 Fed. Reg. 45,020.

[52] *See* 84 Fed. Reg. 45,020.

[53] 84 Fed. Reg. at 45,021–22, *codified at* 50 C.F.R. § 424.12(b)(2).

[54] *Id.*

[55] 84 Fed. Reg. at 45,049.

V. The current proposal to rescind and/or revise the 2019 Rules

On January 20, 2021, President Biden issued Executive Order 13990 directing all federal agencies to review certain actions taken by the prior administration.[56] In a subsequent fact sheet, President Biden identified the 2019 Section 4 and Section 7 Rules—but not the 2019 Section 4(d) Rule—as warranting review.[57] Following that review, on June 4, 2021, FWS publicly announced its intent to rescind the 2019 Section 4(d) Rule, and the Services announced their intent to revise the 2019 Section 4 and Section 7 Rules.[58]

FWS initially announced a schedule to complete rulemaking to rescind the 2019 Section 4(d) Rule by January 27, 2023.[59] And the Services initially announced a schedule to complete rulemaking to revise the 2019 Section 4 and Section 7 Rules, by December 2, 2022.[60] However, due to ongoing litigation in the United States District Court for the Northern District of California, that schedule was delayed.[61] During the course of that same litigation, the 2019 Rules were briefly vacated between July 5, 2022, and September 21, 2022.[62] However, a successful petition for writ of mandamus filed by PLF attorneys ensured the continued operation of the 2019 Rules during the course of the current rulemakings.[63] Following resolution of that litigation, the Services subsequently announced an updated rulemaking schedule to rescind and/or revise the 2019 Rules by

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[56] *See* 86 Fed. Reg. 7037 (Jan. 20, 2021).

[57] *See* Fact Sheet: List of Agency Actions for Review, The White House (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.

[58] *See* Press Release: U.S. Fish and Wildlife Service and NOAA Fisheries to Propose Regulatory Revisions to Endangered Species Act, U.S. Fish & Wildlife Serv. (June 4, 2021), https://www.fws.gov/news/ShowNews.cfm?ref=u.s.-fish-and-wildlife-service-and-noaa-fisheries-to-propose-regulatory-&_ID=36925.

[59] *See* Federal Defendants' Motion to Stay and Memorandum of Points and Authorities, *Ctr. for Biological Diversity*, No. 4:19-cv-05206 (N.D. Cal. Aug. 13, 2021), ECF No. 132 at 15.

[60] *See id.*

[61] *See* Third Declaration of Gary D. Frazer, *Ctr. for Biological Diversity*, No. 4:19-cv-05206 (N.D. Cal. Dec. 10, 2021), ECF No. 146-1, ¶¶ 12–14; Fourth Declaration of Samuel D. Rauch, III, *Ctr. for Biological Diversity*, No. 4:19-cv-05206 (N.D. Cal. Dec. 10, 2021), ECF No. 146-2, ¶¶ 9–12.

[62] *See* Order Granting Motion to Remand and Vacating Challenged Regulations, *Ctr. for Biological Diversity*, No. 4:19-cv-05206 (N.D. Cal. July 5, 2022), ECF No. 168.

[63] *See In re Washington Cattlemen's Ass'n*, No. 22-70194, 2022 WL 4393033, at *1 (9th Cir. Sept. 21, 2022) (staying district court's order and reinstating 2019 Rules). *See also* Amended Order Granting Motion to Remand, *Ctr. for Biological Diversity*, No. 4:19-cv-05206 (N.D. Cal. July 5, 2022), ECF No. 198 (amending previous order and leaving 2019 Rules in place pending further agency rulemaking).

May 2024.[64] And on March 7, 2023, proposed rules to rescind and/or repeal the 2019 Rules were submitted to OIRA for review.[65]

Analysis

PLF contends that certain provisions of the 2019 Rules must be retained, consistent with the plain requirements of the ESA. Specifically, PLF contends that the 2019 4(d) Rule, codified at 50 C.F.R. §§ 17.31, 17.71, and the provisions of the 2019 Section 4 Rules pertaining to the designation of unoccupied critical habitat, codified at 50 C.F.R. § 424.12(b)(2), must be retained.

I. The 2019 Section 4(d) Rule must be retained

PLF respectfully submits that it would be a grave error for FWS to rescind the 2019 Section 4(d) Rule and return to the previous "blanket" approach. First, to rescind the 2019 Section 4(d) Rule and return to the prior "blanket" approach would violate the plain requirements of the ESA. Second, the ESA's plain requirements give effect to important policy considerations related to effective cost-benefit analysis and federalism that FWS would be ignoring, should it rescind the 2019 Section 4(d) Rule.

A. The Endangered Species Act does not authorize a blanket extension of the take prohibition to all threatened species

FWS' prior blanket approach to regulating take of all threatened species was illegal. By rescinding the 2019 4(d) Rule, FWS would therefore be committing itself to an unlawful course of action, potentially leading to litigation and further uncertainty in its application of the ESA. This is the case for at least five reasons. First, the ESA's plain text clearly forbids extension of the take prohibition to all threatened species. Second, legislative history confirms that Congress did not intend for the take prohibition to be extended to threatened species on a blanket basis. Third, constitutional principles counsel against a

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[64] *See* Federal Defendants' Notice, *Ctr. for Biological Diversity*, No. 4:19-cv-05206 (N.D. Cal. March 15, 2023), ECF No. 200.

[65] *See* Endangered and Threatened Wildlife and Plants: Regulations for Prohibitions to Threatened Wildlife and Plants (RIN: 1018-BF88), Reginfo.gov, https://www.reginfo.gov/public/do/eoDetails?rrid=299512 (last visited Apr. 5, 2023); Endangered and Threatened Wildlife and Plants: Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat (RIN 1018-BF95), Reginfo.gov, https://www.reginfo.gov/public/do/eoDetails?rrid=299513 (last visited Apr. 5, 2023); Endangered and Threatened Wildlife and Plants: Regulations for Listing Species and Designating Critical Habitat (RIN 0648-BK47), Reginfo.gov, https://www.reginfo.gov/public/do/eoDetails?rrid=299515 (last visited Apr. 5, 2023).

blanket approach to ESA Section 4(d). Fourth, pursuant to the major questions doctrine, blanket application of the take prohibition to threatened species would be *ultra vires*. And finally, any appellate authority that might support FWS' prior blanket approach does not withstand scrutiny.

1. The ESA's text prohibits a blanket extension of the take prohibition to all threatened species

A rigorous analysis of section 4(d)'s text compels the conclusion that the agencies' authority is limited to the issuance of species-specific take regulations.[66] This is so, for three reasons.

First, section 4(d)'s first sentence places two limitations on the Services' authority to extend protective regulations—including prohibiting take—to a threatened species. Neither limitation can be reconciled with a blanket approach to regulating take, and both compel a species-specific approach. First, section 4(d) only permits the Services to issue protective regulations "*[w]henever* any species is *listed* as a threatened species."[67] As such, the authority to issue protective regulations is triggered by the listing of a species as threatened. A protective regulation, therefore, cannot lawfully precede listing, as it did with the blanket 4(d) rule's categorical extension of the take prohibition to all subsequently listed threatened species. Second, before issuance, the Services must "deem[]" a protective regulation "necessary and advisable to provide for the conservation" of a threatened species.[68] FWS cannot adequately determine that a protective regulation is "necessary and advisable" for a threatened species' conservation, unless it has identified the species and considered its specific needs.

Considering these limitations, the only way to interpret section 4(d) as permitting a blanket rule is to read its second sentence—which identifies take as a subset of the protective regulations that might be issued—as an independent grant of authority, untethered from the limitations imposed by the first sentence.[69] But that reading must be rejected. The first sentence gives the agencies a broad authority to adopt *any* kind of regulation when a species is listed as threatened if it is "necessary and advisable to

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[66] *See Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("As with any question of statutory interpretation, our analysis begins with the plain language of the statute.").

[67] *See* 16 U.S.C. § 1533(d) (emphases added).

[68] *See id.*

[69] *See Sweet Home Chapter of Communities for a Great Or. v. Babbitt*, 1 F.3d 1, 6 (D.C. Cir. 1993) (upholding the blanket 4(d) rule by deferring under *Chevron* to FWS' interpretation of the second sentence of Section 4(d) as an independent grant of authority).

provide for the conservation of [the] species."[70] A regulation prohibiting the take of any such species is merely a specific example of the type of regulation that could be adopted. Consequently, the power articulated in the second sentence must be a subset of that in the first sentence, and the first sentence's limitations must apply to it. And applying the limitations in the first sentence of section 4(d), to its second sentence, clearly forbids indiscriminate extension of the take prohibition to all threatened species.

Second, the first and second sentences of section 4(d) refer to "*any* species . . . listed as a threatened species" and "*any* threatened species."[71] The term "any" in this context denotes particularity. When the ESA refers to endangered or threatened species as a category it does not use the term "any." For example, the second sentence of Section 4(d) refers to the protection of endangered species as a category by omitting "any."[72] Thus, section 4(d) refers to the listing of particular threatened species and not to threatened species as a category. The Supreme Court interprets "any" in similar statutory schemes the same way. The Clean Air Act, for example, requires EPA to adopt regulations for "emission of *any* air pollutant" from a mobile source.[73] That provision has been construed as the power to regulate particular pollutants.[74] Section 4(d)'s use of the term "any" to denote particularity cannot be reconciled with a blanket approach that would categorically extend the take prohibition to all threatened species.

Third, the statutory scheme as a whole counsels against a blanket approach to section 4(d).[75] Section 4(d) should be interpreted in light of Congress having expressly declined to categorically prohibit take of threatened species.[76] One cannot interpret section 4(d) as empowering the Services to reverse that congressional decision through imposition of a blanket rule. Indeed, when Congress wanted endangered and threatened species to be

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[70] 16 U.S.C. § 1533(d).

[71] *See id.* (emphases added).

[72] *Id.* ("with respect to endangered species").

[73] *See* 42 U.S.C. § 7521(a)(1) (emphasis added).

[74] *See Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007) (finding that "[c]arbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are" "air pollutants").

[75] *See King v. Burwell*, 576 U.S. 473, 486 (2015) (holding that to ascertain a statute's plain meaning a reviewing court must "read the words 'in their context and with a view to their place in the overall statutory scheme'" (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000))).

[76] *See* 16 U.S.C. § 1538(a)(1) (limiting the take prohibition to endangered species).

treated the same way, it said so expressly.[77] FWS' prior blanket approach cannot be reconciled with Congress's decision to regulate take of threatened and endangered species differently.

2. Legislative history confirms that the ESA prohibits the blanket extension of the take prohibition to all threatened species

The ESA's legislative history reinforces the conclusion that the 2019 4(d) Rule's species-specific approach is compelled by the statute. Three aspects of the legislative history are of particular relevance.

First, the Senate Report explicitly interprets ESA section 4(d) as limited to species-specific regulations. It explains that the section

> requires the Secretary, once he has listed a species of fish or wildlife as a threatened species, to issue regulations to protect *that* species. Among other protective measures available, he may make any or all of the acts and conduct defined as "prohibited acts" . . . as to "endangered species" also prohibited acts as to *the particular* threatened species.[78]

This language confirms that the power to prohibit take *is a subset* of the authority granted in section 4(d)'s first sentence,[79] and that this authority is limited to prohibiting take of "*particular* threatened species."[80]

Second, Senator John Tunney—the ESA's Senate manager—repeatedly emphasized the distinction between endangered and threatened species and acknowledged that the take prohibition should be limited to those species in greatest need.[81] The House Report

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[77] *See* 16 U.S.C. § 1536(a)(2) ("Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any *endangered species or threatened species* or result in the destruction or adverse modification of habitat of such species . . . ." (emphasis added)).

[78] S. Rep. No. 93-307, at 8 (1973), *reprinted in* ESA Legislative History, *supra* note 20, at 307 (emphasis added).

[79] *See id.* ("Among other protective measures available . . . .").

[80] *See id.* (emphasis added).

[81] *See* ESA Legislative History *supra* note 20, at 357 (statement of Sen. Tunney) (explaining that the take prohibition was limited to endangered species to "minimiz[e] the use of the most stringent prohibitions" and that "[f]ederal prohibitions against taking must be absolutely enforced *only* for those species on the brink of extinction" (emphasis added)); *id.* at 360 ("I feel that this bill provides the necessary national protection to *severely endangered* species while encouraging the States to utilize all of their resources toward the furtherance of the purposes of this act." (emphasis added)).

similarly emphasizes the statutory distinction between the treatment of threatened and endangered species.[82]

Third, even decisionmakers within the Department of the Interior interpreted their soon-to-be-delegated authority under section 4(d) as limited to species-specific regulations. For example, Douglas P. Wheeler—then Acting Assistant Secretary of the Interior—told Congress that limiting the take prohibition "assure[s] protection of all endangered species commensurate with the threat to their continued existence."[83] Wheeler went on to explain that any regulations adopted under section 4(d) would "depend on the circumstances *of each species* . . . ."[84]

3. The constitutional avoidance canon requires reading ESA Section 4(d) in accordance with its plain meaning to avoid nondelegation problems

Under the canon of constitutional avoidance, courts must interpret statutes to avoid giving them a constitutionally suspect meaning.[85] If the "necessary and advisable" standard did not apply to section 4(d) rules extending the take prohibition to a threatened species, then no standard would govern the exercise of this power, rendering it an unconstitutional delegation. As such, even if section 4(d) were susceptible to a construction that would permit the previous blanket approach, that interpretation would raise significant constitutional concerns, and would not withstand judicial review.

The nondelegation doctrine forbids Congress from delegating discretionary power to administrative agencies without providing an "intelligible principle" to guide its

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[82] *See* H.R. Rep. No. 93-412 (1973), *in* ESA Legislative History, *supra* note 20, at 154 ("Sec. 9. (a) Subparagraphs (1) through (5) of this paragraph spell out a number of activities which are specifically prohibited with respect to endangered (not threatened) species . . . .").

[83] Letter from Douglas P. Wheeler, Acting Assistant Secretary of the Interior, to Rep. Leonor Sullivan, Chairman, House Committee on Merchant Marine and Fisheries (Mar. 23, 1973), *in* ESA Legislative History, *supra* note 20, at 162; *see also* Letter from Rogers C. B. Morton, Secretary of Interior, to Rep. Carl Albert, Speaker of the House of Representatives (Feb. 15, 1973), *in* ESA Legislative History, *supra* note 20, at 160.

[84] Letter from Douglas P. Wheeler, *in* ESA Legislative History, *supra* note 20, at 162 (emphasis added).

[85] *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) ("When 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))).

exercise.[86] The nondelegation doctrine "is rooted in the principle of separation of powers" and the Constitution's provision that "[a]ll legislative Powers . . . shall be vested in . . . Congress."[87] The doctrine operates to forbid Congress from delegating that legislative power to any other branch.[88] To determine whether Congress has provided an intelligible principle, the most important inquiry is whether Congress, and not the agency, has made the fundamental or overarching policy choice governing the agency's exercise of its discretion.[89] The nondelegation doctrine is frequently invoked by courts applying the avoidance canon.[90]

As discussed above, the only way to interpret section 4(d) as permitting FWS' prior blanket rule is to read its second sentence—which identifies take as a subset of the protective regulations that might be issued—as an independent grant of authority.[91] To interpret section 4(d) in this manner raises significant nondelegation concerns. The only principle to guide the Services' exercise of its power to extend protective regulations to a threatened species is the "necessary and advisable" standard contained in section 4(d)'s first sentence. The grant of authority in the second sentence, divorced from the limiting principle contained in the first, would authorize the Services to forbid or exert regulatory control over *any* activity that affects *any* threatened species, for any reason or no reason whatsoever. FWS could forbid private activity, or not, as it saw fit. Delegation of such unbounded authority would be a classic violation of the Supreme Court's "intelligible principle" rule.[92] Indeed, it is difficult to imagine a more obvious example of the delegation of legislative power to an administrative agency than that contained in the second sentence of section 4(d), standing alone. These nondelegation problems can only be avoided by construing section 4(d)'s two sentences together so that the limits in the first sentence apply to any regulation of take authorized by the second.

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[86] *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 414–16 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–32 (1935).

[87] *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (quoting U.S. Const. art. 1, § 1).

[88] *Id.*

[89] *See Gundy v. United States*, 139 S. Ct. 2116, 2131–37 (2019) (Gorsuch, J., dissenting).

[90] *See Mistretta*, 488 U.S. at 373.

[91] *See supra* note 69 (citing *Sweet Home*, 1 F.3d at 7–8).

[92] *See Panama Refining*, 293 U.S. at 415 (finding that a grant of authority which did "not qualify the President's authority," did "not state whether or in what circumstances or under what conditions the President" was to regulate, "establishe[d] no criterion to govern" the exercise of that power; and did "not require any finding by the President as a condition of his action," contained no intelligible principle).

4. Reimposition of the blanket 4(d) rule would be *ultra vires* pursuant to the major questions doctrine

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."[93] Thus, "an agency literally has no power to act . . . unless and until Congress confers power upon it."[94] The Supreme Court has recently clarified that where an agency claims broad authority "to exercise powers of vast economic and political significance," it "must point to 'clear congressional authorization' for the power it claims."[95] In the absence of such a clear statement, the agency necessarily lacks the authority it has claimed.[96]

Categorically and indiscriminately forbidding any private activity that affects any threatened species—as FWS would be doing by reimposing the blanket 4(d) rule—easily meets this standard. Such regulation would have dramatic consequences for countless private landowners and businesses across the entire county.[97] Yet in adopting the "blanket" approach to section 4(d), FWS identified no clear statement authorizing it to exercise such sweeping power.[98] Nor could it have. The text of ESA section 4(d) contains no such clear statement of authorization. Indeed, to the contrary, the first sentence of section 4(d) contains language expressly limiting FWS' authority to act, by requiring that it first make a finding that any protective regulation is "necessary and advisable" to the conservation of a particular threatened species.[99] As such, pursuant to the "major questions doctrine," reimposition of the "blanket" 4(d) rule, would be *ultra vires*, and would not withstand judicial review.[100]

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[93] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

[94] *La. Pub. Serv. Comm'n v. Fed. Comm. Comm'n*, 476 U.S. 355, 374 (1986).

[95] *West Virginia v. EPA*, 142 S. Ct. 2587, 2605, 2609 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). *See also Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 665 (2022) (quoting *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)).

[96] *See West Virginia*, 142 S. Ct. at 2605, 2609.

[97] *Cf.* Randy T. Simmons & Kimberly Frost, *Accounting for Species: The True Costs of the Endangered Species Act*, PERC (2004) (assessing the public and private costs of ESA regulation), http://perc.org/sites/default/files/esa_costs.pdf. *See also* Gordon, *supra* note 19 (analyzing the costs of ESA regulation).

[98] *See* 40 Fed. Reg. 44,412, 44,414, 44,425 (Sept. 26, 1975) (failing to identify any clear statement authorizing sweeping imposition of the take prohibition).

[99] *See supra* 12–14.

[100] *Cf. West Virginia*, 142 S. Ct. at 2609 ("Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'" (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001))).

5. The District of Columbia Circuit's decision in *Sweet Home* does not withstand scrutiny

PLF is aware of one case from the United States Court of Appeals for the District of Columbia Circuit upholding FWS' prior blanket approach as a reasonable interpretation of the ESA under *Chevron*.[101] The District of Columbia Circuit's decision in *Sweet Home* does not withstand scrutiny and is inconsistent with recent Supreme Court case law. The foremost reason that *Sweet Home* is unpersuasive is that the plain text of section 4(d)—as reinforced by legislative history, canons of construction, and application of the major questions doctrine—forbids any interpretation of section 4(d) that would permit FWS' prior blanket approach.[102] But the District of Columbia Circuit in *Sweet Home* erred in applying *Chevron* deference to FWS' blanket 4(d) rule, for an additional reason; FWS offered no interpretation of section 4(d) in its 1975 regulation extending the take prohibition to all threatened species.[103] As such, the interpretation to which the court in *Sweet Home* deferred was articulated only as FWS' litigation position. *Chevron* deference must not be afforded to an agency interpretation under such circumstances.[104] *Sweet Home* does not withstand scrutiny.

B. The ESA's plain requirements give effect to important policy considerations that FWS would be ignoring should it choose to rescind the 2019 Section 4(d) Rule

The plain requirements of section 4(d) discussed above also give effect to important policy considerations pertaining to effective cost-benefit analysis and principles of federalism. In addition to lacking statutory authority to do so, by rescinding the 2019 Section 4(d) Rule and reimposing a blanket take prohibition for all threatened species, FWS would be ignoring these policy considerations.

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[101] *See Sweet Home*, 1 F.3d at 6 (citing *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

[102] *See supra* 14–17.

[103] *See* 40 Fed. Reg. at 44,414.

[104] *See Georgetown Univ. Hosp.*, 488 U.S. at 213 ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 n.6 (2019) ("The general rule . . . is not to give deference to agency interpretations advanced for the first time in legal briefs." (citing *Georgetown Univ. Hosp.*, 488 U.S. at 213)).

1. ESA section 4(d) requires individualized cost-benefit analysis that could not occur were the take prohibition extended to all threatened species on a blanket basis

It is widely recognized that a thorough analysis of costs and benefits is essential to rational government regulation.[105] This is even more so true in the context of ESA section 4(d)'s requirement that FWS must "deem[]" a protective regulation "necessary and advisable to provide for the conservation" of a threatened species.[106]

In *Michigan v. EPA*, the Supreme Court held that broad standards like "necessary and advisable" may give agencies significant discretion, but that discretion can only be exercised after thorough consideration of all relevant factors, especially costs imposed on private parties.[107] As such, FWS can only determine whether a section 4(d) rule is "necessary and advisable" to the conservation of a species if it first thoroughly analyzes the costs and benefits of that rule.[108]

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[105] *See Michigan v. EPA*, 576 U.S. 743, 753 (2015) ("Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions"); *id.* at 765 (Kagan, J., dissenting) ("I agree with the majority—let there be no doubt about this—that . . . [the] regulation would be unreasonable if '[t]he Agency gave cost no thought *at all*.'" (quoting *id.* at 749–51) (emphasis in original))); OMB Circular A-4, at 2 (Sept. 17, 2003) ("Benefit-cost analysis is a primary tool used for regulatory analysis. Where all benefits and costs can be quantified and expressed in monetary units, benefit-cost analysis provides decision makers with a clear indication of the most efficient alternative, that is, the alternative that generates the largest net benefits to society (ignoring distributional effects). This is useful information for decision makers and the public to receive, even when economic efficiency is not the only or the overriding public policy objective."); Richard L. Revesz & Michael Livermore, Retaking *Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* (2011) (explaining that effective cost-benefit analysis can improve environmental regulation); Cass R. Sunstein, *Is Cost-Benefit Analysis for Everyone*, 53 ADMIN L. REV. 299, 313 (2001) ("My suggestion here has been that properly understood, CBA deserves wide approval . . . .").

[106] *See* 16 U.S.C. § 1533(d).

[107] *See Michigan*, 576 U.S. at 751–52 (discussing "appropriate," a term similarly as "broad and all-encompassing" as advisable "that naturally and traditionally includes consideration of all the relevant factors").

[108] PLF does not suggest that FWS must consider costs and benefits when deciding whether to *list* a species as threatened under section 4(a). The extension of protective regulations to a threatened species via the issuance of a 4(d) rule is a distinct regulatory action subject to a different statutory standard than that for the listing of a species under section 4(a). As such, *Michigan*'s rule that broad standards like "necessary and advisable" require the consideration of all costs and benefits, *see* 576 U.S. at 751–55, does not conflict with the ESA's requirement that *listing* decisions be based only upon biological considerations, *see* 16 U.S.C. § 1533(a)(1), (b)(1)(A).

Under the blanket 4(d) rule, however, FWS never engaged in this required weighing of the costs and benefits of extending the take prohibition to threatened species, because it indiscriminately extended that prohibition to all subsequently listed threatened species in 1975.[109] And it could not have. It is not possible to adequately assess costs and benefits to determine that a protective regulation is "necessary and advisable" for a threatened species' conservation, unless the specific species and its specific needs are first identified.[110] As such, by rescinding the 2019 4(d) Rule, FWS will be foreclosing the possibility of adequate cost-benefit analysis, in violation of the ESA's plain requirements and in derogation of widely accepted principles of rational agency decision-making.

2. Federalism principles counsel against rescission of the 2019 Section 4(d) Rule

The ESA's requirement that the take prohibition be extended to individual threatened species only where "necessary and advisable" to provide for the conservation of that species also gives effect to important principles of federalism.

In passing the ESA, Congress intended to safeguard the traditional role of the states in protecting wildlife.[111] And Senator John Tunney—the ESA's Senate manager—repeatedly invoked principles of federalism in emphasizing the distinction between endangered and threatened species and acknowledging that the take prohibition should be limited to those species in greatest need. For Senator Tunney, the take prohibition was limited to endangered species to "provide[] the necessary national protection to *severely endangered* species while encouraging the States to utilize all of their resources toward the furtherance of the purposes of this act."[112] Additionally, section 4(d)'s text expressly invokes the role of the states, by providing that protective regulations will only apply in

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[109] *See* 40 Fed. Reg. at 44,414, 44,425.

[110] Indeed, section 4(d)'s requirement that protective regulations be tailored to specific threatened species after full consideration of costs and benefits can be expected to improve conservation outcomes. The species-specific approach provides greater flexibility, better aligns the incentives of private landowners with the interests of threatened species, reduces unnecessary conflict, and allows states to pursue more innovative programs. *See* Jonathan Wood, *The Road to Recovery: How restoring the Endangered Species Act's two-step process can prevent extinction and promote recovery*, PERC Policy Report (2018), https://www.perc.org/2018/04/24/the-road-to-recovery/.

[111] *See* John Nagle, *The Original Role of the States in the Endangered Species Act*, 53 IDAHO L. REV. 385, 391–98 (2017) (discussing the ESA's legislative history and focusing on congressional intentions regarding the role of states).

[112] ESA Legislative History, *supra* note 20, at 360 (statement of Sen. Tunney) (emphasis added).

states having entered into a cooperative agreement with FWS, to the extent such regulations are also adopted by that state.[113]

Rescinding the 2019 Section 4(d) Rule and indiscriminately extending the take prohibition to all threatened species, however, is entirely inconsistent with Congress's intention to safeguard the traditional role of the states for two reasons. First, by extending the take prohibition to all threatened species, FWS would be imposing a broad and inflexible federal mandate, at the expense of local and state control—entirely displacing the role of the states in conserving threatened species. Second, in proposing rules under section 4(d)'s "necessary and advisable" standard, consideration of the role of state governments in protecting threatened wildlife is one important factor for FWS' consideration. Section 4(d) as written provides FWS with the means to tailor individual 4(d) rules after consideration of all relevant factors—which would naturally include consideration of existing state efforts. Yet, by removing any requirement that FWS conduct an individualized analysis when considering protective regulations for a threatened species, FWS would eliminate any opportunity to consider the role of state governments.

II. The provisions of the 2019 Section 4 Rules pertaining to the designation of unoccupied critical habitat are required by the ESA and must be retained

Because the provisions of the 2019 Section 4 Rules pertaining to the designation of unoccupied critical habitat, codified at 50 C.F.R. § 424.12(b)(2), are compelled by the ESA, PLF also urges their retention. These provisions contain two important requirements. First, the provisions restore the familiar two-step approach of considering all occupied areas first, and only turning to unoccupied areas where the designation of occupied areas would be insufficient.[114] Second, these provisions give effect to the Supreme Court's decision in *Weyerhaeuser*, by confirming that the Services will only designate unoccupied areas if those areas contain one or more of the physical or biological features essential to the conservation of the species.[115] To revise the 2019 Section 4 Rules in such a way as to eliminate these requirements would violate the statute.

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[113] 16 U.S.C. §§ 1533(d), 1535(g).

[114] 84 Fed. Reg. at 45,021–22, *codified at* 50 C.F.R. § 424.12(b)(2).

[115] *Id.*

A. The 2019 restoration of the two-step process for designating unoccupied critical habitat was statutorily compelled

By eliminating the familiar two-step approach to designating unoccupied critical habitat, not only would the Services be reversing over thirty years of agency practice, they would also be violating the ESA's plain requirements.

As discussed above, the ESA authorizes the Services to designate "occupied" or "unoccupied" areas as critical habitat.[116] However, it draws clear distinctions between the standards for designating each form of critical habitat and requires a heightened showing that unoccupied critical habitat be "essential for the conservation of the species."[117] This requirement imposes "a more onerous procedure on the designation of unoccupied areas."[118] For most of the ESA's history the Services honored the statutory distinction, determining critical habitat by first considering occupied areas and only turning to unoccupied areas if the designation of occupied areas would be insufficient for the conservation of the species.[119] Nevertheless, that requirement was eliminated in 2016.[120] This departure from thirty years of agency practice was illegal. It degraded the ESA's distinction between occupied and unoccupied critical habitat and ignored the "onerous" requirement that any "unoccupied" area be "essential for the conservation of the species."[121] Indeed, the Services cannot plausibly determine that an unoccupied area is "essential" for a species' conservation if the areas the species occupies would alone be sufficient for its conservation.[122] The provisions of the 2019 Section 4 Rules pertaining to the designation of unoccupied critical habitat restored the Services' previous practice of first considering all occupied areas and only turning to unoccupied areas where the

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[116] *See* 16 U.S.C. § 1532(5)(A).

[117] *Id.*

[118] *See Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163.

[119] *See* 49 Fed. Reg. 38,900, 38,909 (Oct. 1, 1984); 50 C.F.R. § 424.12(e) (2015). *See also N.M. Farm & Livestock Bureau v. U.S. Dep't of Interior*, 952 F.3d 1216, 1228 (10th Cir. 2020) (describing the "step-wise" approach that was implemented for much of the ESA's history).

[120] *See* 81 Fed. Reg. at 7414.

[121] *See Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163; 16 U.S.C. § 1532(5)(A)(ii).

[122] *Cf. Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) ("The ESA requires the FWS to demonstrate that unoccupied area is 'essential' for conservation before designating it as critical habitat. The implementing regulation phrases *this same requirement* in a different way, and states that the FWS must show that the occupied habitat is not adequate for conservation." (emphasis added)).

designation of occupied areas would be inadequate for the species' conservation.[123] To reverse course now would violate the plain requirements of the ESA.

B. The 2019 requirement that unoccupied critical habitat contain at least one essential physical or biological feature is compelled by the Supreme Court's decision in *Weyerhaeuser*

In promulgating the 2016 critical habitat regulations, the Services also concluded that unoccupied areas could be "essential" even if they lacked the physical and biological features necessary for the species to be able to occupy the area, there was no reasonable likelihood the area would develop such features, and that such features would never exist in quantities necessary for the area to serve an essential role in the species' conservation.[124] In other words, the Services' position was that unoccupied "critical habitat" need not first be "habitat" in order to be designated. In 2018, however, the Supreme Court held unanimously that the ESA limits the designation of "critical habitat" to areas that currently constitute "habitat" for the species.[125] The 2019 Section 4 Rules respond to *Weyerhaeuser*'s holding by requiring an area designated us unoccupied critical habitat contain one or more of the physical or biological features essential to the conservation of the species.[126] This change follows logically from—and was compelled by—the Supreme Court's decision in *Weyerhaeuser*.[127] An area that does not contain at least one essential physical or biological feature essential for the species cannot be "habitat," as required by the ESA. To reverse the 2019 requirement that unoccupied critical habitat contain at least one essential physical or biological feature would therefore run afoul of the ESA and Supreme Court case law.

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[123] *See* 50 C.F.R. § 424.12(b)(2).

[124] *See* 81 Fed. Reg. at 7420.

[125] *See Weyerhaeuser Co.*, 139 S. Ct. at 368–69.

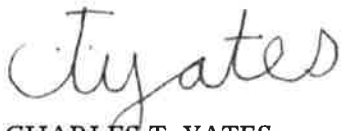
[126] *See* 84 Fed. Reg. at 45,022, 45,049. *See also* 50 C.F.R. § 424.12(b)(2).

[127] *Cf.* 84 Fed. Reg. at 45,022, 45,049.

Conclusion

For the reasons outlined above, PLF respectfully recommends retention of the 2019 4(d) Rule, codified at 50 C.F.R. §§ 17.31, 17.71, and the provisions of the 2019 Section 4 Rules pertaining to the designation of unoccupied critical habitat, codified at 50 C.F.R. § 424.12(b)(2).

Sincerely,



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