PACIFIC LEGAL FOUNDATION

April 20, 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)

Dear Administrator Revesz:

Pacific Legal Foundation (PLF) respectfully submits this supplement to its written materials discussing the above proposed rule. During PLF's April 17, 2023, Executive Order 12866 meeting several questions were asked pertaining to PLF's recommendation that the 2019 4(d) Rule be retained. Specifically, the discussion focused on (1) the incremental costs imposed upon landowners by the United States Fish and Wildlife Service's prior "blanket approach" and whether there exist any specific examples; and (2) how the Service's post-2019 practice of extending take prohibitions to most species listed as threatened bears on the practical benefits of retaining the 2019 4(d) rule.

PLF provides this supplement to assist OIRA and the Service in their consideration of these questions. PLF has also appended a copy of a recent 60-day notice of intent to sue the Service to correct deficiencies in its section 4(d) analysis for the threatened Northern distinct population segment of the lesser prairie-chicken.

I. Blanket extension of the take prohibition between 1975 and 2019 imposed incremental costs on landowners

A. Preliminary considerations

The Service's previous blanket approach to ESA section 4(d) imposed very real incremental costs upon landowners. Two preliminary considerations are important for understanding this point.

First, the Service interprets its 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.[1] This broad take prohibition is backed by severe civil and criminal penalties.[2] As such, upon the extension of the take prohibition to a threatened species, landowners must immediately cease or alter an enormous range of ordinary land use activities on pain of significant civil or criminal liability.

Second, the ESA as written prohibits take "with respect to any endangered species,"[3] only permitting the extension of the take prohibition to a threatened species where "necessary and advisable" to the conservation of that species.[4] The statutory presumption is, therefore, that while listing of an endangered species automatically results in the prohibition of take, no such automatic imposition occurs upon listing of a threatened species. Simply put, the baseline level of regulation upon *listing* of a threatened species does not include any prohibition against take.

The sum of these two considerations is that, when the Service extended the take prohibition to all subsequently listed threatened species in 1975, it created a regime whereby the listing of a threatened species would trigger the automatic regulation of an enormous range of private land use activities, where such restrictions would otherwise not have existed or would have only been extended on an individualized basis after due consideration of all relevant factors. This means that *any* cost associated with the take prohibition for a pre-2019 threatened species is necessarily incremental.[5]

B. Specific examples

Although examples abound, three specific instances of pre-2019 threatened listings demonstrate the enormous burdens created by the blanket 4(d) rule, burdens that very well might not have existed had the Service not indiscriminately extended the take prohibition to all threatened species in 1975.

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[1] *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 Service's broad definition of "harm").

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

[3] *See* 16 U.S.C. § 1538(a).

[4] *See* 16 U.S.C. § 1533(d).

[5] *Cf.* 78 Fed. Reg. 53,058, 53,060 (Aug. 28, 2013) (defining incremental costs in the context of critical habitat as those impacts "over and above those resulting from existing protections.").

First, in 1990 the Service listed the northern spotted owl as a threatened species.[6] Because the spotted owl was listed as threatened during the blanket-approach era, it was automatically afforded full protection against take.[7] The cost imposed upon the public by the listing of the northern spotted owl and related regulations has been the subject of significant analysis and study.[8] Given these substantial costs, had the Service conducted an individualized analysis, it very well might not have concluded that extension of the take prohibition was "necessary and advisable," or it may have pursued an approach to protective regulation that was more narrowly tailored.

Second, in 1993, the Service listed the delta smelt as a threatened species.[9] Again, because the species was listed as threatened during the blanket-approach era, it was automatically afforded full protection against take.[10] And again, the listing of the species and associated regulatory actions had a significant economic impact.[11] It stands to reason that, given these associated costs, the Service might have reached a different conclusion had it properly studied the costs of extending the take prohibition, and engaged in the proper individualized analysis pursuant to ESA section 4(d).

Third, in 1994, the Service listed the vernal pool fairy shrimp as a threatened species.[12] Again, because the species was listed as threatened during the blanket-approach era, it was automatically afforded full protection against take.[13] And again, regulatory actions associated with the protections afforded the species imposed significant costs,[14] such that a study of costs associated with the take prohibition pursuant to ESA section 4(d) might have resulted in a more tailored approach, perhaps one focusing on actions that

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[6] *See* 55 Fed. Reg. 26,114 (June 26, 1990).

[7] *See* 50 C.F.R. § 17.31 (2018).

[8] *See*, *e.g.*, Ann E. Ferris & Eyal G. Frank, *Labor Market Impacts of Land Protection: The Northern Spotted Owl*, 109 J. of Envt'l Econ. & Mgmt. (2021) (concluding that the 1990 listing of the northern spotted owl led to significant reduction in timber industry employment).

[9] 58 Fed. Reg. 12,854 (March 5, 1993).

[10] *See* 50 C.F.R. § 17.31 (2018).

[11] *See*, *e.g.*, David Sunding, et al., Economic Impacts of Reduced Delta Exports Resulting from the Wanger Interim Order for Delta Smelt, Department of Agricultural & Resource Economics, University of California, Berkely, CUDARE Working Papers No. 1083 (2009) (determining significant economic impacts resulting from regulatory actions associated with the listing of the delta smelt).

[12] 59 Fed. Reg. 48,136 (Sept. 19, 1994).

[13] *See* 50 C.F.R. § 17.31 (2018).

[14] *See* 70 Fed. Reg. 46,924, 46,926 (Aug. 11, 2005) (citing cost estimates contained within draft economic analysis for the designation of critical habitat for the vernal pool fairy shrimp).

knowingly harm the fairly shrimp in vernal pools but excluding certain common farming or ranching activities that inadvertently might harm the species.[15]

II. Since 2019 the Service has failed to meaningfully change its approach

PLF also received a question regarding the Service's present approach to ESA section 4(d) under the 2019 rule—specifically, how the Service's decision to extend protective regulations to most species listed since 2019 bears upon the practical benefits of retaining the 2019 Section 4(d) Rule. PLF submits that the Service has failed to meaningfully change its approach to protecting threatened species since 2019. This reality makes a comparison of the practical differences between the pre- and post-2019 approaches difficult. But such difficulty is not a legitimate reason to pursue the unlawful course of rescinding the 2019 Section 4(d) rule.

Under the 1975 blanket 4(d) rule, the significant burdens associated with the take prohibition were only lifted upon the Service issuing a separate rule to *relax* the prohibition for a particular species.[16] These rules were known as "special rules."[17] The result was a reversal of the statutory standard. Whereas the ESA, as written, requires the Service to make a showing that *imposition* of the take prohibition is "necessary and advisable" for the conservation of the threatened species, under the blanket approach the Service focused on the advisability of *relaxing* the take prohibition.[18] The blanket 4(d) rule therefore converted what Congress envisaged as a *regulatory* action into a *deregulatory* action. The advisability of prohibiting take was presumed, and the analysis focused on whether deviation was warranted.

This paradigm changed when the blanket rule was repealed 2019.[19] No longer would a prohibition of take be automatically asserted and only relaxed where "necessary and advisable." Instead, the Service would *extend* the take prohibition on a case-by-case basis

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[15] The federal government has previously averred the relevance of inadvertent modification of vernal pool fairy shrimp habitat resulting from farming activity, in alleging violations of the Clean Water Act. *See* Answer and Counterclaim, Duarte Nursery, Inc. v. U.S. Army Corps of Eng'rs, No. 2:13-cv-02095 (E.D. Cal. May 7, 2014), ECF No. 28 ¶ ¶ 73–79 ("Wetlands at the Site provided suitable habitat for, inter alia, vernal pool fairy shrimp (*Branchinecta lynchi*), a threatened species . . . .").

[16] *See* 50 C.F.R. § 17.31 (2018).

[17] *See*, *e.g.*, 58 Fed. Reg. 65,088 (Dec. 10, 1993) (carving out narrow exemptions to the take prohibition in a "special rule" for the threatened Coastal California gnatcatcher).

[18] *See* 80 Fed. Reg. 60,468, 60,487 (Oct. 6, 2015) (focusing analysis on the advisability of exempting certain timber management activities from the take prohibition for the black pinesnake).

[19] *See* 88 Fed. Reg. 44,753 (Aug. 27, 2019).

after application of the necessary and advisable standard.

Nevertheless, PLF submits that the Service has not meaningfully changed its approach to account for this new paradigm. The Service has repeatedly refused to conduct cost-benefit analysis when exercising its authority pursuant to section 4(d).[20] And it has continued to baldly presume the advisability of the maximum force of protective regulations whenever it lists a species as threatened, before focusing the majority of its analysis on the propriety of affording narrow exceptions.[21] As such, the Service continues to focus predominantly on the advisability of exemption from the take prohibition, as opposed to the advisability of extending the take prohibition in the first place. This approach is inadequate under the ESA's "necessary and advisable" standard and closely resembles the Service's approach to "special rules" issued prior to 2019. Unsurprisingly, the result has been the issuance of a series of arbitrary and overbroad section 4(d) rules.[22]

PLF has repeatedly pointed out this analytical error.[23] Yet the Service has not corrected course. As a result, on April 12, 2023, PLF provided notice of its intent to sue to correct this error in the specific context of the Service's overbroad section 4(d) rule for the Northern distinct population segment of the lesser prairie chicken. PLF has appended its notice letter to this supplement.

PLF submits that, due to these analytical deficiencies in the Service's current approach to section 4(d), it is at present exceedingly difficult to examine the practical differences between the pre- and post-2019 approaches. But this is not a legitimate reason to simply rescind the 2019 Section 4(d) Rule and go back to the illegal blanket approach. To do so would compound the Service's error. Instead, the 2019 rule should be retained and the

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[20] *See*, *e.g.*, 87 Fed. Reg. 72,674, 72,717 (Nov. 25, 2022) (disclaiming any obligation to consider costs when finalizing section 4(d) protections for the threatened Northern distinct population segment of the lesser-prairie chicken); 87 Fed. Reg. 546, 562–64 (Jan. 5, 2022) (omitting any discussion of costs and benefits in finalizing section 4(d) protections for the threatened Panama City crayfish).

[21] *See* 87 Fed. Reg. at 72,748–52; 87 Fed. Reg. at 562–64.

[22] *See* 87 Fed. Reg. at 72,748–52 (finalizing section 4(d) rule for Northern DPS of the lesser prairie chicken that broadly prohibits take subject to three narrow exceptions); 87 Fed. Reg. at 562–64 (finalizing section 4(d) rule for Panama City crayfish broadly prohibiting take subject to narrow exceptions).

[23] *See* Comment from Pacific Legal Foundation, Kansas Natural Resource Coalition, Kenneth Klemm, and Beaver Creek Buffalo Company, Federal Comment ID No. FWS-R2-ES-2021-0015-0327, *available at* https://www.regulations.gov/comment/FWS-R2-ES-2021-0015-0327 (Northern DPS of the lesser prairie-chicken); Comments of Pacific Legal Foundation, Federal Comment ID No. FWS-R4-ES-2020-0137-0021, *available at* https://www.regulations.gov/comment/FWS-R4-ES-2020-0137-0021 (Panama City crayfish).

Service must meaningfully alter its practices to account for the ESA's plain requirements.

Sincerely,

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