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**September 24, 2018**

**Comments regarding the Revision of  
Regulations for Prohibitions to  
Threatened Wildlife and Plants**

Submitted by:

**Energy and Wildlife Action Coalition**

Filed electronically to the attention of:

Public Comments Processing  
Attn: FWS-HQ-ES-2018-0007  
U.S. Fish and Wildlife Service  
MS: BPHC  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

The Energy and Wildlife Action Coalition (“EWAC”)<sup>1</sup> submits these comments in response to the U.S. Fish and Wildlife Service’s (“USFWS”) July 25, 2018 Proposed Revision of Regulations for Prohibitions to Threatened Wildlife and Plants (“Proposed Regulations”).<sup>2</sup>

EWAC is supportive of the USFWS’s current rulemaking efforts designed to improve implementation of the Endangered Species Act (“ESA”). The ESA provides separate definitions for “endangered species” and “threatened species,” and the USFWS is required to make its listing determinations in accordance with those definitions. Under the USFWS’s existing “blanket rule,” threatened species and endangered species are treated the same, and the section 9 take prohibition is applied uniformly to both, unless a species-specific rule is promulgated for a particular threatened species under section 4(d). Under the Proposed Regulations, threatened species and endangered species would be treated distinctly different at the outset. While the statutory take prohibition applies to all endangered species without further rulemaking, each threatened species is subject to the take prohibition only if a specific 4(d) rule is promulgated for that species. Use of species-specific 4(d) rules for threatened species better reflects the distinction Congress made that section 9 proscriptions apply to endangered species. Indeed, by mandating that the take prohibition applies to a threatened species only to the extent the USFWS determines necessary by promulgating a species-specific 4(d) rule, the Proposed Regulations would better reflect the difference in the level of risk to endangered and threatened species, as required by the ESA. This approach is not new or untested; it has been successfully implemented by the National Marine Fisheries Service (“NMFS”). EWAC encourages the USFWS to adopt the Proposed Regulations and better align its approach with the original intent of the ESA and with the long-held practice of NMFS.

Under the USFWS’s current “blanket rule” approach to threatened species, both the USFWS’s resources and the regulated community are unnecessarily taxed, particularly long term. On the one hand, the USFWS’s current approach obviates the need and cost for the USFWS to issue a species-specific take rule for each threatened species before that species may benefit from ESA protections. On the other, it means that the USFWS must enforce and administer the ESA for threatened species as it does for endangered species. For example, the USFWS has processed dozens of habitat conservation plans (“HCPs”) for each of the following threatened species: Florida scrub-jay, marbled murrelet, California red-legged frog, bull trout, Eastern indigo snake, and desert tortoise. Preparing and processing each of the HCPs required the expenditure of considerable time and cost by both the applicant and the USFWS, and each of those HCPs carries its own litigation risk. With the Proposed Regulations, HCPs would be unnecessary for threatened species without a species-specific 4(d) rule and, even with such a rule, HCPs may be focused on a narrower range of actions than would otherwise constitute take were the “blanket rule” to apply.

EWAC recognizes that the Proposed Regulations do not relieve the entire regulatory burden on the USFWS. Promulgating a species-specific rule for a threatened species takes time, requires agency resources, and is subject to litigation. However, aside from those activities set forth in species-specific rules, the USFWS would not have the burden of permit processing or enforcement for future threatened species. Moreover, under the Proposed Regulations, the USFWS would be able to tailor each species-specific rule to address the precise threats facing the species. The USFWS could then focus its regulatory attention and efforts on those particular threats to the listed species and reduce its regulatory burden. NMFS has successfully administered this approach for decades. Additionally, species-specific 4(d) rules

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<sup>1</sup> EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

<sup>2</sup> 83 Fed. Reg. 35,174 (July 25, 2018).

are not new to the USFWS, and the USFWS has already had great success in developing specific 4(d) rules (as exceptions to the blanket rule), for a discrete number of threatened species that both address unique threats to the species and provide relief to the burdens on the USFWS and the regulated community.<sup>3</sup>

EWAC notes one aspect of the Proposed Regulations that could create some ambiguity. In the preamble to the Proposed Regulations, the USFWS clarifies that the change in approach will not apply retroactively and will only apply to species “listed or reclassified as threatened species after the effective date of this rule.”<sup>4</sup> However, the proposed amendment to § 17.31(a) states that the new text shall apply “to threatened species of wildlife that were added to the List of Endangered and Threatened Wildlife in §17.11(h) on or prior to [EFFECTIVE DATE OF THE FINAL RULE],” and does not include the term “reclassification.” The Proposed Regulations suggest an identical change to §17.71(a) for threatened plants. EWAC recommends that the USFWS include the term “reclassified” in its additions to §17.31(a) and §17.71(a). Further, EWAC recommends the USFWS clarify that “reclassification” would include those instances where a threatened determination is currently being challenged in a court, the determination is remanded or vacated, and the USFWS re-issues a threatened determination after the effective date of the final rule. The re-issued threatened determination should then be considered as a new listing or reclassification subject to the final rule.

In the Proposed Regulations, the USFWS solicits input on whether to include a requirement that it should promulgate a species-specific 4(d) rule at the time of a threatened listing or within a required timeframe. EWAC recognizes that NMFS has successfully implemented this approach to threatened species without a required time frame. The prospect of potential, but unknown ESA prohibitions can create significant uncertainty in the regulated community. Having some certainty around if, when, and what specific protections will apply would allow the regulated community to better plan and budget for its activities. If the USFWS intends to develop a 4(d) rule for a particular threatened species, EWAC suggests that the USFWS publish a proposed species-specific 4(d) rule concurrently with the final rule listing the species as threatened or include a statement in the final listing rule that no species-specific rule is planned. This approach would accomplish two things: (1) it would provide notice to the regulated community of the USFWS’s intentions with respect to the applicability of the ESA take prohibition; and (2) it would ease the USFWS’s administrative burden by allowing the USFWS to complete the listing rulemaking before it has to respond to public comment on and finalize any 4(d) rule. EWAC encourages the USFWS to consider this suggestion.

Finally, EWAC wishes to emphasize the importance of nationwide consistency in establishing 4(d) rules. For example, despite the existence of a species-specific 4(d) rule for the northern long-eared bat (“NLEB”), it is not uncommon for some regional offices, to require NLEB mitigation for take even where the take is exempted from the ESA section 9 prohibition by the species-specific 4(d) rule. To promote consistency and provide greater clarity to the regional and field offices EWAC recommends that the USFWS develop national guidance on developing and implementing species-specific 4(d) rules. Such guidance would assist USFWS field offices in more efficiently and consistently developing and applying species-specific rules and could potentially lessen litigation against species-specific 4(d) rules. EWAC requests that any guidance created as a result of this recommendation be published in the Federal Register for public comment.

EWAC appreciates the USFWS’s effort to refine this important aspect of the ESA and the opportunity to comment on the Proposed Regulations. EWAC looks forward to continuing to work with

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<sup>3</sup> For example, species-specific rules on the Georgetown salamander, California tiger salamander and threatened sea turtle species have been extremely successful. *See also* Paul Henson, Rollie White, Steven P Thompson; Improving Implementation of the Endangered Species Act: Finding Common Ground Through Common Sense, *BioScience*, *biy093*, <https://doi.org/10.1093/biosci/biy093> (noting several additional examples of successful 4(d) rules).

<sup>4</sup> *Id.* at 35,175.

the USFWS in its efforts to improve administration of the ESA while continuing to ensure our nation's natural resources are effectively being protected and conserved.

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