



**EWAC**<sup>®</sup>  
Energy and Wildlife  
Action Coalition

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**August 21, 2023**

**Comments Regarding the June 22, 2023 Proposed Rule to Reinstate the General Application of the “Blanket Rule” Option for Protecting Newly Listed Threatened Species Pursuant to Section 4(d) of the Endangered Species Act**

**Department of the Interior  
U.S. Fish and Wildlife Service**

Submitted by:

**Energy and Wildlife Action Coalition**

Filed electronically to the attention of:

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Attn: Docket No. FWS-HQ-ES-2023-0018  
U.S. Fish and Wildlife Service  
1849 C Street NW  
Washington, DC 20240

Docket No. FWS-HQ-ES-2023-0018

The Energy and Wildlife Action Coalition (“EWAC”)<sup>1</sup> submits these comments in response to the U.S Fish and Wildlife Service’s (“Service”) June 22, 2023 Notice of Proposed Rulemaking to reinstate the general application of the “blanket rule” option for protecting newly listed threatened species pursuant to section 4(d) of the Endangered Species Act (“ESA”) (“Proposed Rule”).<sup>2</sup> EWAC provides these comments on the Proposed Rule based on the knowledge and experience of its membership.

It is important that ESA regulations not unduly impede the development of the renewable energy and electric transmission and distribution industries at a time when deployment of these resources is critical.<sup>3</sup> EWAC believes that the approach currently in place by the Service, where threatened species are listed with a species-specific 4(d) rule and not automatically protected by the ESA section 9 take prohibition, more appropriately draws a distinction between endangered and threatened species, aligns with the long-held practice by the Service’s sister agency the National Marine Fisheries Service (“NMFS”), and allows for more efficient administration of the ESA. Should the Service reinstate the “blanket rule” EWAC encourages the Service to continue its current practice of promulgating species-specific 4(d) rules concurrent with threatened species listings rather than relying on the “blanket rule.”

## **I. Reinstatement of the “Blanket Rule” will Impose Burdensome Costs and Regulatory Requirements on both the Service and the Regulated Community**

EWAC is concerned that reinstatement of the “blanket rule” likely will result in the Service relying primarily on the “blanket rule” and issuing fewer species-specific 4(d) rules for threatened species. By way of example, the Service issued only two species-specific 4(d) rules per year prior to the Service’s rescission of the original “blanket rule” in 2019 (“2019 Rescission”).<sup>4</sup> Since the 2019 Rescission, the Service has adopted a species-specific 4(d) rule for every species listed as threatened. In doing so, the Service has reduced the instances of regulated entities needing to apply

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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. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

<sup>2</sup> 88 Fed. Reg. 40,742 (June 22, 2023).

<sup>3</sup> Executive Order 14057 declares it a priority to achieve a nationwide energy transition toward a carbon pollution-free electricity sector, which will necessitate the deployment of renewable energy and associated transmission and distribution lines. The burdensome costs and regulatory requirements resulting from the reinstatement of the “blanket rule” will impede the efforts made by renewable energy and electric transmission and distribution sectors to work towards achieving the Biden-Harris Administration’s stated priorities of addressing climate change, modernizing the power grid, and pursuing environmental justice. *See* Executive Order 13990: Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021); Executive Order 14008, 86 Fed. Reg. 48,745 (Aug. 31, 2021). *Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies*; available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

<sup>4</sup> 84 Fed. Reg. 44,753 (Aug. 27, 2019).

for section 10 take authorizations - thereby reducing the burden on both the regulated community and Service staff alike, while ensuring that proactive conservation measures are employed. Conversely, relying on the “blanket rule” to protect threatened species will increase the administration and enforcement of Sections 10 and 9, respectively on both the Service and the regulated community.

In light of the forgoing, EWAC encourages the Service to keep in place the approach it has used since the 2019 Rescission, tailoring protections to the specific threats facing each species through species-specific 4(d) rules. Species-specific 4(d) rules allow the Service to target certain activities for exemption from the ESA section 9 take prohibition, so that the Service can focus its resources on take violations posing the greatest threats to species. Indeed, in guidance issued by the Service in July 2021, the agency acknowledged the benefit of species-specific 4(d) rules, stating that the rules are helpful when there are “data gaps” for newly listed species, and that the rules can “incentivize known beneficial action for the species, as well as . . . remove the regulatory burden on forms of take that are considered inconsequential to the conservation of the species.”<sup>5</sup>

As noted previously, reliance on the “blanket rule” over species-specific 4(d) rules will lead to an increased need for permitting by project proponents, taxing both project proponents and the Service who will have to process and administer additional permits, as well as increase increasing the degree to which the Service must use its resources to enforce the prohibitions of ESA section 9. By tailoring take prohibitions to fit the specific threats facing each threatened species, species-specific 4(d) rules would reduce the need for or expedite permitting and consultation processes. For example, a species-specific 4(d) rule for certain bat species expressly exempting “side-trimming” of electric power line rights-of-ways from the take prohibition would reduce the need for project-specific permitting and streamline inter- or intra- agency consultations under ESA section 7, thus helping conserve the Service’s and project proponents’ resources. In this way, clear and tailored species-specific 4(d) rules help minimize the disruption a listing can have on the regulated community and the permitting burden on the agency.

EWAC notes that species-specific 4(d) rules also can bridge the conservation gap for species that are being targeted for programmatic conservation plans or that are protected by state or local regulations or efforts while maintaining regulatory certainty for project proponents. For example, the Service used its authority under Section 4(d) to provide for the conservation of the coastal California gnatcatcher as a way to support the efforts of the State of California to develop a conservation plan benefitting that species.<sup>6</sup> Specifically, when the Service listed the coastal California gnatcatcher as threatened in March 1993, the State of California and several local governmental entities were working toward finalizing the Natural Community Conservation Planning Act plans. In 2015, the Service issued a species-specific 4(d) rule benefitting the Georgetown salamander, wherein project proponents who abided by water quality measures required under the City of Georgetown, Texas’ Unified Development Code—including setbacks and implementation of certain best management practices in proximity to occupied spring and spring-run sites—would not be subject to the take prohibition of ESA section 9. Use of species-specific 4(d) rules in the above circumstances alleviated the regulatory burden on the Service and

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<sup>5</sup> U.S. Fish & Wildlife Service, *Guidance for Development of Species-Specific 4(d) Rules Under the Endangered Species Act*, at 2 (July 2021), available at: [https://www.fws.gov/sites/default/files/documents/guidance-for-4d-rules-under-the-endangered-species-act\\_0.pdf](https://www.fws.gov/sites/default/files/documents/guidance-for-4d-rules-under-the-endangered-species-act_0.pdf).

<sup>6</sup> 58 Fed. Reg. 65,088 (Dec. 10, 1993).

the regulated community, and encouraged locally-driven solutions to conservation of listed species.

Finally, EWAC believes the Service's concern that species-specific 4(d) rules will increase its regulatory and administrative burden may be misplaced. In the Preamble to the Proposed Rule, the agency appears to imply that because NMFS manages fewer ESA-listed species it is easier for that agency to issue and manage species-specific 4(d) rules.<sup>7</sup> EWAC notes, however, that over the past 15 years, the Service has listed only a small number of species as threatened (e.g., in 2010, the agency listed 54 species total and listed zero as threatened. In 2011, of 11 species listed, only one species was listed as threatened. In 2012, the agency listed 44 species and only four were listed as threatened. In 2021, of 10 species listed, only three were listed as threatened).<sup>8</sup> Promulgation of a small number of species-specific 4(d) rules is unlikely to hinder the Service's administration of the ESA, particularly given species-specific 4(d) rules are likely to reduce the permitting and consultation burden overall. Since the 2019 Rescission, the Service has adopted a species-specific 4(d) rule for each species listed as threatened. While EWAC appreciates the Service's concerns with ensuring efficiency in its administration of the ESA, it is our view that reinstatement of the "blanket rule" will, in fact, add to the agency's regulatory burden. Reinstatement of the "blanket rule" likely will result in an increase in the number of entities applying for section 10 authorization or seeking project-by-project coordination on issues that could have been adequately addressed pursuant to a species-specific 4(d) rule.

## **II. The Service Should not Extend the "Blanket Rule" to Threatened Plant Species**

While ESA section 9 does not prohibit "take" of plant species, it does prohibit a number of actions with respect to plant species listed as endangered. These prohibitions are as follows:

...with respect to any endangered species of plants listed pursuant to [ESA section 4], it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

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<sup>7</sup> Proposed Rule at 40,745.

<sup>8</sup> See U.S. Fish & Wildlife Service, *U.S. Federal Endangered & Threatened Species by Calendar Year*, available at: <https://ecos.fws.gov/ecp/report/species-listings-by-year-totals>.

(D) sell or offer for sale in interstate or foreign commerce any such species;  
or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to [ESA] section [4] and promulgated by the [Service] pursuant to authority provided by this chapter.<sup>9</sup>

Current regulations found at 50 C.F.R. section 17.61 apply some, but not all of these prohibitions to threatened plant species. Through the Proposed Rule, the Service has indicated its intent to fully extend the above prohibitions to all species of threatened plants.

EWAC urges the Service not to alter current regulations applicable to listed plants. Existing regulations adequately protect threatened plants and revising the regulations may create confusion on the part of the Service and regulated community regarding compliance by creating a risk of enforcement where none existed before.

### **III. Should the Service Reinstate the “Blanket Rule,” EWAC Encourages the Service to Make Every Effort to Promulgate Species-Specific 4(d) Rules Concurrent with Listing the Species**

As noted above, should the Service reinstate the “blanket rule,” EWAC encourages the Service nevertheless to continue issuing species-specific 4(d) rules whenever possible and to limit use of the “blanket rule” to instances where the threats facing the species cannot adequately be addressed by a species-specific 4(d) rule. We further encourage the Service to issue species-specific 4(d) concurrent with the species listings, as doing so would ease the Service’s administrative burden by ensuring the Service only has to receive and respond to one round of public comments and finalize one rulemaking as opposed to two. Issuing species-specific 4(d) rules concurrently with species listings will also provide notice and regulatory certainty to project proponents regarding the applicable prohibitions and permitting considerations for those species, allowing for better planning processes by project proponents and thus not serving to impede deployment and operations of renewable energy and transmission and distribution infrastructure. Similarly, whenever the Service lists species as threatened, the agency should clearly indicate whether the “blanket rule” or a species-specific 4(d) rule will apply. Finally, even where the Service does rely on the “blanket rule” when listing a species as threatened, the final rule should include a discussion of activities that are not likely to cause take, in accordance with the agency’s policy.<sup>10</sup>

### **IV. Reinstatement of the “Blanket Rule” Ignores the Distinction Drawn by Congress Between Threatened Species and Endangered Species**

Section 9 of the ESA prohibits take of endangered species.<sup>11</sup> When Congress passed the ESA in 1973, it distinguished endangered species from threatened species and recognized the difference in the conservation status of such species by explicitly applying the section 9 take

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<sup>9</sup>16 U.S.C. § 1538(a)(2).

<sup>10</sup> 59 Fed. Reg. 34,272 (July 1, 1994).

<sup>11</sup> 16 U.S.C. § 1538(a).

prohibition only to endangered species.<sup>12</sup> Section 4 of the ESA protects threatened species by requiring the Service to issue regulations it deems “necessary and advisable to provide for the conservation of threatened species.”<sup>13</sup> By the very definition, endangered species face a greater threat of extinction than do threatened species. As the Service is well-aware, endangered species are defined in the ESA as “any species which is in danger of extinction throughout all or a significant portion of its range” while threatened species are defined as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range”<sup>14</sup> These definitions reflect the different levels of threat faced by endangered and threatened species. In fact, the Service recognized the same in the 2019 Rescission, stating that the rescission of the “blanket rule” provides “meaning to the statutory distinction between species meeting the definitions of ‘endangered species’ and ‘threatened species.’”<sup>15</sup> Applying the same section 9 prohibitions to endangered and threatened species ignores this statutory distinction. Utilization of species-specific 4(d) rules to protect threatened species rather than the “blanket rule” better reflects the distinction in the ESA that section 9 prohibitions apply to threatened species.

While the Service currently is afforded significant deference under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Service should promulgate regulations that are not merely permissible, but are most consistent with the statutory language and legislative intent. Section 4 of the ESA authorizes the Service to issue regulations it deems “necessary and advisable to provide for the conservation of threatened species.”<sup>16</sup> The Service should ensure that regulations it issues to protect threatened species are actually “necessary and advisable” and provide the best interpretation of the statutory distinction between “threatened” and “endangered” species. Reinstatement of the “blanket rule” is not the best interpretation of the statute and intent with respect to threatened species.

## V. Conclusion

EWAC appreciates the Service considering the comments laid out above as the agency contemplates reinstatement of the “blanket rule.” EWAC looks forward to continuing to work with the Service in its efforts to improve the administration and enforcement of the ESA.

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<sup>12</sup> 16 U.S.C. § 1531.

<sup>13</sup> 16 U.S.C. § 1533(d).

<sup>14</sup> 16 U.S.C. §§ 1532(6)-(20).

<sup>15</sup> 2019 Rescission at 44,757.

<sup>16</sup> 16 U.S.C. § 1533(d).