



December 22, 2025

Comments regarding:

November 21, 2025 Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comments Processing
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Docket No. FWS-HQ-ES-2025-0029

The Energy and Wildlife Action Coalition (“EWAC”)¹ submits these comments in connection with the U.S. Fish and Wildlife Service’s (“Service”) November 21, 2025 proposal regarding Regulations Pertaining to Endangered and Threatened Wildlife and Plants (“Proposed Rule”).² EWAC is supportive of the Service’s current rulemaking efforts designed to improve implementation of the Endangered Species Act (“ESA”) and align its regulations with the “single, best meaning of the statute.”³ As described in greater detail below, EWAC supports both the rescission of the blanket ESA section 4(d) rule found at 50 C.F.R. §§ 17.31(a) and 17.71(a) (“Blanket Rule”) and the inclusion of new text at 50 C.F.R. §§ 17.31(d) and 17.71(d) requiring that, whenever the Service proposes a species-specific ESA section 4(d) (“Section 4(d)”) rule, the agency must include a specific “necessary and advisable determination” and seek public comment on that determination.⁴

I. Support for Rescinding the Blanket Rule Option

The ESA provides separate definitions for “endangered species” and “threatened species,” and the Service is required to make its listing determinations in accordance with those definitions. Section 9 of the ESA (“Section 9”) prohibits unauthorized “take” of species listed as endangered. Section 4(d) provides that where a species is listed as threatened, the Service “shall issue such regulations as [it] deems necessary and advisable to provide for the conservation” of that species and “may by regulation prohibit with respect to any threatened species any act prohibited under [Section 9].”⁵ Under the Service’s existing Blanket Rule, threatened species and endangered species are treated the same, and the take prohibition set forth in Section 9 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.

Use of species-specific Section 4(d) rules for threatened species better reflects the distinction Congress made that Section 9 proscriptions apply only to endangered species. Indeed, by requiring that the take prohibition of Section 9 applies to a threatened species only to the extent the Service determines it is necessary and advisable and promulgates a species-specific Section 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”). Moreover, the Service itself has an established track record of issuing species-specific Section 4(d) rules. When the Service rescinded the Blanket Rule in 2019, the agency issued species-specific Section 4(d) rules for each species it listed as threatened until the Blanket Rule was reinstated in

¹ EWAC is a national 501(c)(6) trade association formed in 2014 whose members consist of electric utilities, electric transmission providers, and independent power producers, 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.

² 90 Fed. Reg. 52,587 (Nov. 21, 2025) (“Proposed Rule”).

³ Proposed Rule at 52,589 (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024)).

⁴ *Id.*

⁵ 16 U.S.C. § 1533(d).

2024.⁶ EWAC encourages the Service to adopt the Proposed Regulations and better align its approach with the best meaning of the ESA and with the long-held practice of NMFS.

Under the Service’s current Blanket Rule approach to threatened species, both the Service’s resources and the regulated community are unnecessarily taxed, particularly long term. On the one hand, the Service’s current approach obviates the need and cost for the Service 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 Service must enforce and administer the ESA for threatened species as it does for endangered species. For example, the Service 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 Service, 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 Section 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 Service. 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 Service would not have the burden of permit processing or enforcement for future threatened species. Moreover, under the Proposed Regulations, the Service would be able to tailor each species-specific rule to address the precise threats facing the species. The Service could then focus its 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 Section 4(d) rules are not new to the Service, and the Service has already had great success in developing species-specific Section 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 Service and the regulated community.⁷

II. Support for Separate “Necessary and Advisable” Determination

As noted above, Section 4(d) requires the Service to “issue such regulations as [it] deems necessary and advisable” for the conservation of the species, which “may” include prohibitions on take.⁸ The Proposed Rule would, for the first time, require the Service to include in every species-specific Section 4(d) rule a specific “necessary and advisable determination” (“N&A Determination”), which will include “consideration of conservation and economic impacts” that is “based on the best scientific and commercial data available” and which will be made available for public comment.⁹ EWAC supports the proposal to require the Service to make a specific N&A Determination when it proposes to promulgate a species-specific Section 4(d) rule, including the

⁶ 89 Fed. Reg. 23,919 (April 5, 2024).

⁷ For example, species-specific rules on the 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), <https://doi.org/10.1093/biosci/biy093> (noting several additional examples of successful Section 4(d) rules).

⁸ 16 U.S.C. § 1533(d).

⁹ Proposed Rule at 52,591.

requirement to base the N&A Determination on the best available science. Requiring each species-specific Section 4(d) rule to include a N&A Determination will assist the Service in closely considering whether a rule is, in fact, necessary, and is likely to encourage the Service to tailor any species-specific Section 4(d) rules to hew closely to the specific needs of the species at issue. Likewise, requiring that N&A Determinations be submitted for public review and comment encourages transparency and accountability in Service decision-making, and allows the public an opportunity to consider and provide input on the potential implications of a proposed species-specific Section 4(d) rule in a meaningful timeframe.

III. Recommended Clarification

EWAC notes one aspect of the Proposed Regulations that could create some ambiguity. In the preamble to the Proposed Regulations, the Service clarifies that the change in approach will apply to “every species newly listed as a threatened species, and those reclassified in the future.”¹⁰ However, the proposed amendment to 50 C.F.R. §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 at §17.11(h) on or prior to [EFFECTIVE DATE OF THE FINAL RULE],”¹¹ and does not include the term “reclassification.” The Proposed Regulations suggest an identical change to 50 C.F.R. §17.71(a) for threatened plants.¹² EWAC recommends that the Service include the term “reclassified” in its additions to §17.31(a) and §17.71(a). Further, EWAC recommends the Service clarify that “reclassification” would include those instances where a threatened determination is currently being challenged in a court (prior to the effective date of any final rescission of the Blanket Rule), the threatened determination is then remanded or vacated by a court, and the Service subsequently re-issues a threatened determination for the species after the effective date of the rescission of the Blanket Rule. The re-issued threatened determination should then be considered as a new listing or reclassification subject to the final rule.

IV. Final Rule Should Require Species-Specific Rules to be Promulgated at Time of Listing or within a Required Timeframe.

In the Proposed Rule, the Service solicits input on whether the final rule should include a requirement that a species-specific Section 4(d) rule must be promulgated at the time of a threatened listing or within a required timeframe for newly listed or reclassified threatened species.¹³ EWAC recommends that it should. While NMFS has successfully implemented this approach with respect to threatened species without a required timeframe, NMFS has listed far fewer species than the Service. The prospect of implementing 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 at the time the listing becomes effective would allow the regulated community to better plan and budget for its activities.

If the Service intends to develop a Section 4(d) rule for a particular threatened species, EWAC suggests that the Service publish a proposed species-specific Section 4(d) rule concurrently with the final rule listing the species as threatened, or include a statement in the final listing rule

¹⁰ *Id.* at 52,589.

¹¹ *Id.* at 52,591.

¹² *Id.* at 52,592.

¹³ *Id.* at 52,589.

that no species-specific rule is planned. This approach would accomplish two things: (1) it would provide notice to the regulated community of the Service's intentions with respect to the applicability of the ESA take prohibition; and (2) it would ease the Service's administrative burden by allowing the Service to complete the listing rulemaking before it has to respond to public comment and finalize any species-specific Section 4(d) rule. EWAC encourages the Service to consider this suggestion.

V. Conclusion

EWAC welcomes the opportunity to discuss its comments in greater detail with the Service or others within the Administration.

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