

**CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA**

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5310

September 24, 2018

VIA ELECTRONIC FILING

Ms. Bridget Fahey
U.S. Fish and Wildlife Service, Division of Conservation and Classification
U.S. Department of the Interior
5275 Leesburg Pike
Falls Church, VA

RE: Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35,174 (July 25, 2018); Docket No. FWS-HQ-ES-2018-0007

Dear Ms. Fahey:

The U.S. Chamber of Commerce submits these comments in support of the Fish and Wildlife Service's (FWS) proposed revisions to regulations extending to threatened species most of the prohibitions for activities involving endangered species.¹ The Chamber recognizes the need to protect species threatened with extinction, but urges the FWS to avoid unnecessary impediments to land and natural resources development. FWS can accomplish this by using sound science and tailored section 4(d) rules to balance endangered species protection with property rights and compliance costs when listing species and designating critical habitat.

I. Background

Congress enacted the Endangered Species Act (ESA)² in 1973 to conserve the ecosystems upon which endangered and threatened species depend, to provide a program for the conservation of endangered and threatened species, and to achieve the purposes of certain treaties and

¹ Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35,174 (July 25, 2018).

² The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1973).

conventions.³ The Federal Government must seek to conserve threatened and endangered species and use its authorities to further the purposes of the Act.⁴

The ESA “represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”⁵ The distinct difference between endangered and threatened species creates two separate levels of protection for plants, fish, and wildlife.⁶

The ESA is prohibitive in nature and includes a blanket prohibition on the “take” of endangered species, but does not extend that prohibition to threatened species.⁷ A “take” is any action meant to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁸ Section 9 of the ESA outlines that prohibition and makes it illegal to:

1. Import any such species into, or export any such species from the United States;
2. Take any such species within the U.S. or the territorial sea of the U.S.;
3. Take any such species on the high seas;
4. Possess, sell, deliver, carry, transport, or ship, by any means whatsoever any such species taken;
5. Deliver, receive, carry transport, or ship in interstate or foreign commerce and in the course of commercial activity; or
6. Sell or offer for sale in interstate or foreign commerce any such species.

Section 4(d) of the ESA *allows* FWS to establish regulations for the protection of threatened species. Specifically, the ESA states, “whenever any species is listed as threatened...the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.”⁹ In 1978, FWS used this authority to issue a regulation extending the section 9 take prohibitions to threatened species, unless otherwise modified by a species-specific 4(d) rule.¹⁰ The

³ *Id.* at § 1531(b).

⁴ *Id.* at § 1531(c)(1).

⁵ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

⁶ Congress defined “endangered species” as any species of plant, fish or wildlife “which is in danger of extinction throughout all or a significant portion of its range” (16 U.S.C. § 1532(6)), and defined “threatened species” as “any species of plant, fish, or wildlife which is likely to become endangered species within the foreseeable future throughout all or a significant portion of its range” (*Id.* at § 1532(20)).

⁷ *See* 16 U.S.C. at § 1538 (“Prohibited Acts”).

⁸ *Id.* at. § 1532(19).

⁹ *Id.* at. § 1533(d).

¹⁰ *See* Protection for Threatened Species of Wildlife, 43 Fed. Reg. 18181 (Apr. 28, 1978) (amending 50 C.F.R. § 17.31).

4(d) blanket rule affords threatened species with all of the protections that endangered species automatically receive through section 9.

On February 24, 2017, President Trump published Executive Order 13,777, “Enforcing the Regulatory Reform Agenda,” which aimed to reduce the regulatory burden on citizens and facilitate innovation and economic growth.¹¹ The U.S. Department of the Interior (DOI) solicited comments as to how it could “improve implementation of regulatory reform initiatives and policies and identify regulations for repeal, replacement, or modification.”¹² Officials from DOI and the U.S. Department of Commerce then met with FWS and National Marine Fisheries Service (NMFS) officials in December 2017 to discuss improvements to the ESA, deciding to focus on sections 4 and 7 of the Act.

FWS now proposes to revise its approach to exercising discretion under section 4(d) of the ESA. Specifically, the proposal would rescind current regulations that automatically apply prohibitions for endangered species to threatened species and would tailor future protections for threatened species to what is necessary and advisable for that species. These changes would make no change in existing protections for species currently listed as threatened.

These changes would align FWS’ regulatory approach for future listing determinations with that of NMFS, which has the authority to promulgate 4(d) rules for marine species.¹³ Rather than extend section 9 take prohibitions to threatened species, NMFS promulgates separate regulations regarding prohibitions, protections, or restrictions for each threatened species listed.¹⁴

The Chamber supports FWS’ proposal to align its approach with that of NMFS. This approach would allow FWS to evaluate each species on a case-by-case basis, an approach that has shown to benefit species tremendously. Moreover, it would remove duplicative and overly burdensome permitting requirements, better facilitate the implementation of conservation actions, and allow FWS to focus its limited personnel and fiscal resources on areas where they are needed most. Congress provided both FWS and NMFS the authority to promulgate 4(d) rules, so it would be prudent for the services to operate in as consistent a manner as possible.

II. FWS’ Change in Approach Would Provide for Multiple Regulatory Benefits

FWS and NMFS operating under the same 4(d) regulatory framework would ensure consistency and transparency for affected stakeholders. In our experience, NMFS’ framework is the better approach, and FWS should adopt it by promulgating species-specific 4(d) rules. Rather than extend section 9 protections in a blanket fashion to all threatened species, FWS should develop a

¹¹ Exec. Order 13,777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12,285 (Mar. 1, 2017).

¹² Regulatory Reform, 82 Fed. Reg. 28,429 (June 22, 2017).

¹³ See 16 U.S.C. § 1532(12), citing the Reorganization Plan Numbered 4 of 1970.

¹⁴ 83 Fed. Reg. at 35,175.

species-specific rule for each threatened species. This approach would provide three main benefits, listed in detail below:

1. It would allow FWS to tailor its listing decisions to address those threats identified for each species. FWS currently imposes section 9 take prohibitions on threatened species regardless of whether those prohibitions are necessary for the conservation of the species. This approach burdens project developers and requires FWS to focus its limited resources on potentially unnecessary regulatory hurdles.

In changing its practice, FWS would be in a much better position to balance species conservation with project development. For example, in January 2016, FWS finalized a 4(d) rule for the threatened northern long-eared bat. The 4(d) rule tailors the section 9 take prohibitions to only those areas affected by white-nose syndrome, a fungal disease that affects many hibernating U.S. bat species.¹⁵ The rule exempts incidental take from all activities in those areas where the disease has not affected local bats and incidental take for certain specific activities in those areas where the disease does exist.¹⁶

FWS based this tailored approach on its analysis of a number of threat factors and only imposed the section 9 take prohibitions to the extent needed to conserve the northern long-eared bat. Under this approach, as additional data is collected, FWS can alter the application of its take prohibitions to additional areas where white-nose syndrome may become present in the future. This flexibility would provide for additional project development pivotal to economic growth, and allow FWS to focus its limited resources on conservation efforts within the areas where a specific species is most in decline.

2. It would allow FWS to incentivize and recognize conservation efforts made prior to a threatened species listing. FWS regularly recognizes pre-listing state and private conservation efforts when promulgating 4(d) rules. These regulatory assurances provide for increased participation in the conservation of threatened species while providing economic incentives to the regulated community. For example, FWS has exempted incidental take from activities conducted by participants in range-wide conservation plans.¹⁷ Adopting an approach allowing for increased use of such exemptions would recognize state planning efforts, as well as incentivize private pre-listing conservation efforts designed to benefit the species.

¹⁵ Endangered and Threatened Wildlife and Plants; 4(d) Rule for the Northern Long-Eared Bat, 81 Fed. Reg. 1900, 1901 (Jan. 14, 2016).

¹⁶ *Id.*

¹⁷ *See, e.g.*, Endangered and Threatened Wildlife and Plants; Special Rule for the Lesser Prairie-Chicken, 79 Fed. Reg. 20,073-74 (Apr. 10, 2014) (Providing an exemption for the incidental take of the species during activities conducted by participants in the Lesser Prairie Chicken Range-Wide Conservation Plan).

3. It would allow FWS and stakeholders to prioritize resources. One benefit of an increased use of species-specific 4(d) rules is that prescriptive protection measures provide for the effective conservation of species without imposing unnecessary regulatory burdens on private landowners and the FWS.

In instances other than the use of species-specific 4(d) rules, private landowners typically have to apply for an incidental take permit under section 10 of the ESA, which authorizes the taking of federally listed species if it occurs incidentally to otherwise legal activities.¹⁸ This application process involves the submission of a habitat conservation plan, which requires both the private landowner and FWS to dedicate valuable time, money, and resources. Often, even in the case of “low-effect” HCPs, this process can take years. Section 4(d) rules that are clear and can be easily implemented provide for a much more effective conservation of species than other mechanisms contained under the ESA.

III. Conclusion

The Chamber appreciates FWS’ consideration of these comments and urges FWS to act in an expeditious and thorough manner. If you have questions regarding these comments, please contact me at (202) 463-5558 or at kharbert@uschamber.com.

Sincerely,



Karen A. Harbert

¹⁸ See 16 U.S.C. § 1539.