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Public Comments Processing
Attention: FWS–HQ–ES–2023–0018

Martha Williams
U.S. Fish and Wildlife Service
MS: JAO/3W
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Re: Comments on Proposed Rulemaking on Endangered and Threatened Wildlife and Plants;
Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 88 Fed. Reg. 40,742
(June 22, 2023); RIN 1018–BF88

Dear Director Williams:

Western Energy Alliance (the Alliance) offers these comments on the U.S. Fish and Wildlife Service’s (the Service) proposed rule that would adopt a “blanket” rule under section 4(d) of the Endangered Species Act (ESA) extending prohibitions set forth in section 9 of the ESA to all threatened species, unless the Service determines otherwise (proposed rule). 88 Fed. Reg. 40,742 (June 22, 2023). The Alliance urges the Service to maintain species-specific protections for threatened species and not to restore a blanket rule.

Western Energy Alliance is the leader and champion for independent oil and natural gas companies in the West. Working with a vibrant membership base for over 50 years, the Alliance stands as a credible leader, advocate, and champion of industry. Our expert staff, active committees, and committed board members form a collaborative and welcoming community of professionals dedicated to abundant, affordable energy and a high quality of life for all. The majority of independent producers are small businesses, with an average of fourteen employees.

The Alliance opposes the Service’s proposed revisions to 50 C.F.R. §§ 17.31(a) and 17.71(a), which would restore the “blanket” 4(d) rule to threatened wildlife and plants species. The blanket 4(d) rule will indiscriminately impose all prohibitions under section 9 of the ESA, 16 U.S.C. § 1538, on threatened species, unless the service promulgates a species-specific rule establishing otherwise. The Alliance urges the Service maintain 50 C.F.R. §§ 17.31(a) and 17.71(a) in their current form because they encourage tailored, species-specific protections that promote both the statutory objectives of the ESA and conservation and reduce burdens on land users.

Tailored Protections Promote the Objectives of the ESA.

Tailored protections for threatened species promote the objectives of the ESA. In the ESA, Congress distinguished between threatened and endangered species. Whereas Congress statutorily defined

stringent prohibitions that attach to all endangered species in section 9 of the ESA, *see* 16 U.S.C. § 1538, Congress directed that the Service issue regulations that it “deems necessary and advisable to provide for the conservation” of a particular threatened species but afforded the Service the flexibility to adopt a prohibition applicable to endangered species. *See* 16 U.S.C. § 1533(d). Had Congress intended that threatened species would automatically receive the same prohibitions as endangered species unless the Service determined otherwise, it would have drafted the ESA accordingly. In fact, other provisions of the ESA, such as the interagency cooperation provisions in section 7, apply equally to both threatened and endangered species. *See* 16 U.S.C. § 1536.

Furthermore, tailored, species-specific regulations are consistent with the ESA’s scientific objectives. A bedrock principle of the ESA is that decisions related to species must be made using the “best scientific and commercial data available.” *See, e.g.*, 16 U.S.C. § 1533(b)(1)(A). The Service cannot credibly claim that blanket application of a uniform suite of prohibitions utilizes the “best scientific and commercial data available” to adopt regulatory measures that are “necessary and advisable” for threatened species. Rather, species-specific regulations demand that the Service utilize the “best scientific and commercial data available” to craft those necessary and advisable measures for threatened species. Accordingly, tailored, species-specific regulations promote the ESA’s objectives and scientific policy.

Tailored Protections Promote Conservation.

Precisely tailored protections are more effective at conserving threatened species than the automatic and indiscriminate application of all section 9 prohibitions. Prohibitions that are tailored to the needs of individual species improve their conservation. At the outset, tailored prohibitions require the Service to meaningfully evaluate specific threats to a threatened species. Then, tailored prohibitions demand that the Service identify the prohibitions and management actions necessary to mitigate those threats and promote recovery of the species. And, tailored prohibitions compel the Service to assess the adequacy of existing regulatory mechanisms to manage for these threats and eliminate duplicative or unnecessary prohibitions.

Adopting species-specific regulations also helps encourage States and other stakeholders to participate in conservation. Tailored prohibitions afford States the opportunity to undertake conservation measures with less risk that the Service will impose redundant or contradictory prohibitions should it later list a species as threatened. Similarly, tailored prohibitions provide landowners and land use industries incentives to protect and improve habitat on private land in exchange for the Service’s imposition of a narrower suite of prohibitions for threatened species. *See* 84 Fed. Reg. 44,753, 44,755 (Aug. 27, 2019) (“tailored regulations will encourage actions compatible with, or supportive of, a species; conservation”); *see generally* Sarah Stauffer Curtiss, “A Necessary Tool For Conservation: The Case For Section 4(d) of the Endangered Species Act,” *Endangered Species Act: Current & Emerging Issues Affecting Resource Development*, Paper 7C (2015) (discussing 4(d) rule for streaked horned lark, 78 Fed. Reg. 61,452 (Oct. 3, 2013)). Tailored protections can help the development of conservation plans that encourage habitat improvements and provide landowners assurance against heavy-handed restrictions in the future. Thus, species-specific prohibitions engage States and land users in a way blanket prohibitions do not and promote the ESA’s conservation objectives.

Tailored Protections Reduce Burdens on Land Users.

Finally, species-specific prohibitions reduce regulatory burdens on land users. The listing of a species under the ESA triggers a number of specific prohibitions that apply to individuals, businesses, private landowners, and governmental entities, including the prohibition of take of listed species. 16 U.S.C. § 1538. The ESA broadly defines “take” to include activities that “harm” species, including certain habitat modifications, and “harass” species. 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3. In some cases, the Service views cutting a tree, clearing brush, driving a car, or even making noise as a prohibited take under the ESA. Violations of the ESA’s take prohibition are punishable through civil and criminal penalties and can be enforced both by the Service and through citizen suits. 16 U.S.C. § 1540. When incidental take of a listed species is prohibited, land users must expend significant time and resources to obtain permits under section 10 of the ESA to engage in land use activities that may result in take. *See id.* § 1539. And, the Service is forced to devote resources to developing habitat conservation plans and approving these section 10 permits.

Because of these significant regulatory burdens and risks, the Service cannot blindly impose blanket prohibitions that may be unnecessary or yield little benefit to a species. Otherwise, these prohibitions unnecessarily restrict land use activities and obligate land users to undertake the burdensome and expensive process of obtaining section 10 permits. In fact, in 2019, the Service cited these burdens as justification to eliminate the blanket rule, stating “[w]hen we tailor regulations by limiting the prohibitions to those activities that are causing the threat of extinction, we save the public and [the Service] resources by reducing the need for section 10 permits.” 84 Fed. Reg. at 44,755. The Service should not adopt a rule that unnecessarily increases regulatory burdens on the regulated public. Instead, the Service should retain the existing rules at 50 C.F.R. §§ 17.31(a) and 17.71(a).

The Alliance appreciates the opportunity to provide comments on the Proposed Rule and urges the Service to not reinstate the blanket 4(d) rule. Thank you for consideration of these comments.

Sincerely,



Kathleen M. Sgamma
President