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Public Comments Processing  
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RE: U.S. Fish and Wildlife Service Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, **Docket No. FWS–HQ–ES–2018–0007**

On behalf of the Environmental Defense Fund (EDF) and its over 2 million members and supporters, and the National Audubon Society (Audubon) and its one-million plus members, 23 states offices, and 462 chapters, EDF and Audubon submit these comments in response to the U.S. Fish and Wildlife Service’s Proposed Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants (Proposed 4(d) Rule).<sup>[1]</sup> EDF is an international non-partisan, non-profit organization dedicated to protecting human health and the environment by effectively applying science, economics, and the law. The National Audubon Society protects birds and the places they need, today and tomorrow.

## Introduction

The Proposed 4(d) Rule would eliminate default Section 9 protections for threatened species. The withdrawal of the existing blanket rule, alone, is likely to engender conflict, make recovery less likely and more expensive and increase resource demands on the Fish and Wildlife Service (FWS). However, there is potential for improvement in this area. Last year, the Western Governors’ Association (WGA) recommended that the Service create more certainty around the issuance of special 4(d) rules. Recently, the Environmental Policy Innovation Center (EPIC), the Sand County Foundation and EDF collaborated to submit joint recommendations to this effect into this docket. The comments below describe the

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<sup>[1]</sup> U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 FR 35193 (July 25, 2018).

significant drawbacks associated with the Service’s proposed withdrawal of the 4(d) blanket rule and summarize the previously submitted recommendations for improvement.

## Withdrawal of Blanket Rule

Removing default protections will weaken protections for species unless the Service consistently promulgates species-specific rules based on best available science in parallel with species listing. Without adequate Section 9 take protections, threatened species will be more likely to experience continued population decline, become extinct or require more expensive and difficult to execute recovery plans.

Although the National Marine Fisheries Service (NMFS) has not promulgated a blanket 4(d) rule, comparisons to the NMFS approach are inappropriate and lead to inaccurate assumptions regarding the efficacy of implementing the Services’ current proposed rule for several reasons.

First, the distinction between the NMFS and FWS approaches to the extension of protections to threatened species is, in practice, very narrow. Both agencies begin the 4(d) rule decision-making process by assuming the full protections of Section 9(a)(1) apply to species listed as threatened. NMFS 4(d) rules generally extend full Section 9 protections to threatened species, and identify certain exemptions to take prohibitions.<sup>1</sup> NMFS also has 4(d) rules that extend the full protections afforded by Section 9(a)(1) to threatened species, and do not contain exceptions.<sup>2</sup> Therefore, although the agencies differ with respect to the existence of a general rule, for practical purposes they analyze protections for threatened species very similarly. This suggests that the withdrawal of the blanket rule would not streamline, or otherwise benefit the Service’s analysis. If the Service finalizes the proposed withdrawal of the 4(d) rule, the Service should clarify that its starting assumption is that the full protections of Section 9(a)(1) apply to threatened species.

Second, NMFS issues fewer rules, and rules that are generally longer and more detailed than 4(d) rules issued by the FWS.<sup>3</sup> Of the 238 animal species listed by FWS as threatened through May 2016, only 49% have been covered by a special species 4(d) rule.<sup>4</sup> The withdrawal of the blanket rule would mean that the FWS must double its 4(d) workload in order to extend protections to threatened species. The increased complexity and time requirements for 4(d) rules will be exacerbated if the FWS consistently issues 4(d) rules concurrently with listing determinations. At current staffing and resource levels, it is

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<sup>1</sup> Ya-Wei Li, Section 4(d) Rules: The Peril and the Promise, Defenders of Wildlife (2017), available at: <https://defenders.org/sites/default/files/publications/section-4d-rules-the-peril-and-the-promise-white-paper.pdf>

<sup>2</sup> 50 C.F.R. § 223.208(c)(1); 50 C.F.R. § 223.203(b)(7).

<sup>3</sup> Ya-Wei Li, Section 4(d) Rules: The Peril and the Promise, Defenders of Wildlife (2017)(citing as “unusually lengthy” examples 4(d) rules for all threatened anadromous fish and sea turtles), available at: <https://defenders.org/sites/default/files/publications/section-4d-rules-the-peril-and-the-promise-white-paper.pdf>

<sup>4</sup> Id.

unthinkable that the FWS could accommodate the workload associated with the proposed change to its 4(d) rules.

Third, NMFS special rules focus on similar classifications of species, making science-based decision making more streamlined. On the other hand, comprehensive promulgation of FWS special rules would require analysis of fish, mammals, reptiles and plants, and represent a significant expansion of the breadth of FWS special rules. Currently, 85% of all species covered by a 4(d) rule are fish, mammals and reptiles, even though those groups make up only 61% of all species listed as threatened by the Services.<sup>5</sup> Other species classifications are dramatically underrepresented in 4(d) rule coverage. According to a 2017 Defenders of Wildlife analysis of 4(d) rules,

special rules do not cover most threatened amphibians, birds and insects and are entirely absent for clams, snails and plants. Clams and snails make up only 6 percent of FWS threatened species and are often difficult to detect, so it is unsurprising that none has prompted a special rule. But plants make up 40 percent of all FWS threatened species, and their complete omission from special rules may seem peculiar.<sup>6</sup>

Again, the additional workload and time required to develop detailed science-based special rules for the range of threatened species classifications managed by the Services is significant. As the FWS currently cites staffing and resource shortages to explain delays and missed deadlines, the proposed withdrawal of the blanket 4(d) rule and resulting demands on FWS personnel are likely to exacerbate delays and decision-making absent substantial investment in FWS staff and budget allocations.

In addition to inaccurate comparisons to the NMFS treatment of threatened species, there are other reasons the FWS should reconsider and decline to finalize its proposal to withdraw the 4(d) blanket rule, including the extent to which the new rule will exacerbate, not eliminate, conflict and the lack of a regulatory timeline for special rule promulgation.

Despite the FWS's stated intention, withdrawing the blanket rule will not reduce conflict. If the FWS fails to consistently issue science-based special rules, the withdrawal of the blanket rule will introduce new potential for litigation around the term "advisable and necessary."<sup>7</sup> This is particularly true if 4(d) rules are issued sporadically, or with frequencies that vary dramatically between administrations.

The FWS indicates in the preamble that it intends to finalize species-specific rules concurrent with the final listing or reclassification determination.<sup>8</sup> Prompt promulgation of a 4(d) rule extending necessary protections to species likely to become endangered in the foreseeable future is essential to avoid further species declines and consistent with Congressional intent. Despite the FWS's commendable

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<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> 16 U.S.C. § 1533(d).

<sup>8</sup> Proposed 4(d) Rule.

intent, nothing in the proposed regulatory language creates a timeline or schedule for development of special rules. The Service should clarify in the regulations at 50 C.F.R. 17 that 4(d) rules shall be promulgated concurrently with threatened listing determinations.

In the absence of a regulatory timeline for promulgation of special species rules, the protections afforded by a blanket rule are even more critical to preventing species decline. If the FWS intends to promulgate 4(d) rules for every species, there is only upside to retaining the blanket rule. If, as the FWS suggests, it intends to publish the special rules concurrently with its listing decisions, the blanket protections will be immediately superseded by the special rule. On the other hand, if the FWS is unable to draft and issue a 4(d) rule concurrently with a listing decision for certain species, the blanket rule, if left intact, would provide near-term protection for listed species while the agency drafts its rule without further demands on FWS resources.

Some commenters argue that removing protections for threatened species will incentivize conservation activities for endangered species, as landowners and agencies seek to reduce Section 9 prohibitions or Section 7 consultation obligations. If this were true, the same incentive to conserve and recover threatened species exists under the existing blanket 4(d) rule. Removing the blanket rule and its default protections will reduce incentives to recover threatened species, not add to them. Presumably, the FWS recognizes that the withdrawal of default protections for threatened species will not create conservation incentives, and appropriately omits any reference to conservation incentives as a basis for this proposed rule.

## Guidance for 4(d) Special Rules for Threatened Species

EDF, together with the Environmental Policy Innovation Center (EPIC) and the Sand County Foundation, previously submitted comments to this docket. The joint comments provide two recommendations regarding the FWS's use of special species rules.

First, we recommend that the FWS develop and incorporate quantitative or semi-quantitative assessment methods into listing determinations to accurately distinguish between threatened and endangered species.<sup>9</sup> Because the withdrawal of the 4(d) blanket rule would create a wider distinction between the protections afforded to threatened and endangered species, respectively, the FWS should endeavor to make that determination more precise in order to provide transparency, consistency, predictability, objectivity and defensibility for the regulated community.

Quantitative or semi-quantitative methods available to the FWS for use in listing decisions could include population viability assessments and other models expressing risk or threats to species. Through this recommendation, EDF does not include or endorse the use of absolute population targets or caps as a basis for listing decisions. Rather, the FWS can incorporate observed and projected population and range data into systematic conservation status assessments that inform Section 4 decisions, as well as

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<sup>9</sup> National Audubon Society does not join EDF and EPIC in this recommendation.

the development of monitoring, adaptation measures and conservation management planning for species that are responding to climate change. In most cases, quantitative or semi-quantitative methods will be supplemented with qualitative criteria and evaluation.

Second, EDF recommends that the Service promulgate guidance to clarify when and how 4(d) rules will be developed. This recommendation to adopt a national policy on the implementation of 4(d) rules is consistent with a policy resolution adopted by the WGA following a multi-year stakeholder initiative on Species Conservation and the Endangered Species Act (WGA Policy Resolution 2017-11 as amended). EDF concurs with the WGA's assessment that guidance would provide multiple benefits to the FWS and stakeholders, including the reduction of controversy and legal challenges, and increased incentives for conservation opportunities, regardless of whether the 4(d) blanket rule is withdrawn.

We note that the FWS has promulgated national guidance for similar analysis and permitting processes. For example, Section 10 permitting is covered by comprehensive guidance including a detailed Habitat Conservation Plan Handbook<sup>10</sup> and a recently revised policy on Candidate Conservation Agreements with Assurances (CCAAs). By contrast, species-specific 4(d) rules are not covered by any national policy or guidance. Both Section 10 permitting and Section 4(d) species specific rules allow activities to proceed without violating section 9, and thus both benefit from the clarity, consistency and transparency national guidance can provide.

National guidance on the development of 4(d) rules should accomplish the following elements.

**1. Clarify the FWS's intent regarding when take prohibitions and exemptions**

The FWS should clearly articulate its intent to use special rules to limit Section 9 protections to those threats that meaningfully imperil or impede the recovery of threatened species, and exempt activities with beneficial, neutral or trivial effects. We further suggest that the FWS use national guidance to identify the link between threats identified during the listing process (i.e. during performance of the five-factor threat analysis and any species status assessment) and activities that may be prohibited or permitted in special species rules. Identifying the FWS's strategic vision for how and when take prohibitions will be applied, stakeholders can better anticipate FWS decisions and better contribute to the decision-making process.

**2. Regularly Exempt Activities with Beneficial, Neutral or Trivial Effects**

Activities that benefit survival or recovery, have no known harmful effects, or have only trivial effects should not be subject to section 9 prohibitions absent unusual circumstances. In more clearly articulating the link between identified threats to species and special 4(d) rules, the FWS could use its national 4(d) guidance to make clear that activities with beneficial, neutral or trivial effects will be exempted from Section 9 take prohibitions. Prohibiting such activities will not enhance recovery

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<sup>10</sup> U.S. Fish and Wildlife Service, Habitat Conservation Planning and Incidental Take Permit Processing Handbook (Dec. 21, 2016), available at: [https://www.fws.gov/endangered/what-we-do/hcp\\_handbook-chapters.html](https://www.fws.gov/endangered/what-we-do/hcp_handbook-chapters.html)

prospects, and may impose undue burdens on private landowners or federal agency permittees. Additionally, by regularly exempting activities with beneficial, neutral, or trivial effects, the FWS can reduce its Section 10 permitting workload, allowing the agency to focus its limited resources on other activities with a higher return on investment for conservation.

### **3. Regularly Exempt Activities on Private Working Lands Covered by Existing Conservation Plans**

Activities with beneficial effects that are covered by existing conservation plans should be regularly exempted from Section 9 take prohibitions. This is particularly true with regard to activities conducted on private working lands; ranches, farms and forests. In order to be exempted from take prohibitions, existing conservation plans should be found to explicitly further recovery or achieve a net conservation benefit. Safe Harbor Agreements, Working Lands for Wildlife programs, and certain habitat conservation plans are examples of plans for which such a determination is regularly made. As with state-led conservation plans, the FWS should use national guidance to clarify and make consistent a policy regarding which programs or initiatives would qualify for such 4(d) exclusions. The transparency afforded by national guidance on this issue will incentivize private landowners to enroll in qualifying conservation plans.

### **4. Encourage state collaboration by identifying standards for state-led conservation initiatives**

The FWS should use national 4(d) guidance to provide incentives for state collaboration in conservation efforts that benefit recovery by identifying and clearly outlining standards necessary for a state-led conservation effort to qualify for coverage under 4(d) rule take exemptions. The Utah prairie dog and lesser-prairie chicken special rules facilitated states' roles in the recovery of threatened species, and similar state-led efforts should be encouraged. Setting clear expectations for state-led conservation efforts will assist states and stakeholders in developing recovery and conservation plans and allow enrollees a greater level of confidence that early participation will be rewarded.

### **5. Incorporate adequate avoidance, minimization, and/or offset measures in a 4(d) rule, so that a covered species is no worse off than if it had been covered by a section 10 agreement.**

Most 4(d) rules do not include such requirements, thus potentially setting a lower standard for conservation under a special rule than if the section 10 "minimize and mitigate to the maximum extent practicable" requirement were to apply. One way to address this shortfall in a 4(d) rule would be to encourage landowners to participate in programs created by other entities such as states or conservation organizations. The 4(d) rules for the California gnatcatcher and the lesser-prairie chicken used this approach.

**6. Standardize how the agency considers exemptions, beginning with a default assumption that Section 9 take prohibitions apply.**

The FWS should clarify in national guidance a standard method for considering protections applied to threatened species. Standardization will streamline workflow and clarify stakeholder expectations. Regardless of the withdrawal of the blanket 4(d) rule, the FWS's standard method for processing 4(d) special rules should begin with the assumption that all Section 9 protections apply. Then the FWS should carefully consider, and carve out specific activities.

The Proposed Rule indicates that both the FWS and NMFS approaches to considering special species rules are "reasonable."<sup>11</sup> In practice, they are strikingly similar. The FWS currently deploys 4(d) rules to exempt specific activities from take prohibitions of Section 9. Likewise, the NMFS similarly uses 4(d) rules to extend to threatened species the full protections of Section 9, unless an activity is specifically exempted. This two-step approach, beginning with protections, results in carefully considered exemptions tailored to each species and primary threats thereto, and it minimizes the risk that special rules inadvertently allow activities that hinder recovery and should be adopted as standard practice by the FWS.

**7. Evaluate using science-based metrics.**

Science-based metrics evaluating habitat or population impacts of excepted activities should be used to add rigor and transparency to the 4(d) implementation process. Consistent and verifiable tracking metrics will confirm whether the exempted activities have beneficial, neutral, or negligible impacts, and track risks identified in the FWS's five-factor threat analysis and any species status assessment. For example, the NMFS 4(d) rule for anadromous fish rule requires that "at a minimum, harvest monitoring programs must collect catch and effort data, information on escapements, and information on biological characteristics, such as age, fecundity, size and sex data, and migration timing."<sup>12</sup> States must also "monitor the amount of take of listed salmonids occurring in its fisheries" and report the summarized data periodically.<sup>13</sup>

Monitoring, using science-based metrics, can also help provide a timely and robust evidentiary basis for 4(d) plan revision. FWS specifically identifies its "discretion to revise or promulgate species-specific rules at any time after the final listing or reclassification determination" in the Proposed 4(d) Rule preamble.<sup>14</sup> Revisions that address changing, new or unexpected circumstances will help make sure prohibitions and approved activities accurately address threats to species.

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<sup>11</sup> Proposed 4(d) Rule.

<sup>12</sup> National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce, Endangered and Threatened Species; Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units (ESUs), 65 FR 42422 (July 10, 2000) <http://www.westcoast.fisheries.noaa.gov/publications/frn/2000/65fr42422.pdf>

<sup>13</sup> Id.

<sup>14</sup> Proposed 4(d) Rule.

## Conclusion

Special 4(d) rules can improve the efficiency with which the ESA is implemented, if applied consistently, strategically and transparently. National guidelines that establish when and how the FWS will promulgate special rules and clarify overarching agency commitments to incentivizing voluntary state- and stakeholder-led conservation efforts and the use of science-based metrics to adaptively manage take protections would accomplish this goal. Simply withdrawing default protections for threatened species will not, and will ultimately have negative consequences for species and FWS capacity.

If the FWS would like further clarification of any of the considerations raised in these comments, please do not hesitate to reach out to the undersigned EDF and Audubon representatives.

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