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The Honorable Doug Burgum, Secretary
U.S. Department of Interior
1849 C Street, NW
Washington, DC 20240

December 19, 2025

Submitted via regulations.gov

Re: Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants
Docket No. FWS-HQ-ES-2025-0029
90 Fed. Reg. 52,587 (Nov. 21, 2025)

Dear Secretary Burgum,

On behalf of Defenders of Wildlife ("Defenders") and our nearly two million members and supporters, please accept the following comments regarding the U.S. Fish and Wildlife Service's ("Service") proposed rule to remove the "blanket rule" option for automatically extending full statutory protections to newly listed threatened species under the Endangered Species Act ("ESA") under ESA section 4(d), 16 U.S.C. § 1536(d). 90 Fed. Reg. 52,587 (Nov. 21, 2025) ("2025 Proposed Rule").

Defenders is a national conservation organization focused solely on conserving wildlife and habitat and safeguarding biodiversity. Defenders strongly opposes the 2025 Proposed 4(d) Rule as inconsistent with Congress's intent in enacting the ESA. Rescinding the blanket 4(d) rule would undermine the ESA's objectives of protecting threatened species from declining to the point of warranting listing as endangered and ensuring their full recovery.

Defenders strongly objects to the proposal to incorporate economic considerations into whether a 4(d) rule is "necessary and advisable" for the conservation of a threatened species. This proposal flies in the face of Congress's explicit goal that imperiled species—including threatened species—receive robust statutory protections to ensure not merely their survival but full recovery.

Additionally, Defenders strongly objects to the 2025 Proposed Rule's stated intent of revisiting all threatened species currently protected under the blanket 4(d) rule and instead promulgating species-specific 4(d). Not only will this waste the Service's extremely limited rulemaking resources, but it will undoubtedly reduce or eliminate vital protections that threatened species ranging from the Florida manatee and southern sea otter to the piping plover rely on to prevent further declines towards

endangered status and make continued progress towards the ESA's explicit goal of full recovery.

INTRODUCTION

Biodiversity is the foundation of all life on Earth and is key to human well-being. Healthy, diverse wildlife and habitats pollinate crops, keep our waterways clean, and even buffer humans from diseases like Lyme and malaria. These critical services have wide-reaching impacts on our economies, food security, health, and more.

Yet biodiversity is in crisis. Today, approximately one million species are at risk of extinction globally. Most of Earth's lands and seas have been significantly modified by human activity. Populations of wild species continue to decline, putting ecosystems at risk of collapse.

Biodiversity loss is not just happening elsewhere. The U.S. is gravely at risk. Over one-third of U.S. plant and animal species are at risk of extinction. Land cover conversion continues at an estimated rate of two football fields per minute. None of our ecosystems is shielded from the threats of ongoing habitat loss, climate change, pollution, and invasive species.

The U.S. does, however, benefit from the strong protections of the ESA, one of the world's most powerful laws for biodiversity conservation. When it enacted the ESA in 1973, Congress sought to prevent extinction, fully recover imperiled species, and protect the ecosystems in which they live. Now is the time to uphold and strengthen the protections the ESA affords.

The ESA has a strong track record of success. Approximately 99% of U.S. species listed under the ESA are still extant, and hundreds of those species are on the road to recovery. Moreover, the ESA's protections appear to slow habitat loss for imperiled species on federal lands.

Yet for the ESA to do the work Congress intended it to do, it must be implemented properly. The statute lays out a pathway for imperiled species: from science-based listing (under ESA section 4) to the prevention of harm by federal agencies (section 7) to recovery and ultimately delisting. But if implementation is thwarted—for example, if politics creep into listing or critical habitat designations, or if agencies create backdoor ways to harm listed species—then this pathway to recovery is blocked.

Unless we can arrest and reverse extinction trends, species will remain listed, decline, and creep towards extinction. We will see hundreds of ESA-listed species continue to decline; further, many hundreds of species not yet listed will continue to decline to the point that ESA protections may be required. We will continue to lose biodiversity and experience the fallout of nature's collapse: more frequent pandemics, a hotter planet, and deteriorating human well-being.

Despite the urgency of the issue and the importance of the ESA as a strong tool to address it, the current rulemaking process proposes to return to previous regulatory

changes from 2019 that made the statute less effective before being revised in 2024. The proposed amendments undercut many key protections for species and habitat.

Two years ago, we celebrated the fiftieth anniversary of the ESA. This law was visionary, but it could have never foreseen where we find ourselves today: an extinction rate unprecedented in human history and one million species at risk. There is no common interest more widely shared and inclusive than healthy natural systems founded on thriving, native biodiversity. Failure to prioritize this common interest will mean continued loss of nature and its benefits, to the detriment of all Americans.

Defenders calls on the Service to advance Congress's goal of ensuring the survival and full recovery of threatened species by withdrawing the 2025 Proposal, maintaining the blanket 4(d) rule, and preserving its discretion to apply the ESA's full suite of statutory protections against unauthorized take or trade by default at the time of listing a species as threatened.

BACKGROUND

The Service must list as threatened any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range, 16 U.S.C. § 1532(20), because of any one or any combination of five statutory listing factors, *id.* § 1533(a)(1). A listing decision must be based solely on the best available scientific and commercial data. *Id.* § 1533(b)(1)(A).

Section 9 of the statute establishes a broad range of prohibitions against unauthorized take and trade that apply automatically when a species is listed as endangered. 16 U.S.C. §1538(a)(1) (prohibitions applicable to endangered wildlife); *id.* § 1538(a)(2) (prohibitions applicable to endangered plants). These prohibitions do not apply automatically when a species is listed as threatened.

Via Section 4(d), Congress authorized the Service to protect threatened species so that the agency could "regulate trade, prevent taking, and provide for habitat acquisition for these species before they actually become extinct." 119 CONG. REC. 30,164 (Sept. 18, 1973) (statement of Rep. William Goodling).

Section 4(d) states in relevant part:

> Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the case of plants, with respect to endangered species[.]

16 U.S.C. § 1533(d).

For more than four decades, from 1975 to 2019, the Service's blanket 4(d) rule extended the statutory protections afforded to endangered species to threatened species as a default, helping to ensure that no unauthorized take or trade occurred while the Service considered whether to adopt a species-specific regulation. 40 Fed. Reg. 44,412 (Sept. 26, 1975) (4(d) rule for animals); 42 Fed. Reg. 32,374 (June 24, 1977) (4(d) rule for plants); 84 Fed. Reg. 44,753 (Aug. 27, 2019) (final rule rescinding blanket 4(d) rule) ("2019 Final Rule"). By prohibiting all unauthorized take of or trade in threatened species of animals, including harm, harassment, and killing by any person, the blanket 4(d) rule has protected dozens of threatened animal species, from piping plovers to southern sea otters and Florida manatees.

In 2018, Defenders strongly objected to the Service's proposed rule to rescind the blanket 4(d) rule. 83 Fed. Reg. 35,174 (July 25, 2018) ("2018 Proposed Rule"). We pointed out that the proposal contravened the ESA's express purpose not only of protecting imperiled species and the ecosystems upon which they depend, 16 U.S.C. § 1531(b), but also of ensuring species conservation—i.e., recovery to the point at which the statute's protections are no longer necessary. *Id.* § 1532(3). Nevertheless, over the strong objections of Defenders and myriad other commenters, the Service finalized the rule, thereby eliminating the blanket 4(d) rule for threatened species listed from September 26, 2019, forward. 84 Fed. Reg. 44,753 (Aug. 27, 2019).[1]

In 2023, the Service proposed to reinstate the blanket 4(d) rule, with the continued option to promulgate tailored species-specific rules where appropriate. 88 Fed. Reg. 40,742 (June 22, 2023) ("2023 Proposed Rule"). Defenders supported the proposal as amply supported by the ESA's language and purpose as well as sound biological reasoning and the efficient use of the Service's limited resources. The agency reinstated the blanket 4(d) rule in 2024. 89 Fed. Reg. 23,919 (Apr. 5, 2024) ("2024 Final Rule").

COMMENTS

The Service Fails to Provide a Reasoned Explanation for Its Change in Position

As a threshold matter, the Executive and Secretarial Orders cited in the 2025 Proposed Rule do not justify this proposed regulatory revision. *See* 2025 Proposed Rule, 90 Fed. Reg. at 52,588–89. These orders simply call for review of various ESA regulations, including the Service's blanket 4(d) rule, promulgated in the last administration. They cannot and do not change the bedrock statutory guardrails that apply to all ESA-implementing regulations: the regulations must be noticed and promulgated consistent with the Administrative Procedure Act ("APA"); they must

[1] The 2019 Final Rule maintained the blanket 4(d) rule's protections for threatened species listed prior to September 26, 2019, that did not already have a species-specific 4(d) rule. 2019 Final Rule, 84 Fed. Reg. at 44,760 (Aug. 27, 2019).

adhere to the case law interpreting the APA; and they must be consistent with the ESA itself.

As part of the APA's requirements, when an agency changes its mind and reverses its position, at a minimum it must announce the change; there must be "good reasons" for it; and the agency must believe the new position to be better than the old one. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*FCC v. Fox*"). If an agency cannot meet this standard, the APA directs courts reviewing courts to "hold unlawful or set aside" the action as arbitrary and capricious. *Id.* (citing 5 U.S.C. § 706(2)(A)). The Service has not come close to meeting this standard in proposing to rescind the blanket 4(d) rule.

The Service fails to grapple with the fact that its proposed new policy is a 180-degree change of position from that it advanced in reinstating the blanket 4(d) rule only last year, let alone articulate a satisfactory rationale for this change. None of its stated reasons suffices to demonstrate why it is reversing its position from 2024 and once again proposing to rescind the blanket 4(d) rule.

Loper Bright Does Not Justify the Proposal to Rescind the Blanket 4(d) Rule

The Service first asserts that its existing regulations "do not match the 'single, best meaning' of the statute." 2025 Proposed Rule, 90 Fed. Reg. at 52,589 (quoting *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 400 (2024)). This fundamentally misreads *Loper Bright* and cannot serve as a reasoned basis for the Service's abrupt change in position. *Loper Bright* merely affirmed that it is the role of the courts to determine the best meaning of a statute and to ensure that regulatory interpretations of statutory text conform to the best meaning. *See Loper Bright*, 603 U.S. at 400. Nothing in *Loper Bright* requires *agencies* to embark on new regulatory revisions. Rather, *Loper Bright* ended the judicial practice of deferring to agencies' regulatory interpretations of ambiguous words or phrases in their authorizing statutes. *See id.* at 385–86. And it goes without saying that any ESA-implementing regulation must conform to the express language and clear intent of Congress in enacting the ESA to conserve and recover listed species.

The Service is incorrect as a matter of law that the "single, best meaning" of the ESA is that its "statutory text, structure, and context make clear that Congress intended for the Service to determine what protections are needed for threatened species on a species-by-species basis." 2025 Proposed Rule, 90 Fed. Reg. at 52,589. The statute specifies that "conserving" a species means implementing "*all* methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary"; the list of such methods and procedures that follows is inclusive, not limiting. 16 U.S.C. § 1532(3) (emphasis added); *see also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 708 (1995) ("When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary.").

As the Service stated in reinstating the blanket 4(d) rule last year, "nothing in the statute [] prevents us from first issuing 'blanket rules' proactively that we can later decide whether to apply to species that we list as a threatened species or to promulgate a species-specific 4(d) rule for that species." 2024 Final Rule, 89 Fed. Reg. at 23,924. Moreover, the D.C. Circuit has already rejected the contention that the Service's interpretation of section 4(d) as advanced in the 2025 Proposed Rule is the single, best meaning that the text, structure, and legislative history of the ESA supports. *Sweet Home Chapter of Cmtys. for a Great Or. v. Babbitt*, 1 F.3d 1, 5–8 (D.C. Cir. 1993), *modified on other grounds on reh'g*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd on other grounds*, 515 U.S. 687 (1995); *see also id.* at 6 (finding that "[t]he statute does not unambiguously compel the agency to expand regulatory protection for threatened species only by promulgating regulations that are specific to individual species."); *id.* at 7 ("Furthermore, regardless of the use of singular and plural words, § 1533(d) simply does not speak directly to the question of whether FWS must promulgate protections species-by-species or may extend such protection in a single rulemaking.").[2]

The Service Ignores the Rationales It Advanced in Reinstating the Blanket 4(d) Rule

The Service also asserts that rescinding the blanket 4(d) rule "is a superior choice from a policy perspective." 2025 Proposed Rule, 90 Fed. Reg. at 52,589. It quotes from the 2019 regulation about the putative "many benefits" of species-specific 4(d) regulations, including "reduc[ing] burdens on the Service and regulated entities alike and allow[ing] for the Service to better protect threatened species." *Id*. This approach also brings the Service in line with [NMFS]'s longstanding practice of developing species-specific 4(d) rules." *Id*.

Yet the Service entirely ignores the reasoned explanations on all these points (and more) that it advanced in reinstating the blanket 4(d) rule only last year. As noted above, in 2019, the Service rescinded the blanket 4(d) rule. Four years later, in proposing to reinstate the general application of the blanket 4(d) rule option for protecting threatened species in 2023 with the continued option to promulgate species-specific 4(d) rules as appropriate, FWS explained that it had reviewed the benefits and drawbacks of the rescission, its necessity, its consistency with

[2] The 2025 Proposed Rule notes that the D.C. Circuit's *Sweet Home* decision upheld its blanket 4(d) rule under the *Chevron* doctrine, step two of which required reviewing courts to defer to reasonable agency interpretations through regulations of ambiguous statutory words or phrases. *See* 2025 Proposed Rule, 90 Fed. Reg. at 52,589; *see also Sweet Home*, 1 F.3d at 6 (citing *Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)). Although *Loper Bright* overturned the *Chevron* deference framework, the Supreme Court did "not call into question prior cases that relied on the *Chevron* framework." 603 U.S. at 376. "The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite the Court's change in interpretive methodology." *Id*.

applicable caselaw, and other factors. 2023 Proposed Rule, 88 Fed. Reg. at 40,743. It also examined 35 species listed or reclassified as threatened between September 2019 (when the final rule rescinding the blanket 4(d) rule took effect) and early May 2023. *Id*. at 40,744. It found that the vast majority of species-specific rules included the section 9 prohibitions applied to endangered species (along with commonly provided exceptions). *Id*. The Service proffered two primary reasons it was proposing to reinstate the blanket 4(d) rule.

First, the Service determined that biological reasons supported the proposal, in that reinstatement would help prevent threatened species from further declines towards endangered status and to further the ESA's conservation purposes. *Id*. It noted that, at the time of listing a species as threatened, the agency often lacks a complete understanding of the causes of the species' decline and that taking a precautionary approach of applying section 9 protections proactively addresses potentially unknown threats. *Id*. It also noted that the increased attention brought to a species by a threatened listing might increase the risks of collection or sale. *Id*. Therefore, it concluded that reinstating the blanket 4(d) rule option "assists our goal of putting in place protections that will both prevent the species from becoming endangered and promote the recovery of species." *Id*. It observed that, as it gained more information about the species over time, it would always have the option to establish or revise a species-specific 4(d) rule. *Id*.

Second, the Service determined that practical reasons supported the proposal, in that implementation and enforcement of section 9 prohibitions for threatened species are facilitated by such prohibitions being modeled after the same prohibitions for endangered species. *Id*. at 40,744–45. It also noted the rulemaking efficiencies and reduced administrative costs enabled by reinstating the blanket 4(d) rule option. *Id*. at 40,755. Although in rescinding the blanket 4(d) rule it had cited the policy benefit of bringing its practice into alignment with the National Marine Fisheries Service (NMFS), in proposing to reinstate it, FWS noted that these efficiency gains are particularly important considering the much greater number of threatened species it is responsible for compared to its sister agency. *Id*. In particular, it noted that no increased risk of confusion would result from reinstating the blanket 4(d) rule option, as the Service and NMFS had applied differing approaches for more than 40 years prior to 2019. *Id*.

Although the Service noted that the case law does not require it to find that applying (or not applying) specific section 9 prohibitions is "necessary and advisable" for a threatened species' conservation, *id*. at 40,745, 40,747, it provided a detailed explanation for why reinstating the blanket 4(d) rule and its future use is necessary and advisable for threatened species conservation unless it determines to issue a species-specific 4(d) rule. *Id*. at 40,747. It also noted its "particularly broad discretion" to put in place for any threatened species the applicable section 9 protections for animals and plants. *Id*. Thus, although not required to do so, the Service determined that the blanket 4(d) rule is necessary and advisable to enable

the agency to apply all applicable section 9 protections to a threatened species immediately upon listing to prevent further declines, further the ESA's conservation purposes, and ensure effective implementation and enforcement of section 9 prohibitions. *Id*.

In finalizing the proposal to reinstate the blanket 4(d) rule, the Service provided detailed responses to comments from both supporters and opponents. Among many other responses, the Service provided detailed answers as to why, in its considered opinion: (1) the blanket 4(d) rule is lawful under the ESA and consistent with congressional intent, *see* 2024 Proposed Rule, 89 Fed. Reg. at 23,924; (2) it had provided good reasons for its reversal in policy, as required by *FCC v. Fox*, 556 U.S. at 515, *see* 89 Fed. Reg. at 23,296; (3) it had acknowledged the importance of species-specific 4(d) rules in appropriate instances, including to incentivize beneficial actions for the species and to reduce the regulatory burden of permitting otherwise prohibited actions or forms or levels of take inconsequential to a species' conservation, *see id.*; (4) reinstating the blanket 4(d) rule option would not disincentivize actions to benefit endangered species that might then be downlisted, *see id.* at 23,927; and (5) reinstating the blanket 4(d) rule would not constitute a "default" or "one size fits all" approach, because the Service would continue to decide, as it had prior to the 2019 rescission, whether to apply the blanket 4(d) rule or to promulgate a species-specific regulation, *see id.* at 23,930–31; and (6) reinstating the blanket 4(d) rule will not cause confusion with respect to NMFS's lack of a blanket 4(d) rule, given that the two agencies applied their differing approaches for more than 40 years prior to 2019 without incident, *see id.* at 23,931.

In the face of these detailed reasons for reversing course and reinstating the blanket 4(d) rule it advanced only last year, the Service may not simply cite the 2019 rule without running afoul of the APA's requirements to acknowledge its change in position and provide good reasons for proposing to depart from it. *FCC v. Fox*, 556 U.S. at 515. If the agency finalizes the current proposal without acknowledging its course reversal and explaining the reasons why it now disagrees with its 2024 analysis and believes its current proposal advances a superior policy option consistent with Congress' mandate to recover listed species, it will violate the APA.

Rescinding the Blanket 4(d) Rule Is Inconsistent with the Best Reading of ESA Section 4(d), Is Inconsistent with Conservation Biology Principles, and Is a Grossly Inefficient Use of the Service's Limited Resources

Rescinding the blanket 4(d) rule is inconsistent with the ESA's express purpose and legislative history

The ESA's explicit goal is to conserve endangered and threatened species and the ecosystems on which they depend.16 U.S.C. § 1531(b). All federal agencies—including the Service and NMFS (collectively, "wildlife agencies")—have a mandatory duty to conserve endangered and threatened species in furtherance of Congress' express policy. *Id.* § 1531(c)(1). In turn, conservation is explicitly defined to mean

using all measures necessary to recover listed species to the point at which listing is no longer necessary. *Id.* § 1532(3).

Section 4(d) incorporates two distinct authorities: *first*, the Secretary "shall" issue whatever regulations they deem necessary and advisable for a threatened species' conservation (i.e., full recovery). *Second*, the Secretary "may" extend any section 9 prohibitions against unauthorized take or trade that are applicable to endangered species to any threatened species.

Section 4(d) reflects Congress' mandatory directive to ensure threatened species are adequately protected to enable their full recovery. If the wildlife agencies fail to promulgate regulations necessary and advisable for conservation concurrent with listing, then they fail to implement Congress's directive to take all necessary measures to ensure threatened species not only survive but recover to the point listing is no longer required.

Legislative history demonstrates that Congress intended that the wildlife agencies use section 4(d) affirmatively to protect threatened species and their habitats. The Senate Report states: "[Section 4(d)] *requires* the Secretary, once he has listed a species of fish or wildlife as a threatened species, to issue regulations to protect that species. Among other protective measures available, he may make any or all of the acts and conduct defined as 'prohibited acts' ... as to 'endangered species' also prohibited acts as to threatened species." S. REP. NO. 93-307, at 8 (1973) *as reprinted in* 1973 U.S.C.C.A.N. 2989, 2996 (emphasis added).

Hearings in both the House and the Senate considered the issue of how much protection to afford to threatened species. "It was the firm intent of both the House and Senate that the purpose of the Act was to restore the population of a threatened species." *Sierra Club v. Clark*, 577 F. Supp. 783, 788 (D. Minn. 1984), *aff'd in part and rev'd in part,* 755 F.2d 608, 620 (8th Cir. 1985) (citations omitted).

The final conference report accompanying the ESA demonstrates further that the ESA's definition of "conservation" limits the Secretary's ability to permit taking of threatened or endangered species:

> In view of the varying responsibilities assigned to the administering agencies in the bill, the term [conservation and management] was redefined to include generally the kinds of activities that might be engaged in to improve the status of the endangered and threatened species so that they would no longer require special treatment. The concept of conservation covers the full spectrum of such activities: from total 'hands-off' policies involving protection from harassment to a careful and intensive program of control.

H.R. REP. NO. 93-740 (1973) (Conf. Rep.) *as reprinted in* 1973 U.S.C.C.A.N. 3001, 3002.

This language "clearly indicates an intent to limit the Secretary's discretion to permit the taking of threatened species." *Sierra Club v. Clark*, 755 F.2d at 615; *see also id.* ("Because a 'conference report represents the final statement of terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent.'") (citation omitted). The Secretary's authority to issue section 4(d) rules is constrained by the text and history of the ESA, which requires such rules to have a valid conservation purpose.

The courts have agreed that the Service must do more than simply list a species as threatened. It must also take affirmative steps to prevent it from becoming endangered. *See Oregon Nat. Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1152 (D. Or. 1998) ("The whole purpose of listing species as 'threatened' or 'endangered' is not simply to memorialize species that are on the path to extinction, but also to compel those changes needed to save the species from extinction."); *see also Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1142 (9th Cir. 2001) (quoting legislative history that Congress intended to give the Service "the ability not only to protect the last remaining members of the species but to take steps to insure that species which are likely to be *threatened* with extinction never reach the state of being presently endangered"); *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167, 170 (D.D.C. 1977) ("It is clear from the face of the statute that the [Service] must do far more than merely avoid the elimination of a protected species. It must bring these species back from the brink so they may be removed from the protected class, and it must use all methods necessary to do so.").

Rescinding the blanket 4(d) rule is inconsistent with the ESA's express purpose and congressional intent to ensure the conservation (i.e., full recovery) of threatened species as well as its procedural mandate to issue protective regulations concurrently with listing.

Rescinding the blanket 4(d) rule would directly undermine the conservation of threatened species

The proposed rule fails to take into consideration sound principles of conservation biology, which require applying a precautionary, conservative approach to species management even without complete information on the full range of threats a species faces or the magnitude of such threats. As the Service stated in 2024, "Although threatened species are not currently in danger of extinction like endangered species, we have determined those species are likely to become in danger of extinction in the foreseeable future and we have an opportunity to try to prevent that from happening." 2024 Final Rule, 89 Fed. Reg. at 23,923. If the Service does not have the option at the time of listing to ensure threatened species benefit from the outset from the broad section 9 prohibitions that endangered species enjoy automatically, especially where it lacks complete information on the scope and magnitude of threats to the species and may inappropriately exempt the species from receiving certain section 9 statutory protections at the time of listing, the threatened species may suffer further declines towards endangered status before a

course correction can be made. This flies in the face of prudent application of conservation biology principles and is inconsistent with the congressional mandate to take all measures necessary to fully recover threatened species.

Applying the blanket 4(d) rule from the time of listing helps ensure that threats are immediately addressed rather than waiting for better data to become available on the causes and magnitude of threats and is consistent with the ESA's mandate to list species based solely on the best *available* scientific and commercial data, not the best *possible* scientific and commercial data. 16 U.S.C. § 1533(b)(1)(A). As the Service is fully aware, it always retains the discretion to promulgate a more narrowly tailored species-specific 4(d) rule down the road should the best available scientific data justify it. *See* 2024 Final Rule, 89 Fed. Reg. at 23,923.

The imprecise legal and biological lines between threatened and endangered species highlight another risk of rescinding the blanket 4(d) rule. When Congress enacted the ESA, it clearly recognized that endangered species need strong protections against unauthorized take and trade. Section 4(d) of the Act reflects a congressional presumption that threatened species are less imperiled than endangered species and might not need the full statutory protections automatically afforded endangered species. But in practice, the distinction between threatened and endangered species is often murky for all but the most obvious examples. Many species listed as threatened face risks to their survival that approach the severity and imminence that would justify an endangered listing, and their conservation may require the full suite of section 9 protections. Prudence calls for affording threatened species the full suite of section 9 protections unless a reasoned determination is made through a species-specific rule that fewer protections or other measures will ensure their conservation.[3]

Finally, rescinding the blanket 4(d) rule will discourage non-federal conservation initiatives. Without default section 9 prohibitions for threatened species, non-federal agencies and private parties may lack incentives to undertake voluntary conservation efforts, such as through safe harbor agreements or conservation benefit agreements, thereby undermining recovery and increasing the likelihood that threatened species will further decline to the point of becoming endangered.

Rescinding the blanket 4(d) rule will waste the Service's limited rulemaking resources

Rescinding the blanket 4(d) rule will waste the Service's limited resources for making listing decisions, an efficiency vital to working through any backlog of listing determinations and ensuring timely compliance with section 4's mandatory deadlines. Species-specific 4(d) rules are subject to the suite of required analyses

[3] *See* Ya-Wei Li, *Section 4(d) Rules: The Peril and the Promise*, DEFENDERS OF WILDLIFE (2017), https://defenders.org/sites/default/files/publications/section-4d-rules-the-peril-and-the-promise-white-paper.pdf.

and determinations applicable to every federal regulation under statutes and executive orders, consuming limited agency resources. If the Service now determines to undertake a species-specific 4(d) regulation for every species it lists as threatened in the future, its limited resources will be inordinately consumed with this suite of analyses and determinations.

The Service's listing program already lacks the necessary funding and resources to comply with its mandatory statutory obligations to list species and designate critical habitat on the strict timelines Congress requires.

Further delay will result and limited agency resources will be consumed when federal courts are called upon to determine whether species-specific 4(d) rules that exempt activities from section 9 prohibitions, even activities known to contribute to the species' decline, have met the ESA's conservation standard and have been promulgated lawfully. Therefore, rescinding the blanket 4(d) rule will lead the Service to waste its resources on unnecessary rulemakings and litigation.

The following data demonstrate the additional regulatory burden that the 2019 rescission of the blanket 4(d) rule imposed. From September 26, 2019, to the present, the Service listed 24 new species as threatened with species-specific 4(d) rules. It also reclassified 14 species from endangered to threatened, each with a species-specific 4(d) rule. In total, the Service promulgated 38 species-specific 4(d) rules in less than four years, creating multiple additional regulatory steps along the way.

The Service's stated intent to revisit all threatened species currently protected under the aegis of the blanket 4(d) rule promises an even greater waste of the agency's limited resources both in rulemaking and in subsequent litigation. *See* 2025 Proposed Rule, 90 Fed. Reg. at 52,588 ("The Service intends to create species-specific rules for all species currently protected under the 'blanket rule' option."). The Service provides no rationale for why this will be an efficient use of its limited resources, or why the conservation of the species in question requires the agency to undertake at least 130 new rulemakings. Defenders strongly opposes any effort on the Service's part to revisit statutory protections for threatened species currently covered by the blanket 4(d) rule.

Rescinding the blanket 4(d) rule may undermine compliance and enforcement efforts

In reinstating the blanket 4(d) rule in 2024, the Service pointed to the practical reason that implementation and enforcement of the statute for threatened species can be made more effective when statutory protections are uniform across both endangered and threatened species. 2024 Final Rule, 89 Fed. Reg. at 23,923. Defenders believes that the public, as well as federal, state, and tribal wildlife and law enforcement agencies, are best served by a straightforward understanding of the ESA's section 9 prohibitions applicable to both endangered and threatened species without need to reference different rules for various threatened species. Applying the

blanket 4(d) rule to threatened species also bolsters law enforcement's ability to pursue civil penalties and to prosecute criminal violations not only under the ESA but also under the Lacey Act, 16 U.S.C. §§ 3371–3378, thereby strengthening legal protections and deterring future violations. The Service's proposal to rescind the blanket 4(d) rule may lead to less effective implementation and enforcement of the statute, in direct contravention of the ESA's directive to fully conserve listed species to the point of recovery.

Rescinding the blanket 4(d) rule will expose the listing program to increased political pressure to list species as threatened to avoid section 9 prohibitions

The ESA is clear that the Service must determine to list a species as threatened or endangered based solely on the best available scientific and commercial data. 16 U.S.C. § 1533(b)(1)(A). Yet rescinding the blanket 4(d) rule will lead to additional pressure by special interests on the Service to list species as threatened based on the putative economic impacts of listing, even if those species warrant endangered listing, to take advantage of the potential for obtaining relaxed protections under a species-specific 4(d) rule, thus undermining the scientific integrity of the listing process and resulting in species receiving fewer protections than needed.

In response to such pressures, the Service may be tempted to balance the concerned of regulated parties and the needs of species conservation by listing a species as threatened, to maximize "regulatory flexibility," even where the best available scientific data supports an endangered listing. Several of the Service's most prominent listings of threatened species, including those for the polar bear, the lesser prairie-chicken, the Georgetown salamander, and the northern long-eared bat illustrate this concern, and have triggered criticism—and litigation—from the conservation community. Yet the ESA permits no such balancing; only after listing may economic and social considerations have their day. Such considerations may be accounted for in formulating recovery plans, designating critical habitat, consulting on federal actions under section 7, and issuing incidental take permits based on habitat conservation plans under section 10. As important as these economic considerations may be subsequent to a species' listing, they have absolutely no role to play in determining whether a species is threatened or endangered.

If the Service rescinds the blanket 4(d) rule, industrial and land development interests will predictably press even harder for imperiled species to be listed as threatened in the hopes that the Service will fail to issue species-specific rules at all, leaving threatened species without critical protections needed to prevent their further decline towards endangered status and to ensure their recovery. Indeed, special interests will undoubtedly petition for downlisting species currently listed as endangered to threatened with the same expectations, putting even greater pressure on the integrity and capacity of the Service's listing program.

Bringing the Service's Practice into Alignment with the National Marine Fisheries Service Does Not Warrant Rescinding the Blanket 4(d) Rule

As in 2019, the Service cites NMFS's lack of a comparable blanket 4(d) rule as justification for proposing to rescind the blanket 4(d) rule once again. As noted above, the Service has failed to acknowledge or respond to the 2024 Final Rule's analysis as to why there is no evidence that confusion resulted from the two agencies' differing approaches. *See* 2024 Final Rule, 89 Fed. Reg. at 23,931. Further, the Service is responsible for far more listed species than is NMFS, and has a much greater listing backlog.

Moreover, NMFS's track record of adequately protecting threatened 4(d) species via species-specific 4(d) rules is poor. In multiple instances, it has not only failed to promulgate a species-specific 4(d) rule at the time of listing, but has then had to propose one years later, when the threatened species has suffered additional declines that it might not have had it timely received a 4(d) rule.

One example is the Banggai cardinalfish. A species found entirely in Indonesian waters, the Banggai cardinalfish is popular in the marine ornamental fish trade. Overharvest for the aquarium trade is one of the factors that led NMFS to list the species as threatened in 2016. 81 Fed. Reg. 3023, 3023 (Jan. 20, 2016). The United States ornamental fish market is the source of a significant percentage of global demand for Banggai cardinalfish. As is too often the case with NMFS-listed species, however, the agency failed to promulgate a section 4(d) rule for the species at the time of listing, but deferred consideration of such regulation to a future, unspecified date. *Id.* at 3030. In the face of the species' continuing decline, Defenders and its conservation allies petitioned NMFS for a 4(d) rule in April 2021. NMFS belatedly published a draft 4(d) rule for the species in August 2023, more than seven years after the listing rule, to extend section 9(a)(1)(A) protections against import into and export from the United States. 88 Fed. Reg. 55,432 (Aug. 15, 2023). More than two years later, NMFS has failed to take final action on the proposal and the Banggai cardinalfish lacks any statutory protections against import into and export from the United States.

Another example is the oceanic whitetip shark. Defenders petitioned the species for listing in 2015. In commenting on a December 2016 proposed rule to list the species as threatened, Defenders and its conservation partners explicitly petitioned NMFS under the APA to extend ESA section 9 protections via a species-specific 4(d) rule in listing the species as threatened, observing that the lack of a species-specific 4(d) rule would fail to protect the shark from its primary threat (overutilization by commercial fisheries due to incidental bycatch and the international shark fin trade). In 2018, however, NMFS listed the shark as threatened without proposing or finalizing a species-specific 4(d) rule. 83 Fed. Reg. 4153 (Jan. 30, 2018). Six years later, NMFS belatedly published a proposed 4(d) rule for the species, finding that significant historical declines were ongoing. 89 Fed. Reg. 41,917 (May 14, 2024). With three limited exceptions, NMFS proposed a species-specific 4(d) rule to extend all section 9(a)(1) protections to the species. *Id*. More than a year and a half later, NMFS has

failed to take final action on the proposal, and the oceanic whitetip shark lacks any statutory protections against unauthorized take or trade.

The Service's Proposed Language Regarding "Necessary and Advisable" Findings Is Unwarranted

The Service proposes new regulatory text specifying that, whenever it proposes a species-specific 4(d) rule, it "will ensure that each rule include[s] a necessary and advisable determination (including consideration of conservation and economic impacts) and will seek public comment on that determination." 2025 Proposed Rule, 90 Fed. Reg. at 52,589. As justification for this new text, the Service cites a single recent district court decision.

In *Kansas Natural Resources Coalition v. U.S. Fish and Wildlife Service*, the plaintiffs challenged the validity of a species-specific 4(d) regulation for the lesser prairie-chicken. 780 F. Supp. 3d 650 (W.D. Tex. Mar. 29, 2025). The district court vacated the regulation on the grounds that, in finding the rule "necessary and advisable" for the species' conservation, the Service failed to consider whether the regulation was "advisable" based on an economic cost-benefit analysis. *Id.* at 661–62.

The district court's ruling, however, ignored previous court decisions, including appellate decisions from the Fifth and D.C. Circuits, holding that the Service need not make specific "necessary and advisable" determinations as required by the first sentence of section 4(d) in deciding whether to extend particular section 9 prohibitions to a threatened species as permitted by the separate authority in the second sentence of section 4(d). *See State of Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 332–33 & n.22 (5th Cir. 1988); *Sweet Home*, 1 F.3d at 8; *see also In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litigation*, 818 F. Supp. 2d 214, 229–30 (D.D.C. 2011). The holdings of these cases remain valid following *Loper Bright* as subject to statutory *stare decisis*. 603 U.S. at 376. Thus, the Service's proposal to collapse the two separate sources of authority in section 4(d) into one and to henceforth require "necessary and advisable" determinations for all species-specific 4(d) rules that apply some or all of the section 9 prohibitions based on the *Kansas Natural Resources Coalition* case, *see* 2025 Proposed Rule, 90 Fed. Reg. at 52,589, is inconsistent with prior appellate cases that remain good law.

Nor is the Service's proposal—for the first time in the history of the ESA—to include economic cost-benefit analyses into species-specific 4(d) rulemakings supportable. *See* 2025 Proposed Rule, 90 Fed. Reg. at 52,591 (proposed text for 50 C.F.R. §§ 17.31(d), 17.71(d)). Congress included no such requirement in section 1533(d), in contrast to two other parts of section 4 in which it expressly requires the Service to consider economic impacts—(1) in determining whether to exclude particular areas from critical habitat designation, 16 U.S.C. § 1533(b)(2), and (2) in incorporating into a recovery plan estimates of the cost to carry out the necessary measures to accomplish the plan's goal and achieve intermediate steps, *id.* § 1533(f)(1)(B)(iii). In other words, where Congress intended the Service to analyze economic costs of

protective measures under section 4 of the ESA, it said so. The *Kansas Natural Resources Coalition* decision, which failed to analyze these clear distinctions in section 4 between where Congress explicitly requires economic cost analysis and where it does not, provides no support for the agency's proposal.

In July 2021, the Service issued a guidance document for developing species-specific 4(d) rules, during the period when the blanket 4(d) rule was not in effect.[4] It explicitly determined that a species-specific 4(d) rule "should flow from the analysis and conclusions in the documents supporting the listing or downlisting determination or outlining conservation needs[.]" [5] "Those analyses," the Service stated, "use the best available science to consider key demographic, habitat, and conservation needs of the species."[6] In making "necessary and advisable" determinations, the Service stated that "the justifications in species-specific 4(d) rules will generally be focused on explaining the basis for specific exceptions to the section 9 prohibitions—such that each exception would either be de minimis (too small or insignificant to be of importance) or encourage conservation."[7] Nowhere in the guidance document does the Service suggest that economic considerations should play a role in the "necessary and advisable" determination or potentially result in specific exceptions to the section 9 prohibitions based on a cost-benefit analysis that weights putative economic impacts more heavily than the species' conservation needs. The 2025 Proposed Rule does not acknowledge this recent guidance or explain why a single district court case should override the FWS's July 2021 statement of what a "necessary and advisable" determination entails.

The Service Must Finalize Any Species-Specific 4(d) Rules Concurrent with a Final Listing or Reclassification Determination

The Service specifically requests comment on its stated intention of finalizing species-specific 4(d) rules concurrent with final listing rules, "including whether we should include any requirement in the regulatory text to do so, such as setting a timeframe for concurrently finalizing species-specific rules for newly listed or reclassified threatened species." 2025 Proposed Rule, 90 Fed. Reg. at 52,589.

Although Defenders opposes the proposed rescission of the blanket 4(d) rule, it supports the proposed regulatory requirement to finalize any species-specific 4(d) rule with a final rule listing or reclassifying a species as threatened. This requirement would be consistent with the first sentence of section 4(d) that states "*Whenever* any species *is* listed as a threatened species . . . the Secretary *shall* issue such

[4] U.S. Fish and Wildlife Service, "Guidance for Development of Species-Specific 4(d) Rules Under the Endangered Species Act," https://www.fws.gov/sites/default/files/documents/guidance-for-4d-rules-under-the-endangered-species-act_0.pdf.
[5] *Id.* at 5.
[6] *Id.*
[7] *Id.*

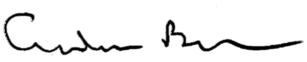
regulations as he deems necessary and advisable to provide for the conservation of the species." 16 U.S.C. § 1533(d) (emphasis added). It would also be consistent with the ESA's express conservation mandate, as detailed above, to ensure threatened species receive the protections they require to recover to the point delisting is appropriate.

Requiring species-specific 4(d) rules concurrent with listing would be an efficient use of the Service's limited rulemaking resources. It would also be cost-effective for the federal government and stakeholders, because ensuring a species' recovery is easier and less resource-intensive when it is not already on the brink of extinction. NMFS's practice of failing to issue species-specific 4(d) rules at the time of listing, as demonstrated by the examples provided above, illustrates why the Service should implement a concurrent 4(d) rule requirement. In the absence of 4(d) rule protections, both NMFS-listed species have declined further towards endangered status, the very result that Congress intended a threatened listing to prevent.

* * *

We appreciate your consideration of these comments.

Sincerely,



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