PETITION TO THE UNITED STATES FISH AND WILDLIFE SERVICE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS' PETITION TO REPEAL TITLE 50 OF THE CODE OF FEDERAL REGULATIONS' SECTION 17.31

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INTRODUCTION

In enacting the Endangered Species Act, Congress expressly limited the statute's broad "take" prohibition[1] — which criminalizes any activity that adversely affects a single member of a protected species or its habitat[2] — to endangered species. Senator Tunney, the floor manager of the bill, explained that the purpose for this choice was to "minimiz[e] the use of the most stringent prohibitions" which would "be absolutely enforced *only* for those species on the brink of extinction."[3] For threatened species, which face only more remote threats, Congress determined that the severe burdens of this restriction are unwarranted. Thus, take of threatened species was left unregulated.

Congress authorized the Service to create exceptions to this general rule. Section 4(d) permits the Service to regulate take of particular threatened species, if "necessary and advisable" for the conservation of that species.[4] This power is limited to the adoption of species-specific regulations; it is not an

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[1] *See* 16 U.S.C. § 1538(a).

[2] *See id.* § 1532(19); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 714 (1995).

[3] Cong. Research Serv., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980, at 357 (1982) (statement of Sen. Tunney) (hereafter "Legislative History") (emphasis added).

[4] *See* 16 U.S.C. § 1533(d).

invitation to reverse Congress' judgment that take of threatened species should generally be unregulated.[5]

In 1975, the Fish and Wildlife Service adopted a regulation extending the take prohibition to all threatened species, including those not yet listed.[6] This regulation exceeds the Service's authority under the Endangered Species Act.[7] In light of the regulation's illegality, the National Federation of Independent Business (NFIB) submits this petition seeking its repeal. This petition is made pursuant to 5 U.S.C. § 553(e)[8] and is submitted to remedy the harm that this illegal regulation has caused NFIB's members, the public, and the species it purports to protect.

INTEREST OF PETITIONERS

NFIB is the nation's leading small business advocacy organization. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is

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[5] *See* Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 Pace Envtl. L. Rev. 23 (2015). A courtesy copy of this article is included with this petition.

[6] *See* Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,414, 44,425 (Sept. 26, 1975), *codified at* 50 C.F.R. § 17.31.

[7] *See* Wood, *supra* note 5.

[8] 5 U.S.C. § 553(e) authorizes anyone to submit a petition to a federal agency seeking the adoption, amendment, or repeal of any rule. Petition denials are final agency actions subject to judicial review under the Administrative Procedure Act, provided that a lawsuit is filed within 6 years of the petition denial. *See* 5 U.S.C. §§ 702, 706.

to promote and protect the right of its members to own, operate, and grow their businesses. It represents approximately 325,000 independent business owners who are located throughout the United States and in a wide variety of industries. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. Small businesses are America's largest private employer and a major source of economic growth. However, small businesses are also more vulnerable to burdensome regulations. Environmental regulations, in particular, can impose severe restrictions on small business operations. The illegal regulation extending the take prohibition to all threatened species, for instance, imposes severe costs on NFIB's members, especially those involved in the agricultural, construction, mining, and timber industries.

I

THE REGULATION EXCEEDS THE SERVICE'S AUTHORITY UNDER SECTION 4(d)

Precursors to the Endangered Species Act of 1973 protected *endangered* species from *government* activities. The Endangered Species Act changed this regime in two significant ways. First, it provides for the listing of threatened species, to provide some preemptive protection before species become endangered.[9] Second, it provides an additional form of protection for

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[9] *See* 16 U.S.C. § 1533(a); *see id.* § 1532(20).

endangered species — and *only* endangered species — by forbidding private activities that adversely affect them.[10] This "take" prohibition is enforced with substantial civil and criminal penalties and prohibited activity can be enjoined through citizen suits.[11] Notably, Congress chose not to combine these innovations; it did not forbid the take of threatened species.

Instead, it authorized the Service to issue regulations for threatened species if "necessary and advisable to provide for the conservation of such species."[12] This includes regulations prohibiting take. This power, however, is limited to the adoption of species-specific regulations.[13] The Service is not authorized to simply reverse Congress' decision to limit the take prohibition to endangered species.

For several reasons, this interpretation is the only way to make sense of Section 4(d)'s text. First, the power to issue regulations is triggered by the

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[10] *See id.* § 1538(a); *see also id.* § 1532(19).

[11] *See id.* § 1540.

[12] *See id.* § 1533(d).

[13] *See* Wood, *supra* note 5, at 30-35; *but see Sweet Home Chapter of Cmtys. for a Great Or. v. Babbitt*, 1 F.3d 1, 8 (D.C. Cir. 1993). *Sweet Home* misapplied *Chevron*, misconstrued the statute and its legislative history, adopted a construction that conflicts with the nondelegation doctrine, and has been called into doubt by later Supreme Court decisions, including *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015), and *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014). *See* Wood, *supra* note 5, at 28-43.

listing of a species as threatened.[14] This means that regulation cannot precede listing. Second, regulations must be "necessary and advisable for the conservation" of the threatened species. This determination can only be made for identifiable species, and then only on a species-by-species basis.[15] Finally, any ambiguity in the text cuts against the Service's authority. The power to criminalize any activity that affects a single member of hundreds of threatened species or their habitats would be a power of "vast economic and political significance." Congress does not delegate such power without clearly saying so.[16]

This interpretation is further reinforced by the statute's legislative history. The record of the House and Senate debates is replete with acknowledgments that the take prohibition imposes significant burdens on affected individuals.[17] Prohibiting take was a last resort necessitated by endangered species' dire state. Any references to regulating take of threatened species indicate that this would be the rare exception, not the rule. To take just

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[14] *See* 16 U.S.C. § 1533(d) ("Whenever any species is listed as a threatened species . . . .").

[15] If the "necessary and advisable" standard does not restrict the Service's power to prohibit the take of threatened species, that power would be unconstitutional under the nondelegation doctrine. *See* Wood, *supra* note 5, at 38-40.

[16] *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

[17] *See* Wood, *supra* note 5, at 35-37.

one example, Senator Tunney, the Endangered Species Act's floor manager, explained that Section 4(d) regulations would be "tailored to the needs of the animal while *minimizing* the use of the most stringent prohibitions."[18]

The Senate Report explicitly interprets Section 4(d) as limited to species-specific regulations. It explains that the section

> 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 *the particular* threatened species.[19]

The Department of Interior, to whom this power would be delegated, also interpreted it this way. In a letter to Congress, the Acting Assistant Secretary of the Interior explained that the take prohibition should be limited to endangered species to "assure protection of all endangered species commensurate with the threat to their continued existence."[20] On the other

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[18] Legislative History, *supra* note 3, at 357 (emphasis added).

[19] S. Rep. No. 93-307, at 2996 (1973), *reprinted in* Legislative History, *supra* note 3, at 307 (emphasis added).

[20] *See* Letter from Douglas P. Wheeler, Acting Assistant Secretary of the Interior, to Rep. Leonor Sullivan, Chairman, House Committee on Merchant Marine and Fisheries (Mar. 23, 1973), *in* Legislative History, *supra* note 3, at 162.

hand, whether take of threatened species would be regulated under Section 4(d) would "depend on the circumstances *of each species*."[21]

Despite the structure of the Endangered Species Act, Section 4(d)'s limits, and the Department of Interior's representations to Congress, the Fish and Wildlife Service promulgated a regulation purporting to extend the take prohibition to all threatened species — including those not yet identified.[22] This regulation is only pared back if the Service enacts a regulation relaxing these severe burdens for a particular species.[23] Many of the species ultimately covered by the regulation were not known at the time, consequently the Fish and Wildlife Service offered no explanation how the regulation was necessary and advisable for their conservation.[24] Since Section 4(d) does not authorize the Service to reverse Congress' decision to generally leave the take of threatened species unregulated, the regulation is illegal and must be repealed.

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[21] *See id.* (emphasis added).

[22] *See* 40 Fed. Reg. 44,412, *codified at* 50 C.F.R. § 17.31.

[23] *See* 50 C.F.R. § 17.31.

[24] *See* 40 Fed. Reg. 44,412; *see also* Wood, *supra* note 5, at 29. Nor does it explain why the Fish and Wildlife Service rejected the understanding that the Department of Interior had previously represented to Congress. *See* 40 Fed. Reg. 44,412; *see also* Wood, *supra* note 5, at 37; *cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 145-46, 155-56 (2000) (no deference to agencies' unexplained changes of heart).

II

THE REGULATION FORBIDS TAKE OF SUBSEQUENTLY-LISTED SPECIES WITHOUT ANY CONSIDERATION OF COSTS

In *Michigan v. EPA*, the Supreme Court of the United States held that EPA's interpretation of "appropriate and necessary" in the Clean Air Act was unreasonable because it didn't include consideration of costs.[25] The Court explained that such an open-ended standard must include costs because "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."[26]

"Necessary and advisable" is similarly comprehensive. Just as a regulation that achieves meager benefits at an exorbitant price is not "appropriate," it is also not "advisable." Therefore, under the statute, the Service cannot prohibit take of threatened species without considering the costs imposed. Once again, the legislative history reinforces this conclusion. It shows that Congress was keenly aware of the incredible costs that the take prohibition imposes.[27]

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[25] *See* 135 S. Ct. 2699.

[26] *See id.* at 2707.

[27] *See* Wood, *supra* note 5, at 35-36; *cf. Sweet Home*, 515 U.S. at 714 (Scalia, J., dissenting) (the take prohibition is so broad that it threatens to "impose[] (continued...)

Yet, through the illegal regulation, the Service imposes substantial costs on the public without any analysis or determination that they are justified. Instead, the take prohibition applies to these species automatically. Ironically, the Service only *reduces* these burdens if it determines that the reduction is necessary and advisable to the conservation of a particular species.[28] In effect, it has turned Congress' standard on its head. This is yet another reason why the regulation violates the Endangered Species Act and must be repealed.

III

REPEALING THE REGULATION WOULD ALLEVIATE SEVERE BURDENS ON NFIB'S MEMBERS AND THE PUBLIC

The illegal regulation has caused much mischief over the last 40 years. Consider, for instance, the northern spotted owl. This species was listed as threatened in 1990 and take of it was automatically forbidden under the illegal regulation.[29] As a consequence, the Pacific Northwest's timber industry was

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[27] (...continued)
unfairness to the point of financial ruin — not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use").

[28] *See, e.g.*, Final Rule Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. 46,158, 46,159 (Aug. 2, 2012).

[29] *See* Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114, 26,174 (June 26, 1990).

(and is) severely impacted. Timber production has declined markedly.[30] Many areas of old growth forest are off-limits to development.[31] And employment within the industry has fallen sharply.[32]

Or consider the piping plover. This species was listed as threatened in 1986.[33] Take of it too was automatically forbidden under the regulation. As a result, coastal property owners have seen the use of their property restricted and coastal economies have been hurt by annual beach closures.[34]

These are just two of the high profile examples of the illegal regulation's severe impacts. The regulation applies to more than 150 species in the United States, hurting numerous local economies, property owners, and small businesses. With many more species waiting in the wings, the

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[30] *See, e.g.*, Scott Learn, *Northern spotted owl marks 20 years on endangered species list*, The Oregonian, June 25, 2010, http://www.oregonlive.com/environment/index.ssf/2010/06/northern_spotted_owl_marks_20.html.

[31] *See, e.g.*, U.S. Fish & Wildlife Serv., *Revised Recovery Plan for the Northern Spotted Owl* I-7, I-8 (June 28, 2011).

[32] *See, e.g.*, Washington Forest Protection Association, *Delving into the impact of the spotted owl* (Dec. 17, 2010), http://www.wfpa.org/news-and-resources/blog/delving-into-the-impact-of-the-spotted-owl/.

[33] Determination of Endangered and Threatened Status for the Piping Plover, 50 Fed. Reg. 50,726 (Dec. 11, 1985).

[34] *See, e.g.*, Kris Frieswick, *The curious case of the piping plover*, Boston Globe, Aug. 14, 2011, http://www.boston.com/lifestyle/articles/2011/08/14/cape_beach_battle_the_curious_case_of_the_piping_plover/?s_campaign=8315.

consequences of the illegal regulation will only grow. That is why it is so important that the Service promptly repeals it.

IV

REPEALING THE REGULATION WILL ALSO BENEFIT LISTED SPECIES

The illegal regulation results in endangered and threatened species receiving the same protection. Not only is this contrary to Congress' intent, it also harms the very species the statute aims to protect. A variety of recognized problems with the administration of the Endangered Species Act can be traced, at least in part, to the consequences of this illegal regulation.

For instance, the Fish and Wildlife Service has been overwhelmed by petitions to list species.[35] A major cause of this problem is the use of "mega petitions" seeking the listing of hundreds of species at a time.[36] But a contributing factor is the illegal regulation's incentive for opponents of development or other private activity to over-petition for the listing of species that may be threatened.

One might expect that endangered species would be the primary focus of environmental campaigns. Not so. For instance, in the 90s, the Service was sued for failing to list threatened species three times more than for endangered

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[35] *See* Proposed Revisions to the Regulations for Petitions, 80 Fed. Reg. 29,286 (May 21, 2015).

[36] *See id.*

species.[37] This makes sense, in light of the illegal regulation. Listing a species is an effective way for a group to achieve anti-development ends.[38] Since the same restrictions are imposed for endangered and threatened species, and the standard for listing a species as threatened is more relaxed, groups have a strong incentive to pursue the listing of marginal candidates for threatened status. Disconnecting a threatened listing and the take prohibition — which repealing the regulation would accomplish — would go a long way to reducing this problem.[39]

The regulation also undermines the incentives for private conservation.[40] Under it, property owners are generally subject to the same burdensome restrictions if a species is listed as endangered or threatened. This means that those whose land have threatened species have little incentive to stop the species' further slide. For them, the damage has already been done; if

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[37] *See* Jonathan H. Adler, *The Leaky Ark in* REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM 22 (Adler ed., 2011).

[38] *See, e.g.*, Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 Cumb. L. Rev. 1, 53 (1993) (explaining that the Sierra Club pushed for the listing of the northern spotted owl to accomplish its "ultimate goal" of delaying and stopping forest harvesting).

[39] *Cf.* Katrina Miriam Wyman, *Rethinking the ESA to Reflect Human Dominion Over Nature*, 17 N.Y.U. Envtl. L.J. 490, 515-17 (2008) (arguing that the ESA listing process would be more effective if it was decoupled from the take prohibition and other regulatory restrictions).

[40] *See* Wood, *supra* note 5, at 47-52.

the species becomes endangered, that will not change the restrictions imposed on the landowner. Similarly, someone whose property provides needed habitat for endangered species has reduced incentives to contribute to the species' recovery since she may receive no relief if the species is downlisted to threatened.

Undermining the incentives for private conservation significantly impacts species. Private lands provide most of the habitat for listed species.[41] Consequently, many species cannot be conserved, much less recovered, without private property owners maintaining or improving the habitat on their lands.

The prospect of avoiding or lifting the take regulation is a powerful incentive. The Fish and Wildlife Service has admitted as much in several policies and recent listing decisions.[42] That threatened species are more likely to be improving than endangered species is also evidence of the strength of

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[41] *See* Brian Seasholes, Reason Found., *Fulfilling the Promise of the Endangered Species Act: The Case for an Endangered Species Reserve Program* (2014), htt://reason.org/files/endangered_species_act_reform.pdf.

[42] *See, e.g.*, Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100 (Mar. 28, 2013) (federal policy encouraging state and private conservation efforts as a preferred alternative to listing species); U.S. Fish & Wildlife Serv., *PECE Evaluation for the New Mexico CCA/CCAA and Texas Conservation Plan* 39 (2012), http://www.fws.gov/southwest/es/Documents?R2ES/DSL_PECE_NM_and_TX_06112012.pdf (applying this policy to state plans to conserve the dunes sagebrush lizard and noting that the affirmative conservation measures achieved under them would not likely be achieved by a listing).

these incentives.[43] If a threatened species recovers to the point of being delisted, affected property owners benefit greatly because the take prohibition no longer applies. Thus they are more motivated to recover those species.

Repealing the regulation and returning to Congress' policy of protecting endangered species more than threatened ones will improve landowners' incentives. The lifting of the take prohibition would be a "carrot" encouraging private parties to work to recover endangered species. And the threat of imposing the prohibition would be a "stick" encouraging private parties to avoid threatened species' further slide.

CONCLUSION

In order to remove the burdens being illegally imposed and to promote the more efficient administration of the statute, NFIB formally requests that the Service rescind 50 C.F.R. § 17.31 in recognition that it exceeds its power under the Endangered Species Act.

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Respectfully submitted,

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[43] *See* Adler, *supra* note 37, at 11.