PETITION TO THE UNITED STATES FISH AND WILDLIFE SERVICE

WASHINGTON CATTLEMEN'S ASSOCIATION'S PETITION TO REPEAL 50 C.F.R. § 17.31

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INTRODUCTION

Over the last several years, the Service has taken or proposed steps to improve its implementation of the Endangered Species Act to make it more efficient and effective.[1] A key reform has been an increase in the Service's engagement with states and property owners and encouragement for private, voluntary conservation efforts.[2] Unfortunately, a decades-old regulation, which is both ill-advised and contrary to the statute, undermines these efforts.

In the 1970s, the Service adopted a regulation extending the statute's burdensome take prohibition to all threatened species,[3] despite Congress' decision to expressly limit the application of that "stringent prohibition"[4] to endangered species.[5] That regulation erodes the distinction between endangered and threatened species, stripping away what should be the key

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[1] *See* Press Release, Office of the Secretary, U.S. Dep't of Interior, *U.S. Fish and Wildlife Service, NOAA Fisheries Launch Effort to Improve Implementation of the Endangered Species Act* (May 26, 2011), https://www.doi.gov/news/pressreleases/US-Fish-and-Wildlife-Service-NOAA-Fisheries-Launch-Effort-to-Improve-Implementation-of-the-Endangered-Species-Act.

[2] *See, e.g.*, U.S. Fish and Wildlife Service, *Proposed Revisions to the Regulations for Petitions*, 80 Fed. Reg. 29,286 (May 21, 2015); U.S. Fish and Wildlife Service, *Policy for Evaluation of Conservation Efforts When Making Listing Decisions*, 68 Fed. Reg. 15,100 (Mar. 28, 2003).

[3] 50 C.F.R. § 17.31.

[4] 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").

[5] 16 U.S.C. § 1538(a).

incentive to preserve threatened species and recover endangered ones.[6] The regulation also frustrates the Service's reform effort, by reducing predictability for landowners and creating a strong incentive for lawsuits. In fact, litigation has become almost inevitable whenever the Service, states, and property owners develop programs to protect and recover species without reliance on command-and-control regulation under the Endangered Species Act.

Repealing the regulation will normalize the Service's practice of favoring private, voluntary conservation efforts over regulation, giving both the Service and affected landowners more certainty and reducing litigation. Repeal is not only good policy, it's also necessary to comply with the statute. The Endangered Species Act does not permit the Service to adopt a blanket prohibition against the take of threatened species, but limits the Service's authority to adopt species-specific take prohibitions where circumstances call for that.[7] For those reasons, the Washington Cattlemen's Association petitions the Service to repeal the regulation, for the benefit of both property owners and listed species.

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[6] *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, 47-52 (2015). A courtesy copy of this article is included with this petition.

[7] 16 U.S.C. § 1533(d); *see* S. Rep. No. 93-307, at 2996 (1973), *reprinted in* Legislative History, *supra* note 4, at 307.

INTEREST OF PETITIONERS

The Washington Cattlemen's Association is a non-profit trade organization dedicated to promoting and preserving the beef industry through producer and consumer education, legislative participation, regulatory scrutiny, and legal intervention related to environmental regulation, including the Endangered Species Act. The Association represents over 1,300 cattlemen and landowners throughout the State of Washington, many of whom own rural lands burdened by Endangered Species Act regulations. In addition to managing their cattle operations, its members also engage in voluntary conservation efforts to preserve and recover species on their private properties.

I

REPEALING THE REGULATION WILL BENEFIT LISTED SPECIES AND INCREASE FLEXIBILITY

Repealing the regulation, thereby restoring the Endangered Species Act to Congress' original design, would greatly facilitate the Service's efforts to increase flexibility and encourage voluntary conservation efforts. Recently, the Service has been trying to promote private, voluntary conservation efforts as an alternative to listing, outside of the normal Endangered Species Act process. When a species is being considered for listing, the Service allows states and private parties to develop alternative conservation programs that it will

evaluate when deciding whether to list the species.[8] If the Service is confident that the programs will be implemented and will sufficiently reduce a species' threats, it may decide that listing the species is no longer necessary. Since the Service has been implementing this reform outside of the normal listing process, these decisions inevitably lead to litigation.[9] These lawsuits do not contribute to the species' recovery and ultimately introduce unnecessary costs and uncertainty into the process of developing private, voluntary conservation programs.

Repealing the regulation would normalize the Service's recent reform efforts by allowing private, voluntary conservation programs to be developed within the normal Endangered Species Act process. Under the statute's approach, a species' listing as threatened would signal to states and private parties that they should develop conservation programs to protect and recover

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[8] *See* 68 Fed. Reg. 15,100.

[9] *See, e.g.*, *Defenders of Wildlife v. Jewell*, 815 F.3d 1 (D.C. Cir. 2016) (challenging the Service's decision to withdraw the proposed listing for the dunes sagebrush lizard in recognition of state and private conservation plans); *Permian Basin Petroleum Ass'n v. Dep't of Interior*, 127 F. Supp. 3d 700 (W.D. Tex. 2015) (invalidating the Service's listing of the lesser prairie chicken for not giving state and private conservation efforts adequate consideration); *Desert Survivors v. U.S. Dep't of Interior*, No. 16-cv-01165 (N.D. Cal. filed Mar. 9, 2016) (challenging the Service's decision to withdraw the proposed listing for the bi-state population of sage grouse in recognition of state and private conservation plans); *Western Watersheds Project v. Schneider*, No. 16-cv-00083 (D. Idaho filed Feb. 25, 2016) (challenging BLM's land management proposal to protect the greater sage grouse, which was designed to preempt the need for a listing).

the species. If they don't, the species may continue to decline until it is uplisted to endangered, at which point the statute's take prohibition would apply.

Making this the norm for threatened species will also provide certainty for states and private parties. Under the current approach, they must decide whether to invest substantial resources into developing conservation programs based on speculation whether the species would otherwise merit listing as threatened and whether the Service will reward their efforts by not listing the species. If a threatened listing was the beginning of the process for developing private, voluntary conservation programs, rather than the conclusion, everyone would have confidence which species are actually in need of protection, ensuring that limited conservation resources are efficiently allocated.

Using threatened listings in this way will also provide necessary breathing room to develop successful conservation programs. As the Service's Policy for Evaluating Conservation Efforts acknowledges, conservation programs thrown together at the last minute are less reliable.[10] Because these programs are chiefly considered when deciding whether to list a species (decisions which, under the statute, must be reached within 12 months), states

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[10] *See* 68 Fed. Reg. at 15,101 ("Last-minute agreements (i.e., those that are developed just before or after a species is proposed for listing) often have little chance of affecting the outcome of a listing decision . . . [because they are] less likely to be able to demonstrate that they will be implemented and effective in reducing or removing threats to the species.").

and private property owners have little time for study and reflection before they must propose their programs.[11] If the regulation was repealed, these plans could be developed once a species is listed as threatened. This would allow states, property owners, the Service, and other stakeholders to cooperate in developing flexible programs, without the unnecessary time constraint or the high stakes of having a species' listing determined based upon them.

Repealing the illegal regulation would also reduce the perverse incentives for challenging the Service's efforts to implement its reforms. Absent the regulation, the Service could list species as threatened to signal to states and private parties that they should develop conservation programs. By going ahead and listing the species, the Service would insulate itself from claims that it violated a mandatory duty to list the species.[12] Furthermore, in cases where a private, voluntary conservation program obviates the need for a listing, outside special interest groups would have less incentive to challenge the Service if the regulation was repealed. They would no longer be encouraged to bring such lawsuits by the prospect that, if successful, a threatened listing will trigger the take prohibition.

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[11] The Service recently proposed to give states more time by requiring petitioners seeking a species listing to provide their petitions to state wildlife agencies before submitting them to the Service. *See Proposed Revisions to the Regulations for Petitions*, 80 Fed. Reg. at 29,287. However, it subsequently relaxed this proposed requirement. *See* 81 Fed. Reg. 23,448 (Apr. 21, 2016).

[12] *See, e.g.*, *Defenders of Wildlife*, 815 F.3d 1.

The illegal regulation undermines the incentives for private conservation, even outside of the context of the Service's recent reform efforts, by treating endangered and threatened species the same.[13] Under it, property owners are generally subject to the same burdensome restrictions whether a species is listed as endangered or threatened. This means that those whose lands have threatened species have little incentive to stop the species' further slide. For them, the damage has already been done; if 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. Under the statute, a downlisting should be a cause for celebration amongst affected landowners, since it would entail the lifting of the take prohibition. But, under the regulation, the Service's policy is to treat the categories the same.[14] The Service occasionally adopts species-specific rules to regulate take of threatened species, but this infrequent practice gives

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[13] *See* Wood, *supra* note 6, at 47-52.

[14] *See* Patricia Sagastume, *Reclassifying Florida manatees: From endangered to threatened*, Al Jazeera Am. (Aug. 8, 2014 5:00 AM) http://america.aljazeera.com/articles/2014/8/8/reclassifying-floridamanatees.html (quoting Chuck Underwood, a Fish and Wildlife Service spokesman, as saying that "[p]eople have misperceptions that we have two lists. It's one classification. Being endangered or threatened relates to whether a species is moving toward extinction or not.").

landowners no certainty or reasonable expectation that, if they recover an endangered species, they will see any benefit.[15]

Undermining the incentives for private conservation significantly impacts species. Private lands provide most of the habitat for listed species.[16] Consequently, many species cannot be conserved, much less recovered, without private property owners maintaining or improving habitat. 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.

The regulation also introduces perverse incentives into the petition process for listing species. The combination of the low threshold required to show that a species should be listed as threatened and the burdensome take restrictions imposed on property owners gives environmental groups and others a strong incentive to petition for the listing of marginal candidates for

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[15] *See* Wood, *supra* note 6, 34 n.69. Additionally, the Service's practice of only adopting such rules when deregulation is necessary and advisable to the conservation of a species effectively limits such relief to cases where imposing the regulation would otherwise be counterproductive. *See id*.

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

threatened status. Because of the take prohibition's burdens, listing a species is an effective way for special interest groups to achieve anti-development ends.[17] This may be the reason why threatened species, despite their reduced threats, are more likely to be the subject of environmentalists' lawsuits.[18] Disconnecting a threatened listing and the take prohibition—which repealing the regulation would accomplish—would go a long way to reducing this problem.[19]

II

THE REGULATION MUST BE REPEALED BECAUSE IT VIOLATES THE ENDANGERED SPECIES ACT

The regulation is not only bad policy, it also violates the statute. In enacting the Endangered Species Act, Congress expressly limited the statute's

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[17] *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 timber harvesting).

[18] In the 90s, the Service was sued for failing to list threatened species three times more than for endangered species. *See* Jonathan H. Adler, *The Leaky Ark in* REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM 22 (Adler ed., 2011).

[19] *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).

broad "take" prohibition[20]—which criminalizes any activity that adversely affects a single member of a protected species or its habitat[21]—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."[22] Senator Tunney's characterization of the take prohibition rings true. The prohibition, which applies even when the impact to a protected species was unintended,[23] is enforced through substantial civil and criminal penalties and can be privately enforced through citizen suits.[24]

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

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[20] *See* 16 U.S.C. § 1538(a).

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

[22] Legislative History, *supra* note 4, at 357 (emphasis added).

[23] *See Sweet Home*, 515 U.S. 687.

[24] *See* 16 U.S.C. § 1540; *see generally* Jonathan Wood, *Overcriminalization and the Endangered Species Act: Mens Rea and Criminal Convictions for Take*, 46 Envtl. L. Rep. 10,496 (2016).

advisable" for the conservation of that species.[25] However, this power is limited to the adoption of species-specific regulations; it is not an invitation to reverse Congress' judgment that take of threatened species should generally be unregulated.[26]

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 listing of a species as threatened.[27] This means that regulation cannot precede listing. A regulation uniformly extending the take prohibition to threatened species necessarily predates the listing of any subsequently listed threatened species to which it applies.

Second, regulations must be "necessary and advisable for the conservation" of the threatened species. A regulation that automatically applies to threatened species, without any consideration of whether it is necessary and advisable for that species, cannot be squared with this requirement.[28]

Finally, any ambiguity in the text cuts against the Service's authority. The power to forbid—to criminalize, in fact—every activity that affects a

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[25] *See* 16 U.S.C. § 1533(d).

[26] *See* Wood, *supra* note 6.

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

[28] 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 6, at 38-40.

single member or habitat of a potentially limitless list of threatened species would indeed be a vast power. Congress does not delegate such power without clearly saying so.[29]

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.[30] 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 one example, Senator Tunney explained that Section 4(d) regulations would be "tailored to the needs of the animal while *minimizing* the use of the most stringent prohibitions."[31] 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.[32]

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[29] *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

[30] *See* Wood, *supra* note 6, at 35-37.

[31] Legislative History, *supra* note 4, at 357 (emphasis added).

[32] S. Rep. No. 93-307, at 2996 (1973), *reprinted in* Legislative History, *supra* note 4, at 307 (emphasis added).

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."[33] On the other hand, whether take of threatened species would be regulated under Section 4(d) would "depend on the circumstances *of each species*."[34]

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 forbidding the take of all threatened species—including those not yet identified.[35] This regulation is only pared back if the Service enacts a regulation relaxing these severe burdens for a particular species.[36] Many of the species ultimately covered by the regulation were not known at the time, consequently the Fish and Wildlife Service

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[33] *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 4, at 162.

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

[35] *See* 40 Fed. Reg. 44,412 (Sept. 26, 1975), *codified at* 50 C.F.R. § 17.31.

[36] *See* 50 C.F.R. § 17.31.

offered no explanation how the regulation was necessary and advisable for their conservation.[37] 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.

III

REPEALING THE REGULATION WOULD ALLEVIATE SEVERE BURDENS ON PROPERTY OWNERS

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.[38] As a consequence, the Pacific Northwest's timber industry was (and is) severely impacted. Timber production has declined markedly.[39] Many

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[37] *See* 40 Fed. Reg. 44,412; *see also* Wood, *supra* note 6, 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 6, 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).

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

[39] *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.

areas of old growth forest are off-limits to development.[40] And employment within the industry has fallen sharply.[41]

Similarly, the listing of the Oregon spotted frog—which despite its name, is also found in Washington and Canada—threatens to impact water use and agricultural activity.[42] Because of the burdensome take regulation's breadth, even those property owners interested in contributing to the species' recovery face the prospect that their activities intended to benefit the frog will expose them to the threat of expensive and time-consuming lawsuits.[43]

The regulation applies to 6 species in Washington alone, hurting numerous local economies, property owners, and small businesses. With many more species waiting in the wings, the consequences of the illegal regulation

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

[41] *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/.

[42] *See* Final Rule Listing the Oregon Spotted Frog as Threatened, 79 Fed. Reg. 51,658, 51,708-09 (Aug. 29, 2014).

[43] The Service initially acknowledged that it may not make sense to regulate such activities as take. *See* Proposed Rule to List the Oregon Spotted Frog as Threatened, 78 Fed. Reg. 53,582, 53,621-22 (Aug. 29, 2013). However, it ultimately decided to apply the illegal regulation, rather than crafting a species-specific alternative. *See* 79 Fed. Reg. at 51,708-09.

will only grow. That is why it is so important that the Service promptly repeals it.

IV

THE REGULATION IMPOSES THESE BURDENS 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.[44] 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."[45]

"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.

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[44] *See* 135 S. Ct. 2699 (2015).

[45] *See id*. at 2707.

It shows that Congress was keenly aware of the incredible costs that the take prohibition imposes.[46]

Yet, through the illegal regulation, the Service imposes substantial costs on property owners 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.[47] 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.

CONCLUSION

In order to remove the burdens being illegally imposed and to promote the more efficient administration of the statute, the Washington Cattlemen's

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[46] *See* Wood, *supra* note 6, 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[] 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").

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

Association formally requests that the Service rescind 50 C.F.R. § 17.31 in recognition that it exceeds its power under the Endangered Species Act.

DATED: August ___, 2016.

Respectfully submitted,

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