

December 22, 2025

John Tirpak
Chief, Division of Conservation and
Classification, U.S. Fish and Wildlife Service
5275 Leesburg Pike Falls
Church, VA 22041

Re: Regulations Pertaining to Endangered and Threatened Wildlife and Plants, Docket No. FWS-HQ-ES-2025-0029

Dear Mr. Tirpak:

The undersigned organizations and our millions of members and activists nationwide write to oppose proposed revisions to the regulations implementing Section 4(d) of the Endangered Species Act, 16 U.S.C. § 1533(d). *Regulations Pertaining to Endangered and Threatened Wildlife and Plants*, 90 Fed. Reg. 52,587 (Nov. 21, 2025) (to be codified at 50 C.F.R. pt. 17). The Service's proposal to withdraw automatic protections from threatened species could leave species inadequately protected, will further overburden the Service, and will undermine private incentives to protect species. It should be withdrawn.

BACKGROUND

The ESA, 16 U.S.C. § 1531 *et seq.*, was passed in 1973 to protect species at risk of extinction. In the ensuing fifty years, it has become one of the most effective and popular environmental protection statutes. According to a recent study, the Act has saved over 99% of listed species from extinction. Center for Biological Diversity, *The Endangered Species Act: A Wild Success*;¹ see also Martin F.J. Taylor et al., *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 BioScience, at 360-367 (Apr. 1, 2005). Furthermore, roughly 80% of Americans support the ESA and its mission of conserving species. Jeremy Bruskotter et al., *Support for the U.S. Endangered Species Act Over Time and Space: Controversial Species Do Not Weaken Public Support for Protective Legislation*, Conservation Letters (Jul. 19, 2018).² In sum, Americans recognize that the ESA works.

A central component of ESA protection is section 9's "take" prohibition. 16 U.S.C. § 1538(a)(1). That section prohibits "take" of endangered species—a term meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." *Id.* § 1532(19). For threatened species, Section 4(d) provides that the Secretary must promulgate regulations that are "necessary and advisable" for their conservation. *Id.* § 1533(d). The Secretary also "may by regulation prohibit with respect to any threatened species any act prohibited under" section 9. *Id.* Pursuant to Section 4(d), the Fish and Wildlife Service has long extended Section 9's take prohibition to

¹ Available at https://www.biologicaldiversity.org/campaigns/esa_wild_success/.

² Available at <https://doi.org/10.1111/conl.12595>.

all threatened species, absent a species-specific 4(d) rule. *See* 50 C.F.R. § 17.31(a), (c). The Proposed Rule would withdraw these automatic “take” protections from threatened species and grant protections only where the Service promulgates a species-specific rule.

ANALYSIS

The Service’s proposed withdrawal of automatic section 9 protections for threatened species will put those species at risk. Although section 4 mandates that FWS promulgate regulations “necessary and advisable” for the conservation of threatened species, the massive workload and insufficient funding available to FWS will likely result in the Service failing to promulgate such rules. Finally, the Service’s proposal undermines incentives for private landowners to voluntarily protect threatened species. For all of these reasons, the Service should continue to extend all of section 9’s prohibitions to threatened species.

The best reading of section 4 supports the Service’s decades-long application of the blanket 4(d) rule. As the Service itself explained in 2024, section 4(d) provides two independent grants of authority with respect to protections for threatened species: “First, the Secretary ‘shall’ issue whatever regulations they deem necessary and advisable to provide for the conservation of any threatened species. Second, the Secretary ‘may’ choose to prohibit for threatened species any of the activities that section 9 prohibits for endangered species.” 89 Fed. Reg. at 23,922 (quoting 16 U.S.C. § 1533(d)). These separate grants of authority reflect Congress’s intent to take all steps necessary to conserve listed species, 16 U.S.C. §§ 1531, 1532, while also acknowledging that threatened species may, in some cases, warrant lesser protection than those that are endangered. The blanket rule allows the Service to efficiently provide default protections in the many cases where comprehensive take protections are warranted.

The contrary reading of the statute now adopted by the Service creates an unnecessary burden on the Service to promulgate a species-specific rule for every newly listed threatened species. Where the Service fails to undertake this resource-intensive task, threatened species may be without the protection they need to survive. The National Marine Fisheries Service’s (NMFS) experience protecting species through species-specific 4(d) rules makes this risk clear. NMFS has failed to promulgate species-specific 4(d) rules for many threatened species under their jurisdiction. Those species include some that occur within the U.S. and are threatened by direct exploitation and, therefore, would likely benefit from Section 9’s take prohibition. These include the yelloweye rockfish, oceanic whitetip shark, and scalloped hammerhead shark. 50 C.F.R. § 223.102 (listing threatened species under NMFS’s jurisdiction and associated 4(d) rules).

The risk that the Service will fail to promulgate 4(d) rules for threatened species is even greater because of their existing workload, which already leaves the agency without the resources it needs to meet its obligations. *See* FWS, *National Domestic Listing Workplan* (updated May 2024)³ (describing prioritization process for hundreds of species that are pending consideration for listing). For some species, the Service has determined that listing is “warranted but precluded,” meaning they would likely be listed and protected if the Service had available

³ Available at <https://www.fws.gov/sites/default/files/documents/2024-05/national-domestic-listing-workplan-2024.pdf>.

resources. *See, e.g.*, Review of Species That Are Candidates for Listing as Endangered or Threatened; Annual Notification of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 90 FR 48,912 (Oct. 31, 2025) (providing update on 16 listing or uplisting candidates for which protection is “warranted but precluded”). Adding new regulatory responsibility to the agency’s already over-stretched resources will make promulgation of 4(d) rules in a timely manner unlikely and also further delay these crucial listing determinations. And FWS’s prospects for additional resources appear dim as the Service’s current funding level is woefully inadequate. With an expanding workload and shrinking funds, it will be nearly impossible for FWS to promulgate species-specific rules for each newly listed species.

In the face of these challenges, the Service offers no rational basis for rescinding the blanket 4(d) rule. Without any analysis of the statute itself, it baldly asserts that “[t]he 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.” 90 Fed. Reg. 52,589. It then explains that species-specific 4(d) rules “make better use of [the Service’s] limited personnel and fiscal resources” and “reduce burdens on the Service.” 90 Fed. Reg. 52,589. This cannot be a genuine attempt to justify repealing the blanket rule. Under its existing practice, the Service has *always* been able to promulgate a species-specific 4(d) rule. It could do so in every instance if it found that to be most efficient. The only conceivable effect of the blanket rule on Service resources is to save the Service the burden of promulgating a special rule where broad take prohibitions are necessary. The Service’s assertion that *requiring* species-specific rules in every instance *saves* Service resources has no basis in reality.

Finally, withdrawing Section 9 protections from threatened species could undermine incentives for private landowners to conserve species. Conservation of species on private land is vital for species recovery. According to a report by the Government Accountability Office, 73% of species studied had over 60% of their habitat on non-federal land, while 37% of species were completely dependent on non-federal land for survival. U.S. General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Lands*, GAO/RCED-95-16, 5 (Dec. 1994).⁴ But without section 9 take prohibitions, private landowners will be under no legal obligation to protect threatened species. Those landowners, therefore, will have little or no incentive to enter into safe harbor agreements or other voluntary conservation agreements with the Service. The proposed rule change will hinder and reduce the number of public-private partnerships and reduce the incentives for private landowners to conserve threatened species.

CONCLUSION

The Service should continue to extend Section 9’s protections to threatened species, consistent with the best reading of section 4(d). The Service’s proposal to end this longstanding practice could lead to insufficient protections for species, will overburden an agency already unable to timely meet its obligations under the ESA, and will decrease incentives for private landowners to protect threatened species. The Service has not offered a single legitimate advantage of repealing the blanket 4(d) rule. It instead points to advantages of species-specific

⁴ Available at <https://www.gao.gov/assets/230/220827.pdf>.

4(d) rules—but the blanket rule does nothing to foreclose the Service from issuing species-specific rules in any circumstance. Unless the ESA expressly forbids the Service from promulgating the blanket 4(d) rule, which it does not, the best reading of the statute is to permit the Service’s decades-long approach to implementation of section 4(d).

Respectfully submitted,

Lucas Rhoads
Senior Attorney, Nature, NRDC

On behalf of:

Alliance for Sustainability
American Bird Conservancy
Animal Welfare Institute
Center for Food Safety
Conservancy of Southwest Florida
Endangered Species Coalition
Endangered Habitats League
Environmental Defense Center
Environmental Protection Information Center
Friends of Minnesota Scientific and Natural Areas
Friends of the Mississippi River
International Marine Mammal Project, Earth Island Institute
Kettle Range Conservation Group
Klamath Forest Alliance
Los Angeles Audubon Society
Maine Audubon
Massachusetts Audubon
Massachusetts Pollinator Network
Minnesota River Valley Audubon Chapter
National Wolfwatcher Coalition
Natural Resources Defense Council
New Jersey Audubon
People & Pollinators Action Network
Pollinator Friendly Alliance
Prairie Hills Audubon Society
Save the Sound
South Carolina Aquarium
Starry Skies North
The Urban Wildlands Group
Vote Climate
Wyoming Untrapped