Texas Public POLICY FOUNDATION

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Public Comments Processing
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041

RE: Docket Number FWS-HQ-ES-2025-0029

To Whom It May Concern:

Introduction

Texas Public Policy Foundation ("TPPF") submits the following comments in connection with a proposed rule proffered by the U.S. Fish and Wildlife Service (Agency). The proposed rule seeks to remove the "blanket rule" options (50 CFR 17.31 and 17.71, respectively) for protecting newly listed threatened species pursuant to section 4(d) of the Endangered Species Act ("Act"). TPPF supports the proposed rule because it is consistent with the plain language of the Act and is consistent with its legislative history.

The blanket rule extended nearly all protections afforded to endangered species under the Act to threatened species under the Act, including the onerous prohibition on the "take" of the listed species. As a result, the blanket rule removed any practical distinction between endangered and threatened species. The proposed rule, which rescinds the blanket rule, would require the Agency to determine, on a species-by-species basis, how best to protect creatures on the threatened species list, without impermissibly defaulting to the protections of the Act intended solely for endangered species.

TPPF is a 501(c)(3) nonprofit, non-partisan research institute headquartered in Austin, Texas, whose mission is "to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation." Founded in 1989, TPPF shapes public policy debates by conducting and publishing academically sound research and providing outreach to policymakers. TPPF is a significant voice for

conservative, free-market solutions on various issues, including environmental policy. TPPF also serves as a public-interest law firm, representing clients across the country in constitutional law cases. TPPF is funded exclusively by private donations, entirely eschewing government funding.

TPPF writes this comment to inform the Agency of some of the statutory and constitutional implications of the "blanket rule" that the proposed rule seeks to rescind, particularly in light of recent U.S. Supreme Court precedent. In a post-*Chevron* United States, it is incumbent upon agencies to analyze and interpret statutes the way that courts are likely to read them – that is, using the traditional canons of construction to seek out the congressional intent of the statute. When interpreted through this lens, it immediately becomes apparent that the "blanket rule" stems from an incorrect and impermissible reading of the Act.

Moreover, TPPF believes that the legislative history of the Act demonstrates that Congress never intended for threatened species to fall, in every instance, under the set of stringent rules created for endangered species. In fact, Congress clearly intended for the status of "threatened" to communicate a first step toward becoming endangered, rather than as a secondary category of endangered species.

Finally, TPPF urges the agency to consider that a court interpreting the Act will necessarily consider the constitutional implications of the Agency's interpretation of the Act. Regulation of any solely intrastate threatened species does not fall within the scope of the Interstate Commerce Clause of the U.S. Constitution. Therefore, any such regulation is not within the jurisdiction of the federal government. To avoid this constitutional overreach, the Agency must be conscientious to only regulate *interstate* species, which requires consideration of each threatened species on a species-by-species basis. Accordingly, the blanket rule impermissibly paints threatened species with the kind of broad brush not authorized by the Constitution.

Statutory Interpretation

The question of whether the Secretary has the authority to impose the blanket rule appears to have been asked of the federal courts of appeal only once, in *Sweet Home Chapter of Comtys for a Great Or. v. Babbitt*, 1 F.3d 1, 5 (D.C. Cir. 1993) *rev'd on other grounds* 515 U.S. 687, 690 (1995). In that case, as part of a larger challenge to the ESA, a series of nonprofits, lumber companies, and trade associations sued the Agency, claiming that the Act required the Agency to regulate each threatened species on the list on a species-by-species basis, rather than simply applying the endangered species regulations to all threatened species. Relying heavily on *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the D.C.

Circuit held that the Secretary's interpretation of the Endangered Species Act was entitled to great deference and upheld the blanket rule as a "reasonable interpretation" of the statute. *Babbitt*, 1 F.3d at 6.

Over 30 years after *Babbitt* was decided, the U.S. Supreme Court overturned *Chevron*, rescinding the discretion previously afforded to agencies' interpretations of statutes. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). Thus, in the post-*Chevron* era, it behooves the Agency to apply statutes utilizing the traditional canons of statutory interpretation to prevent ultimate reversal by a court.

In this instance, three canons of construction are of particular importance: the material variation canon (the corollary of the consistent usage canon), the surplusage canon, and the absurdity doctrine. Applied correctly, these canons lead to the inevitable conclusion that the blanket rule is not the single, best reading of the Act, and is, in fact, contrary to Congress's unambiguously expressed intent.

Material Variation Canon

The material variation canon is a corollary of the oft-cited presumption of consistent usage, which states that a term has the same meaning throughout a statute. *See Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U. S. 224, 232, 127 S. Ct. 2411, 168 L. Ed. 2d 112 (2007) ("[I]dentical words and phrases within the same statute should normally be given the same meaning"). By extension, when a statute uses two different words, the presumption is that the legislature intended to apply a different meaning in each term. A. Scalia & B. Garner, Reading Law 170 (2012) ("[W]here [a] document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea").

Here, the two terms at issue are the terms "endangered" and "threatened." Under the Act, "endangered species" is defined as: "[A]ny species which is in danger of extinction throughout all or a significant portion of its range[.]" 16 USCS § 1532(6). "Threatened species" is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 USCS § 1532(20). Because Congress used two different terms for the two different categories of species, Congress clearly intended that the two categories of species be treated differently. By applying the same prohibitions to threatened species that are applied to endangered species, the blanket rule erases any functional distinction between the two terms.

Logically, the material variation canon applies with particular force where the legislature not only uses and defines two terms differently but also vests the agency with different responsibilities under each term. *Compare* 16 USCS § 1538(a)(1)

(listing the prohibitions with respect to endangered species, including the prohibition on "tak[ing]" endangered species) *with* 16 USCS § 1533(d) ("[T]he Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species."). In fact, the Act goes so far as to clarify that, within the sound discretion of the Secretary, the Secretary *may* "prohibit with respect to any threatened species any act" prohibited with respect to endangered species." As a result, the blanket rule collapses the Secretary's power to exercise discretion on a case-by-case basis into the same general prohibitions applicable to endangered species, and renders the entire term "threatened species" obsolete.

This result is clearly inconsistent with the text of the Act. Because Congress used two different terms for the categories of species, Congress must reasonably have intended the Agency to treat the two categories of species differently, unless specific circumstances justified extending endangered-species type prohibitions to a threatened species. *See* 16 USCS § 1533(d). The Agency's practice of treating the two categories functionally identically, in spite of the material variation of the terms, is inconsistent with the "single, best reading" of the statute.

Surplusage Canon

Moreover, the surplusage canon militates against the blanket rule. Although it may be true that the blanket rule functions to increase Agency efficiency by allowing the Agency to avoid the lengthy process of examining every threatened species individually, the surplusage canon holds that "a provision that seems … unjust or unfortunate" – or, in the case of the blanket rule, inconvenient – "must nonetheless be given effect." A. Scalia & B. Garner, Reading Law 174 (2012). To read the Endangered Species Act as permitting identical treatment of endangered and threatened species is to render the entire definition of "threatened species" surplusage. By enacting the blanket rule in the first place, the Agency effectively eradicated an entire congressionally created category of species.

Absurdity Doctrine

Finally, for over a century, the absurdity doctrine has stood for the proposition that statutes must be construed as to avoid absurd results. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). To read "threatened" and "endangered" as essentially interchangeable would produce absurd results. For example, the Act requires a review, every five years, of all species on the lists to "determine … whether any such species should— (i) be removed from such list; (ii) be changed in status from an endangered species to a threatened species; or (iii) be changed in status from a threatened species to an endangered species." If a species would have identical protection whether it was on the threatened list or the endangered list, a regular

review of the status of the animal to determine which list the animal belongs on would be a great waste of agency time and resources. The only reason that Congress would require such a review is out of concern that a species needs either greater protection than it is currently receiving (and thus has become an endangered species,) or the species is no longer in imminent danger of extinction (and thus is no longer in need of stringent, endangered species protection).

Legislative History

The legislative history of the Act confirms and clarifies the importance of treating threatened species differently from endangered species. When the Act was a bill in the Senate Committee on Merchant Marine and Fisheries, much time was dedicated to discussing the necessity of distinguishing between endangered and threatened species – specifically, the necessity of regulating threatened species on a species-by-species basis. In discussing the distinction between endangered species and threatened species, the Act's floor manager, Senator John Tunney, stated: "The two levels of classification facilitate regulations that are tailored to the needs of the animal while minimizing the use of the most stringent prohibitions." Congressional Research Service, *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980*, 358 (statement of Sen. Tunney). The "most stringent prohibitions" that Congress intended to minimize included the extreme prohibition on taking endangered species, which Congress intended to reserve "only for those species on the brink of extinction." *Id.* at 357. The blanket rule, which applies the take prohibition to all animals on the threatened species list, runs directly counter to the declared legislative intent of the Act.

Moreover, the distinction between endangered species and threatened species was seen not as an oversight, but a specific feature of the law – one which legislators intended to incentivize property owners to protect threatened species. The logic was that a landowner would protect a threatened species on his or her land to prevent the species from becoming endangered, because the species' endangered status would subject the landowner to more stringent prohibitions. Speaking on the intentional distinction between threatened and endangered species, Assistant Secretary Douglas P. Wheeler stated: "This will act, we hope, as an incentive for those portions of the country and the world where species are not now endangered to protect them, to prevent them from falling into either category, and to acknowledge the efforts of those countries which have afforded protection to endangered species." *Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on Env't of the S. Comm. on Commerce*, 93d Cong., at 54-55 (1973) (statement of Assistant Sec'y of Fish & Wildlife & Parks Wheeler). In other words, the threatened list was intended to serve as a carrot to entities, public and private, who discovered threatened species on their property. If those entities made efforts to protect and rehabilitate the

threatened species on their land, those entities could avoid the species becoming endangered and the accompanying stringent prohibitions that accompanied that designation. The blanket rule erases that vital, carefully-crafted incentive structure.

Constitutional Considerations

Another important consideration for the Agency in interpreting the Act is whether the statutory interpretation places the constitutionality of the statute in doubt. In much the same way that, when a statute can be interpreted in a constitutional or unconstitutional manner, courts must prefer the constitutional interpretation, *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909), agencies must endeavor to avoid unconstitutional interpretations of a statute. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

The federal government's power to enact the Act is derived from the Commerce Clause, which provides that Congress has the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Under the Commerce Clause, Congress may only regulate an activity if that activity "substantially affects *interstate* commerce." *United States v. Morrison*, 529 U.S. 598, 608-09 (2000) (emphasis added). If an activity isn't inherently economic, Congress may only regulate the activity if the regulation is a necessary part of a comprehensive economic regulatory scheme. *See Gonzales v. Raich*, 545 U.S. 1 (2005). In *Raich*, the regulation at issue was a prohibition on the possession of marijuana, even if that marijuana was grown intrastate. *Id.* at 7. The Supreme Court held that the prohibition of the possession of marijuana was a necessary part of the valid statutory scheme regulating the interstate sale of marijuana. *Id*. at 25.

Applying *Raich*'s rationale to the Act, it becomes apparent that the federal government only has power to regulate those intrastate species that are necessary to the statutory scheme of interstate commerce. This cannot be accomplished while the blanket rule remains in effect, because the tendency of a species to affect interstate commerce is a species-specific inquiry. Adopting a universal approach, rather than a species-by-species approach, will invariably result in violations of the Commerce Clause.

For example, it may be constitutional to regulate northern sea otters, which have both a range that includes Oregon, Canada, Alaska, and the Kuril Islands and also an obvious bearing on interstate and international commerce, as a current and historical cornerstone of the international fur trade. U.S. Fish & Wildlife Serv., *Historical and Current Sea Otter Distribution* (July 28, 2021), However, applying those same regulations to the Squirrel Chimney Cave shrimp (which lives its entire

life in only one sinkhole in Central Florida, is completely blind, and eats only the dung of the bats that visit the sinkhole), would be outside of the power of the federal government under the Interstate Commerce Clause. Therefore, a blanket rule that applies identically to both species would be a violation of the constitution.

Conclusion

For the reasons described, TPPF urges the Agency to adopt the proposed rule, rescind the "blanket rule," and return to determining the best protection of threatened species on a species-by-species basis.

Sincerely,

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