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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-2025-0048

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 clarify the process by which the Agency implements various statutory provisions of the Endangered Species Act (“Act”), specifically the way the Agency will consider economic, national security, and other relevant impacts before determining whether a piece of land should be excluded from critical habitat designation. For the reasons stated below, TPPF strongly supports the proposed rules and additionally urges the Agency to take great care to ensure that the critical habitats it designates are consistent with the U.S. Constitution.

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 strongly supports the proposal to consider the economic and national security impacts of critical habitat designation throughout the regulatory process under the Act. At the same time, the Agency should be cognizant of the limitations

placed by the Interstate Commerce Clause of the Constitution on its authority to regulate purely intrastate species and their critical habitats, as discussed in the following portion of these comments.

Constitutional Considerations

An 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 enforce 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 prohibited 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 the critical habitats that are necessary to a statutory scheme of interstate commerce. As a result, the Agency must necessarily consider not only the economy of the area in question, but also the extent to which designation of critical habitat affects commerce "with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Accordingly, the examples of "Economic Impact," described in the proposed version of 50 CFR § 17.90 must accommodate the limitations on Agency power imposed by the Commerce Clause.

While considering "the economy of a particular area, productivity, jobs, and any opportunity costs arising from the critical habitat designation ... as well as possible benefits and transfers (such as outdoor recreation and ecosystem services)," *Endangered and Threatened Wildlife and Plants; Regulations for Designating*

Critical Habitat, 90 Fed. Reg. 52592 (Proposed Nov. 21, 2025) (to be codified at 50 C.F.R. pt. 17), the Agency should decline to designate critical habitat for solely intrastate species that have no economic impacts on other states, foreign nations or Indian Tribes. Such species and their critical habitats are beyond the power of the Agency to regulate.

Conclusion

For the reasons described, TPPF urges the Agency to explicitly acknowledge in the final regulations that critical habitat will not be designated for purely intrastate species because of the limitations on Agency power set forth in the Commerce Clause.

Sincerely,



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