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<https://www.regulations.gov/document/FWS-HQ-ES-2025-0044>

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

Public Comments Processing
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
1401 Constitution Avenue NW, Room 5128
Washington, DC 20230

RE: Docket Number FWS-HQ-ES-2025-0044

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 and the National Oceanic and Atmospheric Administration (“Agencies”). The proposed rule seeks to clarify the process by which the Agency implements various statutory provisions of the Endangered Species Act (“Act”), specifically the manner in which interagency cooperation is executed. TPPF supports the proposed rules and additionally urges the Agency to take great care to ensure that actions taken in interagency cooperation 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 reconsider interagency cooperation 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 endangered species if that regulation is necessary to a statutory scheme of interstate commerce. Accordingly, the Agency's interpretation of the interagency cooperation provisions of the Act must take into account the limitations on Agency power imposed by the Commerce Clause. Specifically, to the extent the Commerce Clause restricts the Agency's power to regulate purely intrastate species, the Agency's regulations should state explicitly that it cannot, and will not, engage in interagency cooperation in connection with such species.

Conclusion

For the reasons described, TPPF urges the Agency to abide by the principles embedded in the Commerce Clause in connection with its promulgation of final regulations addressing the Act's requirements for interagency cooperation, as set forth in these comments.

Sincerely,



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