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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANIMAL LEGAL DEFENSE FUND,

Plaintiff,

v.

DEB HAALAND, U.S. Secretary of the Interior, et al.,

Defendants,

KENNETH KLEMM; BEAVER CREEK BUFFALO CO.; WASHINGTON CATTLEMEN'S ASSOCIATION; and PACIFIC LEGAL FOUNDATION,

Private Landowner Intervenors.

No. 4:19-cv-06812-JST

Related Cases: 4:19-cv-05206-JST
4:19-cv-06013-JST

PRIVATE LANDOWNER INTERVENORS' SUPPLEMENTAL BRIEF RE FEDERAL DEFENDANTS' MOTION FOR VOLUNTARY REMAND

Judge: The Hon. Jon S. Tigar

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

Statutes

Regulations

Other Authorities

INTRODUCTION

Defendant-Intervenors Ken Klemm, Beaver Creek Buffalo Company, Washington Cattlemen's Association, and Pacific Legal Foundation (collectively, the "Private Landowners"), respectfully submit the following supplemental brief in response to this Court's February 24, 2022, Order Requiring Supplemental Briefing. *See* ECF No. 155 (the "Order").[1] That Order requests supplemental briefing analyzing whether Federal Defendants the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together, the "Services"), properly invoked the categorical exclusions under the National Environmental Policy Act (NEPA), when they promulgated the challenged regulations implementing the Endangered Species Act (ESA) (the "2019 Regulations"), and whether vacatur is the proper remedy for a violation of NEPA. *See* ECF No. 155 at 2.

It is well established that NEPA's requirements are triggered only by discretionary federal action. *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995). As such, before considering the propriety of the Services' invocation of the categorical exclusions, this Court must answer a threshold question: whether the 2019 Regulations were discretionary and therefore subject to NEPA's requirements in the first place. The Private Landowners demonstrate below—and intend to argue more fully on the merits—that the 2019 rule repealing FWS' previous blanket approach to ESA Section 4(d), codified at 50 C.F.R. §§ 17.31, 17.71 (the "2019 4(d) Rule"), and the provisions of the 2019 Section 4 Rules pertaining to the designation of unoccupied critical habitat, codified at 50 C.F.R. § 424.12(b)(2) (the "Rule for Designating Unoccupied Areas"), are statutorily compelled and therefore nondiscretionary. As a result, the 2019 4(d) Rule and the Rule for Designating Unoccupied Areas were not subject to NEPA's requirements and the Services' invocation of the categorical exclusions could not have been improper under any circumstances.[2] "Concerns" with,

[1] Except where documents substantively differ as between each related case, reference will be made to the ECF numbers in the lowest numbered case: *Center for Biological Diversity v. Haaland*, No. 19-cv-5206 (N.D. Cal. Aug. 21, 2019).

[2] The Private Landowners only respond to the Order to the extent it requests supplemental briefing on the two rules they sought limited intervention to defend: the 2019 4(d) Rule and the Rule for Designating Unoccupied Areas. *See* ECF No. 152 at 7; ECF No. 41 at 8. This brief does not express any position on the Services' NEPA determinations for the remaining 2019 Regulations.

or purported deficiencies in, the Services' NEPA analysis cannot under any circumstances justify vacatur of the nondiscretionary 4(d) Rule and Rule for Designating Unoccupied Areas.

At the very least, the Private Landowners have demonstrated an intention to raise a colorable defense on the merits that the 2019 4(d) Rule and the Rule for Designating Unoccupied Areas are nondiscretionary. These merits arguments must be resolved before this Court can determine the lawfulness of the Services' invocation of the categorical NEPA exclusions. The current posture of this case does not permit a resolution of the merits. *See* ECF No. 152 at 27. As such, if this Court is inclined to resolve the propriety of the Services' categorical NEPA exclusions for the 2019 4(d) Rule and the Rule for Designating Unoccupied Areas, the Private Landowners respectfully request that it first set an orderly schedule to resume summary judgment briefing.

LEGAL BACKGROUND

NEPA requires that each agency prepare an environmental impact statement (EIS) for certain "major Federal actions significantly affecting the quality of the human environment." *Stand Up for California! v. U.S. Dep't of the Interior*, 959 F.3d 1154, 1163 (9th Cir. 2020) (quoting 42 U.S.C. § 4332(2)(C)). An agency engaging in discretionary decision-making that otherwise qualifies as a "major federal action" generally may only avoid NEPA's requirements where that action falls under a predefined "categorical exclusion." *See Envtl. Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 988 (9th Cir. 2020) (citing 40 C.F.R. § 1508.4).

NEPA's requirements are only "triggered by a discretionary federal action." *Sierra Club*, 65 F.3d at 1512. Where agency action is compelled by statute or otherwise nondiscretionary, NEPA is inapplicable. *See id.* (collecting cases) (concluding that "case law is . . . forceful in excusing nondiscretionary agency action or agency 'inaction' from the operation of NEPA"). *See also Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1226 (9th Cir. 2015) (finding NEPA inapplicable where agency discretion was limited by a statutory mandate); *Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283, 1293–95 (8th Cir. 1990) (collecting cases) (same). The rationale for this well-established rule is simple. Where an agency's decision is nondiscretionary there can be no application for NEPA's purpose of injecting environmental considerations into agency decision-making. *See Alaska Wilderness League*, 788 F.3d at 1226 (finding that to apply NEPA to a

statutorily compelled process "would merely 'require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform,'" and that to do so "would clearly violate NEPA's 'rule of reason.'" (quoting *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 769 (2004))); *Sierra Club v. Babbitt*, 65 F.3d at 1512 ("[W]e see no benefit from NEPA compliance where the [agency's] ability to modify or halt" its decision-making "is limited."); *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988) ("The EIS process is supposed to inform the decision-maker. This presupposes he has judgment to exercise.").

ARGUMENT

This Court has requested supplemental briefing analyzing whether the Services' NEPA determinations for the 2019 Regulations were proper. ECF No. 155. Before addressing that issue, however, this Court must answer a threshold question: whether NEPA applies to the 2019 Regulations in the first place. As to the 2019 4(d) Rule and the Rule for Designating Unoccupied Areas, it does not. First, the ESA forbids the blanket extension of the take prohibition to all threatened species. As a result, the 2019 repeal of the illegal blanket 4(d) rule was nondiscretionary and not subject to NEPA's requirements. Second, the Rule for Designating Unoccupied Areas' reintroduction of the two-step process for designating unoccupied critical habitat and its requirement that unoccupied critical habitat contain at least one essential physical or biological feature, are compelled by the ESA and applicable Supreme Court case law. The Private Landowners have presented these arguments below, and—if provided the opportunity—intend to exposit them more fully in responding to the Plaintiffs' motions for summary judgment.

I. The 4(d) Rule and the Rule for Designating Unoccupied Areas Are Compelled by the ESA and Therefore Not Subject to NEPA's Requirements

The 4(d) Rule and the Rule for Designating Unoccupied areas are compelled by the ESA and applicable Supreme Court case law. As such, no analysis under NEPA was required during

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their promulgation, and the Services' invocation of the categorical exclusions could not have been improper under any circumstances.[3]

A. The Endangered Species Act does not authorize a blanket extension of the take prohibition to all threatened species

The ESA authorizes the Services, to list species as either endangered or threatened. *See* 16 U.S.C. § 1533(a)(1), (b)(2). As an additional safeguard for endangered species, befitting their greater risk of extinction, the ESA also prohibits "take" of such species. 16 U.S.C. §§ 1532(19); 1538(a). The ESA's prohibition of take is strict—establishing severe civil or criminal penalties for any activity that "harm[s]" a single member of a protected species. *See* 16 U.S.C. §§ 1532(19); 1540(a). As a result, Congress limited the take prohibition's application to endangered species, *see* 16 U.S.C. § 1538(a), while also authorizing its extension to threatened species on a case-by-case basis, but only where "necessary and advisable" for the protection of that species, *see id.* § 1533(d). In 1975, however, FWS reversed Congress's policy choice and issued a regulation that indiscriminately prohibited take of all threatened species, including any subsequently listed threatened species. *See* 40 Fed. Reg. 44,412, 44,414, 44,425 (Sept. 26, 1975), *codified at* 50 C.F.R. § 17.31 (2018). That "blanket" 4(d) rule remained in effect until 2019. *See* 84 Fed. Reg. at 44,753. The 2019 4(d) Rule repeals that policy and revives the statute's species-specific approach to regulating take of threatened species. *Id.*

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[3] In promulgating the 4(d) Rule and the Rule for Designating Unoccupied Critical Habitat, the Services did not rely upon NEPA's inapplicability to nondiscretionary agency action to excuse compliance with NEPA. *See* 84 Fed. Reg. 45,020, 45,051 (Aug. 27, 2019) (relying upon categorical exclusions for discretionary agency action that is administrative, legal, technical, or procedural in nature); 84 Fed. Reg. 44,753, 44,759 (Aug. 27, 2019) (same). Nevertheless, *Chenery*'s rule—that agency action may only be upheld on those grounds advanced by the agency during the administrative process, *see Securities & Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943)—does not bar this Court from considering the Private Landowners' arguments. The Ninth Circuit has held that *Chenery* is inapplicable where "the issue in dispute is the interpretation of a federal statute." *Railway Labor Execs.' Ass'n v. Interstate Commerce Comm'n*, 784 F.2d 959, 969 (9th Cir. 1986). The Private Landowners argue that a plain reading of the ESA compelled the Services to promulgate the 2019 4(d) Rule and the Rule for Designating Unoccupied Areas, and that as a result, no NEPA analysis was required. There is no application for the *Chenery* doctrine to this pure issue of statutory construction. *See id.*

The blanket approach to regulating take of all threatened species was illegal and the 2019 4(d) Rule's repeal of that approach was nondiscretionary. FWS' invocation of the categorical exclusions therefore could not have been improper and the Plaintiffs' NEPA claims necessarily fail.

1. The ESA's text prohibits a blanket extension of the take prohibition to all threatened species

Section 4(d) provides, in relevant part, that:

> Whenever any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) . . . or section 1538(a)(2) . . . with respect to endangered species . . . .

16 U.S.C. § 1533(d). A rigorous analysis of section 4(d)'s text compels the conclusion that the agencies' authority is limited to the issuance of species-specific take regulations. *See Cheneau v. Garland*, 997 F.3d 916, 919 (9th Cir. 2021) ("As with any question of statutory interpretation, our analysis begins with the plain language of the statute." (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009))). This is so, for three reasons.

First, section 4(d)'s first sentence places two limitations on the Services' authority to extend protective regulations—including prohibiting take—to a threatened species. Neither limitation can be reconciled with a blanket approach to regulating take, and both compel a species-specific approach. First, Section 4(d) only permits the Services to issue protective regulations "*[w]henever* any species is *listed* as a threatened species." *See* 16 U.S.C. § 1533(d) (emphases added). As such, the authority to issue protective regulations is triggered by the listing of a species as threatened. A protective regulation, therefore, cannot lawfully precede listing, as it did with the blanket 4(d) rule's categorical extension of the take prohibition to all subsequently listed threatened species. Second, before issuance, the Services must "deem[]" a protective regulation "necessary and advisable to provide for the conservation" of a threatened species. *See* 16 U.S.C. § 1533(d). In *Michigan v. United States Environmental Protection Agency (EPA)*, the Supreme Court held that where Congress imposes broad standards like "necessary and advisable" on an agency's rulemaking authority, the agency must consider the costs and benefits associated with that regulation. *See* 576

U.S. 743, 751–55 (2015) (holding that the phrase "appropriate and necessary" in the Clean Air Act "naturally and traditionally includes consideration of all the relevant factors" especially costs and burdens to private parties (citation omitted)). Under the blanket 4(d) rule, however, FWS never engaged in this required weighing of the costs and benefits of extending the take prohibition to threatened species, because it indiscriminately extended that prohibition to all subsequently listed threatened species in 1975. *See* 40 Fed. Reg. at 44,414, 44,425.[4] FWS cannot adequately determine that a protective regulation is "necessary and advisable" for a threatened species' conservation unless it has identified the species and considered its specific needs.[5]

Considering these limitations, the only way to interpret section 4(d) as permitting a blanket rule, is to read its second sentence—which identifies take as a subset of the protective regulations that might be issued—as an independent grant of authority, untethered from the limitations imposed by the first sentence. *See Sweet Home Chapter of Communities for a Great Or. v. Babbitt*, 1 F.3d 1, 6 (D.C. Cir. 1993) (upholding the blanket 4(d) rule by deferring to FWS' interpretation of the second sentence of Section 4(d) as an independent grant of authority). But that reading must be rejected. The first sentence gives the agencies a broad authority to adopt *any* kind of regulation when a species is listed as threatened if it is "necessary and advisable to provide for the conservation of [the] species." 16 U.S.C. § 1533(d). A regulation prohibiting the take of any such species is merely a specific example of the type of regulation that could be adopted. Consequently, the power

[4] The Private Landowners do not to suggest that the Services must consider costs and benefits when deciding whether to *list* a species as threatened under section 4(a). The extension of protective regulations to a threatened species via the issuance of a 4(d) rule is a distinct regulatory action subject to a different statutory standard than that for the listing of a species under section 4(a). As such, *Michigan*'s rule that broad standards like "necessary and advisable" require the consideration of all costs and benefits, *see* 576 U.S. at 751–55, does not conflict with the ESA's requirement that *listing* decisions be based only upon biological considerations, *see* 16 U.S.C. § 1533(a)(1), (b)(1)(A).

[5] Indeed, section 4(d)'s requirement that protective regulations be tailored to specific threatened species can be expected to improve conservation outcomes. The species-specific approach provides greater flexibility, better aligns the incentives of private landowners with the interests of threatened species, reduces unnecessary conflict, and allows states to pursue more innovative programs. *See* Jonathan Wood, *The Road to Recovery: How restoring the Endangered Species Act's two-step process can prevent extinction and promote recovery*, PERC Policy Report (2018), https://www.perc.org/2018/04/24/the-road-to-recovery/.

articulated in the second sentence must be a subset of that in the first sentence, and the first sentence's limitations must apply to it.

Second, the first and second sentences of section 4(d) refer to "*any* species . . . listed as a threatened species" and "*any* threatened species." *See* 16 U.S.C. § 1533(d) (emphases added). The term "any" in this context denotes particularity. When the ESA refers to endangered or threatened species as a category it does not use the term "any." For example, the second sentence of Section 4(d) refers to the protection of endangered species as a category by omitting "any." *Id.* ("with respect to endangered species"). Thus, section 4(d) refers to the listing of particular threatened species and not to threatened species as a category. The Supreme Court interprets "any" in similar statutory schemes the same way. The Clean Air Act, for example, requires EPA to adopt regulations for "emission of *any* air pollutant" from a mobile source. *See* 42 U.S.C. § 7521(a)(1) (emphasis added). That provision has been construed as the power to regulate particular pollutants. *See Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007) (finding that "[c]arbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are" "air pollutants"). Section 4(d)'s use of the term "any" to denote particularity cannot be reconciled with a blanket approach that would categorically extend the take prohibition to all threatened species.

Third, the statutory scheme as a whole counsels against a blanket approach to Section 4(d). *See Cheneau*, 997 F.3d at 919 (holding that to ascertain a statute's plain meaning a reviewing court must "read the words in their context and with a view to their place in the overall statutory scheme." (quoting *King v. Burwell*, 576 U.S. 473, 486 (2015) (internal quotations omitted))). Section 4(d) should be interpreted in light of Congress having expressly declined to categorically prohibit take of threatened species. *See* 16 U.S.C. § 1538(a)(1) (limiting the take prohibition to endangered species). One cannot interpret Section 4(d) as empowering the Services to reverse that congressional decision through imposition of a blanket rule. Indeed, when Congress wanted endangered and threatened species to be treated the same way, it said so expressly. *See* 16 U.S.C. § 1536(a)(2) ("Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any *endangered species or threatened species* or result in the destruction or adverse modification of habitat of such species.

. . . .” (emphasis added)). FWS’ prior blanket approach cannot be reconciled with Congress’s decision to regulate take of threatened and endangered species differently.

2. Legislative history confirms that the ESA prohibits the blanket extension of the take prohibition to all threatened species

The plain language of Section 4(d) is clear, and this Court need not examine the ESA’s legislative history to conclude that it forbids a blanket rule. *See Transwestern Pipeline Co., LLC v. 17.19 Acres of Prop. Located in Maricopa Cty.*, 627 F.3d 1268, 1271 (9th Cir. 2010). However, the ESA’s legislative history reinforces the conclusion that the 2019 4(d) Rule’s species-specific approach is compelled by the statute. Three aspects of the legislative history are of particular relevance.

First, 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.

S. Rep. No. 93-307, at 8 (1973), *reprinted in reprinted in* Cong. Research Serv., *A Legislative History of the Endangered Species Act of 1973, As Amended In 1976, 1977, 1978, 1979, and 1980* (hereinafter “ESA Legislative History”), at 307 (1982) (emphasis added). This language confirms that the power to prohibit take *is a subset* of the authority granted in the Section 4(d)’s first sentence, *see id.* (“Among other protective measures available . . . .”), and that this authority is limited to prohibiting take of “*particular* threatened species,” *see id.* (emphasis added).

Second, Senator John Tunney—the ESA’s Senate manager—repeatedly emphasized the distinction between endangered and threatened species and acknowledged that the take prohibition should be limited to those species in greatest need. *See* ESA Legislative History, *supra*, at 357 (statement of Sen. Tunney) (explaining that the take prohibition was limited to endangered species to “minimiz[e] the use of the most stringent prohibitions” and that “Federal prohibitions against taking must be absolutely enforced *only* for those species on the brink of extinction.” (emphasis

added); *id.* at 360 ("I feel that this bill provides the necessary national protection to *severely endangered* species while encouraging the States to utilize all of their resources toward the furtherance of the purposes of this act.") (emphasis added). The House Report similarly emphasizes the statutory distinction between the treatment of threatened and endangered species. *See* H.R. Rep. No. 93-412 (1973), *in* ESA Legislative History, *supra*, at 154 ("Sec. 9. (a) Subparagraphs (1) through (5) of this paragraph spell out a number of activities which are specifically prohibited with respect to endangered (not threatened) species . . . .").

Third, even decisionmakers within the Department of the Interior interpreted their soon-to-be-delegated authority under Section 4(d) as limited to species-specific regulations. For example, Douglas P. Wheeler—then Acting Assistant Secretary of the Interior—told Congress that limiting the take prohibition "assure[s] protection of all endangered species commensurate with the threat to their continued existence." 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* ESA Legislative History, *supra*, at 162; *see also* Letter from Rogers C. B. Morton, Secretary of Interior, to Rep. Carl Albert, Speaker of the House of Representatives (Feb. 15, 1973), *in* ESA Legislative History, *supra*, at 160. Wheeler went on to explain that any regulations adopted under Section 4(d) would "depend on the circumstances *of each species* . . . ." Letter from Douglas P. Wheeler, *in* ESA Legislative History, *supra*, at 162 (emphasis added).

3. The constitutional avoidance canon requires reading ESA Section 4(d) in accordance with its plain meaning to avoid nondelegation problems

Under the canon of constitutional avoidance courts must interpret statutes to avoid giving them a constitutionally suspect meaning. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) ("When 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))). Section 4(d) is unambiguous in foreclosing the Service's prior blanket approach and there is thus no need to apply the avoidance canon. *See id*. (holding that the canon of constitutional avoidance "comes into play only when . . . the statute is found to be susceptible of more than one construction"

(quoting *Clark v. Martinez*, 543 U.S. 371, 385 (2005))). Nevertheless, even if Section 4(d) were susceptible to a construction that would permit the blanket approach, that interpretation would raise significant nondelegation concerns that this Court must avoid.

The nondelegation doctrine forbids Congress from delegating discretionary power to administrative agencies without providing an "intelligible principle" to guide its exercise. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 414–16 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–32 (1935). The nondelegation doctrine "is rooted in the principle of separation of powers" and the Constitution's provision that "[a]ll legislative Powers . . . shall be vested in . . . Congress." *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (quoting U.S. Const. art. 1, § 1). The doctrine operates to forbid Congress from delegating that legislative power to any other branch. *Id*. To determine whether Congress has provided an intelligible principle the most important inquiry is whether Congress, and not the agency, has made the fundamental or overarching policy choice governing the agency's exercise of its discretion. *See Gundy v. United States*, 139 S. Ct. 2116, 2131–37 (2019) (Gorsuch, J., dissenting). The nondelegation doctrine is frequently invoked by courts applying the avoidance canon. *See Mistretta*, 488 U.S. at 373.

As discussed above, the only way to interpret section 4(d) as permitting FWS' prior blanket rule is to read its second sentence—which identifies take as a subset of the protective regulations that might be issued—as an independent grant of authority. *See supra* 6–7 (citing *Sweet Home*, 1 F.3d at 7–8). To interpret Section 4(d) in this manner raises significant nondelegation concerns. The only principle to guide the Services' exercise of its power to extend protective regulations to a threatened species is the "necessary and advisable" standard contained in Section 4(d)'s first sentence. The grant of authority in the second sentence, divorced from the limiting principle contained in the first, would authorize the Services to forbid or exert regulatory control over *any* activity that affects *any* threatened species, for any reason or no reason whatsoever. The Services could forbid private activity, or not, as they see fit. Delegation of such unbounded authority would be a classic violation of the Supreme Court's "intelligible principle" rule. *See Panama Refining*, 293 U.S. at 415 (finding that a grant of authority which did "not qualify the President's authority," did "not state whether or in what circumstances or under what conditions the President" was to

regulate, "establishe[d] no criterion to govern" the exercise of that power; and did "not require any finding by the President as a condition of his action," contained no intelligible principle). Indeed, it is difficult to imagine a more obvious example of the delegation of legislative power to an administrative agency than that contained in the second sentence of Section 4(d). These nondelegation problems can only be avoided by construing Section 4(d)'s two sentences together so that the limits in the first sentence apply to any regulation of take authorized by the second.

4. The District of Columbia Circuit's decision in *Sweet Home* is unpersuasive

The Private Landowners are aware of one out-of-circuit case upholding FWS' prior blanket approach as a reasonable interpretation of the ESA under *Chevron*. *See Sweet Home*, 1 F.3d at 6 (citing *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The District of Columbia Circuit's decision in *Sweet Home* does not withstand scrutiny and is inconsistent with recent Supreme Court case law. This Court should not consider it persuasive. The foremost reason that *Sweet Home* is unpersuasive is that the plain text of Section 4(d)—as reinforced by legislative history and canons of construction—forbids any interpretation of Section 4(d) that would permit FWS' prior blanket approach. *See supra* 4–11. But the District of Columbia Circuit in *Sweet Home* erred in applying *Chevron* deference to FWS' blanket 4(d) rule, for at least two additional reasons.

First, FWS offered no interpretation of Section 4(d) in its 1975 regulation extending the take prohibition to all threatened species. *See* 40 Fed. Reg. at 44,414. As such, the interpretation to which the court in *Sweet Home* deferred was articulated only as FWS' litigation position. *Chevron* deference must not be afforded to an agency interpretation under such circumstances. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). Second, the Supreme Court has recently clarified that it "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 665 (2022) (quoting *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)). Categorically and indiscriminately forbidding any private activity that affects any threatened species—as FWS did in

its blanket 4(d) rule—easily meets this standard. *See* Randy T. Simmons & Kimberly Frost, *Accounting for Species: The True Costs of the Endangered Species Act*, PERC (2004), http://perc.org/sites/default/files/esa_costs.pdf (assessing the public and private costs of ESA regulation). Further supporting application of this "major questions" standard is that section 4(d) was one of the "key reforms" of the ESA and is "central" to its "statutory scheme." *King v. Burwell*, 576 U.S. at 486. There can be no application of *Chevron* under such circumstances and the *Chevron* analysis in *Sweet Home* is therefore incorrect and unpersuasive.

B. The Rule for Designating Unoccupied Areas is compelled by the ESA and not subject to NEPA

The Services' 2019 reforms also made changes to the regulations governing the designation of unoccupied critical habitat. *See* 84 Fed. Reg. at 45,021–23; 50 C.F.R. § 424.12(b)(2). This Rule for Designating Unoccupied Areas—which largely reversed illegal revisions made in 2016, *see* 81 Fed. Reg. 7414 (Feb. 11, 2016)—is compelled and therefore not subject to NEPA requirements, for at least two reasons.

1. The Rule for Designating Unoccupied Areas' restoration of the two-step process for designating unoccupied critical habitat is compelled

The ESA authorizes the Services to designate "occupied" or "unoccupied" areas as critical habitat. *See* 16 U.S.C. § 1532(5)(A). However, it draws clear distinctions between the standards for designating each form of critical habitat and requires a heightened showing that unoccupied critical habitat be "essential for the conservation of the species." *Id*. The Ninth Circuit interprets this requirement as imposing "a more onerous procedure on the designation of unoccupied areas." *See Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010). For most of the ESA's history the Services honored the statutory distinction, determining critical habitat by first considering occupied areas and only turning to unoccupied areas if the designation of occupied areas would be insufficient for the conservation of the species. *See* 49 Fed. Reg. 38,900, 38,909 (Oct. 1, 1984); 50 C.F.R. § 424.12(e) (2015). *See also N.M. Farm & Livestock Bureau v. U.S. Dep't of Interior*, 952 F.3d 1216, 1228 (10th Cir. 2020) (describing the "step-wise" approach that was implemented for much of the ESA's history). Nevertheless, that requirement was eliminated in

2016. *See* 81 Fed. Reg. at 7414. This departure from thirty years of agency practice was illegal. It degraded the ESA's distinction between occupied and unoccupied critical habitat and ignored the "onerous" requirement that any "unoccupied" area be "essential for the conservation of the species." *See Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163; 16 U.S.C. § 1532(5)(A)(ii). Indeed, the Services cannot plausibly determine that an unoccupied area is "essential" for a species' conservation if the areas the species occupies would alone be sufficient for its conservation. *Cf. Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) ("The ESA requires the FWS to demonstrate that unoccupied area is 'essential' for conservation before designating it as critical habitat. The implementing regulation phrases *this same requirement* in a different way, and states that the FWS must show that the occupied habitat is not adequate for conservation." (emphasis added)). The 2019 Rule for Designating Unoccupied Areas restored the Services' previous practice of first considering all occupied areas and only turning to unoccupied areas where the designation of occupied areas would be inadequate for the species' conservation. *See* 50 C.F.R. § 424.12(b)(2). This revision was nondiscretionary.

2. The Rule for Designating Unoccupied Areas' requirement that unoccupied critical habitat contain at least one essential physical or biological feature is compelled by the Supreme Court's decision in *Weyerhaeuser*

In promulgating the 2016 critical habitat regulations the Services also concluded that unoccupied areas could be "essential" even if they lacked the physical and biological features necessary for the species to be able to occupy the area, there was no reasonable likelihood the area would develop such features, and that such features would never exist in quantities necessary for the area to serve an essential role in the species' conservation. *See* 81 Fed. Reg. at 7420. In other words, the Services' position was that unoccupied "critical habitat," need not first be "habitat" in order to be designated. In 2018, however, the Supreme Court held unanimously that the ESA limits the designation of "critical habitat" to areas that currently constitute "habitat" for the species. *See Weyerhaeuser Company v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368–69 (2018). The 2019 Regulations respond to *Weyerhaeuser's* holding by requiring an area designated us unoccupied critical habitat contain one or more of the physical or biological features essential to the

conservation of the species. *See* 84 Fed. Reg. at 45,022, 45,049. *See also* 50 C.F.R. § 424.12(b)(2). This change follows logically from—and was compelled by—the Supreme Court's decision in *Weyerhaeuser*. *Cf.* 84 Fed. Reg. at 45,022, 45,049. An area that does not contain at least one essential physical or biological feature essential for the species cannot be "habitat," as required by the ESA.

II. If This Court Is Inclined to Resolve the Propriety of the Services' NEPA Determinations, the Private Landowners Respectfully Request that Merits Briefing First Be Resumed

The Private Landowners have at the very least demonstrated an intention to raise a colorable argument on the merits that the 4(d) Rule and the Rule for Designating Unoccupied Areas were nondiscretionary. *See supra* 3–13. This Court therefore cannot determine whether "the Services properly invoked the categorical exclusions under NEPA when they promulgated the [4(d) Rule and the Rule for Designating Unoccupied Areas]," *see* ECF No. 155, without first resolving the merits of the Private Landowners' arguments, *see Sierra Club*, 65 F.3d at 1512 (holding that NEPA does not apply to nondiscretionary federal action).

The Plaintiffs have moved for summary judgment on their claims that the Services improperly invoked the categorical exclusions under NEPA when they promulgated the 2019 Regulations. *See* ECF No. 142 at 12, 42–47 (*CBD*); ECF No. 162 at 2, 48–51 (*California*); ECF No. 107 at 2, 44–47 (*ALDF*). In response, the Services maintain that their NEPA certifications for each rule were lawful but request that this Court withhold a resolution of that question and instead remand the 2019 Regulations without vacatur. *See* ECF No. 146 at 32; ECF No. 156 at 12.

If this Court is inclined to deny the Services' request and instead resolve the merits of the Plaintiffs' NEPA claims, then the Private Landowners respectfully request that it first set an orderly schedule for the resumption of summary judgment briefing. This Court cannot properly address the lawfulness of the Services' NEPA determinations for the 2019 4(d) Rule and the Rule for Designating Unoccupied Areas without first resolving the merits of the Private Landowners' arguments. This Court can, and must, resolve the crucial threshold question—that is NEPA's applicability to the 4(d) Rule and the Rule for Designating Unoccupied Areas—before determining the propriety of the Service's NEPA certifications. *See* ECF No. 152 at 13–21 (explaining that the

merits of the Plaintiffs' challenges to the 4(d) Rule and the Rule for Designating Unoccupied Areas are capable of separate resolution, and requesting this Court exercise its discretion to permit merits briefing to continue).

CONCLUSION

The 2019 4(d) Rule and the Rule for Designating Unoccupied Areas are statutorily compelled and therefore not subject to NEPA's requirements. Alleged deficiencies in the Services' use of NEPA's categorical exclusions cannot under any circumstances justify vacatur. At the very least, this Court must resolve the Private Landowners merits arguments before it can resolve the Plaintiffs' NEPA claims. The current posture of this case does not permit such a resolution. As such, if this Court is inclined to determine the propriety of the Service's use of the categorical exclusions, the Private Landowners respectfully request that it set an orderly schedule for the resumption of summary judgment briefing.

DATED: March 11, 2022.

Respectfully submitted,

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