December 4, 2023

Via Electronic Submission Only

Public Comments Processing
U.S. Fish and Wildlife Service

Subject: Docket No. FWS-R8-ES-2023-0092: **Amended** Comments on Proposed Rule to List Northwestern Pond Turtle and Southwestern Pond Turtle as Threatened Species and Adopt Section 4(d) Prohibitions

Dear U.S. Fish and Wildlife Service:

On October 3, 2023, the United States Fish and Wildlife Service (Service) published a proposed rule which, if adopted, would: designate the northwestern pond turtle and the southwestern pond turtle (collectively, "turtles") as "threatened species" under the Endangered Species Act, 16 U.S.C. § 1531 et seq. (ESA), and establish regulatory proscriptions under section 4(d) of the ESA (16 U.S.C. § 1533(d)). 88 Fed. Reg. 68370 (Oct. 3, 2023).

The undersigned organizations each urge that the Service not adopt the proposed rule. The proposed rule, which was apparently driven by litigation deadlines, would impose broad-ranging regulatory restrictions over more than 100 million acres in Washington, Oregon, Nevada, and California. Its reach and proscriptions are unnecessary and far too broad, and there has, to our knowledge, been no effort to reach out to regulated communities to pursue well focused strategies that would serve the interests of the species and not simply apply the blunt instrument of the ESA.

We are concerned with negative impacts on ongoing agricultural activities, particularly irrigated agriculture, where agricultural producers and water managers could – overnight – become exposed to legal liability for ordinary and necessary practices that are not identified in the proposed rule as being a significant future threat to the species. Agriculture has been, and will continue to be, a proactive partner in species conservation.

In this case, it appears that the threats to the species include predation – especially from exotic bullfrogs – and several other non-human factors and concerns beyond the Service's reasonable ability to control. We believe that a strategy of public education and collaboration, including incentives for population-enhancing actions, would be well received by citizens and far more

effective than new regulatory burdens that are not directed toward measurable improvements in turtle populations.

The Service Should Extend the Comment Period and Provide Opportunity for Meaningful Engagement with Stakeholders

The "Previous Federal Actions" section of the proposed rule explains that the Service's actions concerning the species, and specifically the current twelve-month finding and proposed rule, are a product by litigation-driven court deadlines. 88 Fed. Reg. 68371-68372. With publication of the proposed rule, the Service has complied with the obligations for action by a specific date that are disclosed in the proposed rule. It is not clear whether the Service has committed to take final action on a rule by any particular date. Regardless, the Service is under no obligation related to the substance of any action that it may or may not take. The proposed rule itself identifies major areas of uncertainty.

The listing decision and any other determinations will benefit from a more deliberate process that affords opportunity for engagement with stakeholders rather than the hurried adoption of regulatory mandates not tailored to the circumstances at hand.

The Listing Is Not Warranted

The information described in the proposed rule and supporting material[1] does not support that listing is warranted at this time. The analysis is based to a significant degree on long-term (e.g., twenty-five to ninety-year) projections from two population models developed for the purposes of the twelve-month finding. The projections do not support that a threatened listing is required or warranted, let alone on a hurried schedule.

Washington, Oregon, California, and Nevada all have assigned a special status to the turtles under state law. The proposed rule states that only Washington has applied its state endangered species act to turtles. Meanwhile, the non-regulatory conservation measures in Washington appear to show promise. In fact, the section of the proposed ruled titled "Conservation and Efforts and Regulatory Mechanisms" (88 Fed. Reg. 68381-68382) clearly demonstrates the opportunity for collaboration with states and conservation partners that can prevent any future need for listing.

The Proposed 4(d) Rule Is Excessive and Not Justified

Even if the Service were to determine that a threatened listing is necessary at this time, an indiscriminate adoption of a take prohibition is not appropriate. When an animal is listed as

[1] The "Supporting and Related Material" includes "Version 1.1" of the species status assessment team report posted on October 26, 2023 – over three weeks after publication of the proposed rule. https://www.regulations.gov/docket/FWS-R8-ES-2023-0092/document?documentTypes=Supporting%20%26%20Related%20Material. We have not had the opportunity to assess the reason for the late posting or whether it is significant.

threatened, the Service has discretion as to what, if any, regulatory mandates will apply to the species. 16 U.S.C. § 1533(d). As the proposed rule states, the Secretary has "'an almost infinite number of options available' to her." 88 Fed. Reg. 68395 (quoting H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Accordingly, there is no need for robotic adoption of the same blanket prohibitions on "take" that apply to animals listed as endangered. Unfortunately, the proposed rule would impose that sweeping regulatory mandate throughout the entire range of the species, without consideration of whether or why it is necessary or advisable to do so. The only sure consequence of a prohibition on take is to create risk of legal liability, including exposure to citizen lawsuits for incidental take that may be inconsequential to the species, or even beneficial over the long term. A take prohibition will have no effect on non-human threats that the proposed rule identifies. In addition, many human activities that could result in incidental take are not identified as threats to overall species populations. There is no cause to penalize those activities.

The Proposed Exemptions Are Too Narrow

We appreciate that the proposed rule does identify four areas of activity for which incidental take would be authorized. 88 Fed. Reg. 68396. We support these proposals, including the exception for "[r]outine management and maintenance of livestock ponds, including maintenance and management of berms and dams to maintain livestock water supplies, by landowners." Exception (4).

However, there are other essential activities that should be permitted. We understand that the proposed rule identifies historic changes in land use as a factor that has affected turtle populations. Those past effects are distinct from ongoing activities on existing, open-space landscapes.

The operation and maintenance of irrigation and drainage infrastructure (diversions, pumps, canals, drains, and other conveyance facilities) is time-sensitive, not discretionary, and is essential to tens of millions of acres that produce food, fiber, and forage that also supports local and national economies and food security. Further, the operators of water systems must make improvements to facilities, including irrigation modernization and efficiency efforts. Any of these activities may have the potential to result in incidental take of an individual member of the species. In the same way, it is possible that incidental take would sometimes occur as a result of ordinary farming or ranching practices. The prohibition of these continuing activities will not serve the goals of the ESA. (In fact, the most important protection for turtles that may exist in irrigation systems is to ensure that there is water in those systems.)

Accordingly, if the species are listed, and if there is some level of prohibition of take, the section 4(d) rule should expressly permit the operation, maintenance and improvement of irrigation and drainage infrastructure (e.g., diversions, pumps, canals, drains, and other conveyance facilities), and ordinary farming and ranching practices from the section 9 take prohibition.

Further Information

We are interested in discussing our comments and in providing clarification or any additional information that may be of assistance. For communication with our group as a whole, please contact Dan Keppen, Executive Director of the Family Farm Alliance, at dan@familyfarmalliance.org.

Sincerely,

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