Comments of the Attorneys General of California, Maryland, Massachusetts, Connecticut, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, and City of New York

November 26, 2021

Via electronic submission to http://www.regulations.gov

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Re: Comments on the Proposed Rules: (1) Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, FWS–HQ–ES–2019–0115, 86 Fed. Reg. 59,346 (Oct. 27, 2021); and (2) Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, FWS–HQ–ES–2020–0047, 86 Fed. Reg. 59,353 (Oct. 27, 2021)

Dear Ms. Estenoz and Mr. Rauch:

The undersigned Attorneys General of California, Maryland, Massachusetts, Connecticut, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, and the City of New York (hereinafter, "the States and Cities") respectfully submit these comments on the proposed rules by the U.S. Fish & Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively, the "Services"), that would rescind two eleventh-hour rulemakings by the previous federal administration affecting the designation of critical habitat and the definition of habitat under the federal Endangered Species Act, 16 U.S.C. §§ 1531-44 ("ESA" or "Act"). *See* 86 Fed. Reg. 59,346 (Oct. 27, 2021) (proposed rescission of the "Habitat Exclusion Rule"); 86 Fed. Reg. 59,353 (Oct. 27, 2021) (proposed rescission of the "Habitat Definition Rule").

The States and Cities have significant interests in the conservation of the natural heritage within their borders and are uniquely qualified to evaluate and comment on these rules. Indeed, in many jurisdictions, the States and Cities hold these wildlife resources in trust for the benefit of their people. Within the States' and Cities' boundaries, there are hundreds of species listed as endangered or threatened under the ESA, as well as millions of acres of Federal public lands, and

numerous Federal facilities and infrastructure projects that are subject to the ESA's section 7 consultation requirements. The ESA thus specifically directs the Services to "cooperate to the maximum extent practicable with the States" in implementing the Act and also gives states a unique seat at the table in ensuring the faithful and fully informed implementation of the Act's species-conservation mandates. 16 U.S.C. § 1535(a). Moreover, the States and Cities seeking to protect their natural resources would need to devote significant resources and institutional capacity to make up for the Services' failure to properly implement the purposes of the ESA. And, as the U.S. Supreme Court has recognized, states are entitled to "special solicitude" in seeking to remedy environmental harms within their territories. *See Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 519-22 (2007).

As described in detail in the States and Cities' prior comments, attached hereto as Exhibits 1 and 2, and Complaint challenging these rules, attached hereto as Exhibit 3, the Habitat Exclusion Rule and Habitat Definition Rule violate the ESA's plain language and conservation purposes, its precautionary approach to protecting imperiled species and critical habitat, its legislative history, and binding judicial precedent. These rules also lack any reasoned basis and are otherwise arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551–59, 701–06. Moreover, the Services violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–47, by failing to consider and disclose the significant environmental impacts of the rulemakings. Given these serious flaws, the States and Cities wholeheartedly agree that both rules should be rescinded in their entirety, and urge the Services to finalize these actions without delay.

The Habitat Exclusion Rule—promulgated by FWS allegedly to "provide greater transparency and certainty"—creates a new process that will result in FWS's exclusion of potentially substantially more areas from critical habitat designations and the associated protections under the ESA. 85 Fed. Reg. 82,376 (Dec. 18, 2020). Finalized without any changes from the proposed version, which was released just three months earlier, the Habitat Exclusion Rule unlawfully and arbitrarily: biases the statutorily required economic analysis against designating critical habitat and instead favors excluding both federal and non-federal lands from such designations; mandates an exclusion analysis any time the proponent of exclusion puts forth "credible information" supporting exclusion; and generally requires FWS to defer to outside sources regarding information on impacts allegedly not within FWS's expertise (including some impacts that are, in fact, within FWS's expertise). *Id*. at 82,388–89. Moreover, FWS's claim that the Habitat Exclusion Rule is responsive to the Supreme Court's decision in *Weyerhaeuser Co. v. FWS*, 139 S. Ct. 361 (2018), ignores the fact that the Court did not, and, indeed, could not, authorize FWS to abdicate (and delegate to third parties) its statutory duty to consider whether and how to conduct a critical habitat exclusion analysis under section 4(b)(2) of the Act. Furthermore, in violation of the APA, FWS altogether failed to explain the Habitat Exclusion Rule's dramatic departure from its 2016 policy governing critical habitat designations, 81 Fed. Reg. 7,226 (Feb. 11, 2016). *See Fed. Communications Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (agency required to provide "a reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy").

The Habitat Definition Rule—jointly promulgated by the Services allegedly to respond to the *Weyerhaeuser* decision—adds a new definition of "habitat" to the Services' implementing regulations that bears no resemblance to, and is not a logical outgrowth of, the definition originally proposed by the Services for public comment. 85 Fed. Reg. 81,411 (Dec. 16, 2020). The rule unlawfully and arbitrarily defines the term habitat, for purposes of designating critical habitat, to cover only areas that "*currently or periodically* contain[] the resources and conditions necessary to support one or more life processes of a species." 85 Fed. Reg. at 81,421 (emphasis added). The definition fails to account for species' need to expand their current ranges or to migrate to currently unoccupied habitat in response to habitat destruction or loss, including from the increasingly severe and existential threat of climate change, to ensure species recovery and survival as mandated by the ESA. The definition also fails to account for the possibility of restoring habitat that may not "currently or periodically contain[] the resources and conditions necessary to support one or more life processes of a species," but which could do so after reasonable restoration efforts. Nor is the Services' new definition consistent with, or required by, the *Weyerhaeuser* decision, in which the Court neither opined on the Services' longstanding, species-specific approach to defining "habitat" based on an individual species' life history, nor made any attempt to define this term.

The Services also violated NEPA by failing to assess the broader environmental impacts of both rules and by failing to circulate such analyses for public review and comment. Both rules are unquestionably major federal actions that will significantly affect the human environment by limiting designation of, and, accordingly, important protections for, critical habitat under the ESA, particularly those under the inter-agency consultation provisions of section 7. Neither of these major, substantive rules qualifies for the limited, procedural categorical exclusions from NEPA compliance upon which the Services rely. 85 Fed. Reg. at 81,421, 82,388 (claiming Habitat Definition Rule and Habitat Exclusion Rule fall within categorical exclusion under 43 C.F.R. § 46.210(j) for "Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature"). Additionally, the Services unlawfully segmented their NEPA review of the rules by claiming piecemeal coverage under that categorical exclusion, rather than evaluating the rules' environmental impacts together, as NEPA requires.

Finally, to the extent that the rules were designed to carry out the prior administration's regulatory reform agenda pursuant to Executive Order 13777, *see* 85 Fed. Reg. at 55,399, that Executive Order has since been revoked. *See* Executive Order 13992, Sec. 2, 86 Fed. Reg. 7,049 (Jan. 25, 2021).

CONCLUSION

For all of these reasons, the States and Cities urge the Services to finalize the rescission of the Habitat Exclusion Rule and Habitat Definition Rule without delay, and work to address the significant threats posed by habitat destruction and degradation in order to fulfill the ESA's fundamental purposes of affording imperiled species the "highest of priorities" and providing for their full recovery. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

Sincerely,

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Exhibit 1

Comments of the Attorneys General of California, Maryland, Massachusetts, Connecticut, Illinois, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, and City of New York

September 4, 2020

Via electronic submission to http://www.regulations.gov

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Re: Comments on the Proposed Rule: Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, FWS-HQ-ES-2020-0047, 85 Fed. Reg. 47,333 (Aug. 5, 2020)

Dear Mr. Frazer:

The undersigned Attorneys General of California, Maryland, Massachusetts, Connecticut, Illinois, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, and the City of New York (hereinafter, "the States and Cities") respectfully submit these comments on the proposed rule by the U.S. Fish & Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively, "the Services") entitled, "Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat," 85 Fed. Reg. 47,333 (Aug. 5, 2020) (hereinafter, the "Proposed Rule"). The Proposed Rule would add a new, restrictive definition of "habitat" to the Services' regulations for making critical habitat designations under Section 4 of the federal Endangered Species Act of 1973, 16 U.S.C. §§ 1531 *et seq*. (the "Act" or "ESA"). Both the proposed definition and the Services' alternative definition are contrary to the plain language and broad conservation purposes of the ESA, lack any reasoned basis, and would arbitrarily limit the Services' ability to recover imperiled species by reducing—in some cases potentially severely—the amount and type of critical habitat that can be protected under the Act. The Services also failed to comply with the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq*. ("APA"), and the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*. ("NEPA"), in issuing the Proposed Rule. There are at least three major legal flaws with the Services' proposal.

First, the Proposed Rule's definition of "habitat" is contrary to the ESA's definition of "critical habitat" and overriding conservation (i.e., species recovery) purpose because it requires species to *currently* "depend upon" certain areas, and further requires that such areas contain "*existing* attributes" to support a species, limitations that undermine the Act's substantive mandates and appear nowhere in the text of statute. This language appears designed to restrict the Services' ability to designate currently unoccupied critical habitat that is essential to species recovery and, in some cases, their very survival. This includes, for example, currently marginal or secondary habitat that, through reasonable restoration efforts, would allow a species to expand into portions of its former range, or areas into which a species may foreseeably need to move in response to new threats posed by climate change. Indeed, these types of scenarios are likely to become even more common in the foreseeable future with increasing human-caused impacts on the survival and recovery of imperiled species.

Second, the Proposed Rule is arbitrary and capricious under the APA because the Services have failed to provide any reasoned explanation for this definition, other than that it is supposedly called for by the U.S. Supreme Court's recent decision in *Weyerhaeuser Co. v U.S. Fish & Wildlife Serv*., 139 S. Ct. 361 (2018). Yet nowhere in that decision did the U.S. Supreme Court attempt to define "habitat" or encourage the Services to promulgate such a restrictive definition to implement the Act. To the contrary, the Court took no issue with the Services' longstanding species-specific approach for defining "habitat," tailored to species' individual life histories, despite extensive briefing on the topic.

Finally, the Services' suggestion that the Proposed Rule is subject to a categorical exclusion under NEPA, or that the Services might complete NEPA review at a later date, is contrary to that statute because the proposal is a major substantive change in the law which is likely to cause significant environmental effects on imperiled species and their habitat.

The States and Cities have significant interests in the conservation of the natural heritage within their borders and are uniquely qualified to evaluate, and demand withdrawal of, the Services' Proposed Rule. Indeed, in many places, these wildlife resources are held in trust by the States and Cities for the benefit of their people. Within the States' and Cities' boundaries, there are hundreds of species listed as endangered or threatened under the ESA, as well as millions of acres of federal public lands, and numerous federal facilities and infrastructure projects that are subject to the ESA's section 7 consultation requirements.

Accordingly, the ESA specifically directs the Services to "cooperate to the maximum extent practicable with the States" in implementing the Act and also gives states a special seat at the table in ensuring the faithful and fully informed implementation of the Act's species-conservation mandates. 16 U.S.C. § 1535(a). Moreover, the States and Cities seeking to protect their natural resources would need to devote significant resources and institutional capacity to make up for the Services' failure to properly implement the purposes of the ESA. And, as the U.S. Supreme Court has recognized, states are entitled to "special solicitude" in seeking to remedy environmental harms within their territories. *See Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 519-22 (2007).

For these reasons, the States and Cities urge the Services to withdraw this Proposed Rule and instead fulfill their longstanding statutory obligations to protect and ensure the recovery of endangered and threatened species and their habitat.

BACKGROUND

I. The Endangered Species Act.

Congress enacted the ESA nearly forty-five years ago in a bipartisan effort "to halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978); *see* 16 U.S.C. § 1531. The ESA accordingly enshrines a national policy of "institutionalized caution" in recognition of the "overriding need to devote whatever effort and resources [are] necessary to avoid further diminution of national and worldwide wildlife resources." *Hill*, 437 U.S. at 177, 194 (internal quotation omitted). "[T]he language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Id.* at 174; *see also id.* at 194. That pervasive goal "is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id*. at 184; *see also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698-99 (1995) (describing broad purposes of Act).

The Act declares that endangered and threatened species of "fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). The fundamental purposes of the ESA are to "provide a means whereby the ecosystems upon which endangered … and threatened species depend may be conserved [and] to provide a program for [their] conservation." *Id*. § 1531(b). The Act defines "conservation" broadly as "use of all methods and procedures which are necessary to bring any endangered species or threatened species *to the point at which the measures provided pursuant to this chapter are no longer necessary*." *Id*. § 1532(3) (emphasis added); *see Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) ("[T]he ESA was enacted not merely to forestall the extinction of species … but to allow a species to recover to the point where it may be delisted."); *Sierra Club. v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001) ("[T]he objective of the ESA is to enable listed species not merely to survive, but to recover from their endangered or threatened status."). Further, "*every agency of government is committed* to see that those purposes are carried out." *Hill*, 437 U.S. at 184 (*quoting* 119 Cong. Rec. 42913 (1973)) (emphasis in original); *see also* 16 U.S.C. §§ 1531(c), 1536(a)(1).

As particularly relevant here, Section 4 of the ESA, 16 U.S.C. § 1533, prescribes the process for the Services to list a species as "endangered" or "threatened" within the meaning of the statute, and to designate "critical habitat" for each such species. While the ESA does not define "habitat," the Services' long-held position has been that habitat is best determined on a species-by-species basis in order to account for the divergent types of life histories, behavior patterns, and survival strategies of myriad listed species. *See Weyerhaeuser,* Brief for the Federal Respondents, 2018 WL 3238924, **25-29. The ESA, however, does define "critical habitat" as:

(i) the specific areas *within* the geographical area occupied by the species, at the time it is listed in accordance with the [ESA], on which are found those physical or biological features (I) *essential to the conservation of the species* and (II) which may require special management considerations or protection; and

(ii) specific areas *outside* the geographical area occupied by the species at the time it is listed ... upon a determination by the Secretary that such areas are *essential for the conservation of the species*.

16 U.S.C. § 1532(5)(A) (emphases added).

A critical habitat designation "places conditions on the Federal Government's authority to effect any physical changes to the designated area, whether through activities of its own or by facilitating private development," through issuance of federal permits and licenses. *Weyerhaeuser*, 139 S. Ct. at 365-66. In particular, Section 7 of the ESA, 16 U.S.C. § 1536, requires all federal agencies to "insure" that any action they propose to authorize, fund, or carry out "is not likely to jeopardize the continued existence" of any endangered or threatened species or "result in the destruction or adverse modification of" any designated critical habitat, *id*. § 1536(a)(2). If a federal agency action "may affect" any listed species or critical habitat, the federal action agency must initiate consultation with the relevant Service. *See id.* §§ 1536(b)(3), (c)(1).

If the federal action agency or the appropriate Service determines that the action is "likely to adversely affect" a listed species and/or designated critical habitat, the Service must prepare a biological opinion on the effects of the action on the species and/or critical habitat. *Id.* § 1536(b)(3)(A). The Services' biological opinion must determine whether the action is likely to jeopardize the continued existence of any listed species or adversely modify or destroy any designated critical habitat. *Id*. If the Services find jeopardy or adverse modification, the biological opinion must include "reasonable and prudent alternatives" to the agency action that "can be taken by the federal agency or applicant in implementing" the action and that the Secretary believes would avoid jeopardy or adverse modification. *Id*. Finally, the biological opinion must include a written statement (referred to as an "incidental take statement") specifying the impacts of any incidental take on the species, any "reasonable and prudent measures that the [Services] consider [] necessary or appropriate to minimize such impact," and the "terms and conditions" that the agency must comply with in implementing those measures. *Id*. § 1536(b)(4).

II. The Proposed Rule.

The Services' Proposed Rule would add a new, narrow definition of "habitat" for purposes of critical habitat designations under Section 4 of the Act, 16 U.S.C. § 1533. 85 Fed. Reg. at 47,333. In particular, this proposal would define "habitat" as:

> The physical places that individuals of a species *depend upon* to *carry out one or more life processes*. Habitat includes areas with *existing* attributes that have the capacity to support individuals of the species.

Id. at 47,334 (emphases added). The Services also request comment on an alternative definition that would define "habitat" as:

> The physical places that individuals of a species *use to carry out one or more life processes*. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species *presently exist*.

Id. (emphases added).

While the Services note that the ESA and its implementing regulations have never previously included a definition of "habitat," they claim that this proposal is necessary to respond to the U.S. Supreme Court's recent decision in *Weyerhaeuser*. 85 Fed. Reg. at 47,334. In particular, the Services cite the Supreme Court's holding that "Section 4(a)(3)(A)(i) does not authorize the Secretary to designate [an] area as critical habitat unless it is also habitat for the species." 139 S. Ct. at 368.

The Services further "anticipate" that adding this definition of "habitat" will be subject to a categorical exclusion under of the Department of Interior's NEPA implementing regulations, 43 C.F.R. § 46.210(i), and NMFS' similar NEPA procedures. 85 Fed. Reg. at 47,336 (citing NOAA Companion Manual, "Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities" (effective Jan. 13, 2017), Appendix E, Categorical Exclusion G7). The Department of Interior regulation provides an exemption for "[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case." 43 C.F.R. § 46.210(i). NMFS' NEPA procedures provide a similar exclusion for "preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature." 85 Fed. Reg. at 47,336. The Services also state, however, that they are "continuing to consider the extent to which this proposed regulation may have a significant impact on the human environment," without indicating when and how a final decision will be made. *Id*.

COMMENTS ON THE PROPOSED RULE

Under the APA, courts will set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). An agency action is arbitrary and capricious where the agency: (i) has relied on factors which Congress has not intended it to consider; (ii) entirely failed to consider an important aspect of the problem; (iii) offered an explanation for its decision that runs counter to the evidence before the agency; or (iv) offered an explanation so implausible that it could not be ascribed to a difference

of view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"). In addition, an agency does not have authority to adopt a regulation that is "manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Further, where an agency changes its prior approach, it "must display awareness that it is changing position" and "show that there are good reasons for the new policy," including providing "a reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fed. Comm'cns Comm'n v. Fox Television Stations, Inc*. ("*FCC v. Fox*"), 556 U.S. 502, 515-16 (2009).

Here, for the reasons explained below, the Services' proposed definition of "habitat" is contrary to the plain language and conservation purposes of the ESA, is arbitrary and capricious and in violation of the APA, and fails to consider the significant environmental impacts of this action in violation of NEPA.

I. The Services' Proposed Definition of "Habitat" Is Contrary to the Plain Language and Conservation Purposes of the ESA.

A. The Plain Language and Conservation Purposes of the ESA Demand that "Habitat" Be Broadly Interpreted.

The Proposed Rule is contrary to the plain language and conservation purposes of the ESA, as set forth by Congress and interpreted by the courts and the Services themselves. In particular, the Services' definition of "habitat" conflicts with the statutory definition of "critical habitat" in Section 3(5)(A), 16 U.S.C. § 1532(5)(A), which requires that critical habitat be sufficient to provide for the "conservation" (*i.e.*, recovery) of listed species. *See Gifford Pinchot Task Force*, 378 F.3d at 1070 ("[T]he purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery"). This statutory definition specifically authorizes the designation of unoccupied critical habitat that may be essential for a species' survival and recovery. *See* 16 U.S.C. § 1532(5)(A)(ii). Since "critical habitat" is, by definition, a subset of habitat," *see Weyerhaeuser*, 139 S. Ct. at 368, any proposed definition of 'habitat' must therefore be broader – not more restrictive – than "critical habitat." And the proposed definition conflicts with the fundamental, overarching purposes of the ESA to conserve endangered and threatened species and their habitat. 16 U.S.C. §§ 1531(b), (c), 1536(a)(1).

Courts have interpreted the ESA's definition of "critical habitat" broadly, consistent with the ESA's plain text and the fundamental purposes of critical habitat designation to provide for listed species' eventual recovery.[1] As the Fifth Circuit has explained:

> The ESA defines "critical habitat" as areas which are "essential to the conservation" of listed species. "Conservation" is a much broader concept than

[1] Nothing in the U.S. Supreme Court's decision in *Weyerhaeuser*, as discussed below, overrules these numerous holdings and legal interpretations of the ESA.

> mere survival. The ESA's definition of "conservation" speaks to the *recovery* of a threatened or endangered species.

Sierra Club, 245 F.3d at 441-42 (*citing* 16 U.S.C. § 1532(5)(A)) (emphasis added). The Ninth Circuit also has recognized that "it is logical and inevitable that a species requires more critical habitat for recovery than is necessary for the species' survival," which necessarily must include potentially suitable habitat areas that the species formerly occupied or may potentially occupy in the future. *Gifford Pinchot Task Force*, 378 F.3d at 1069.

Thus, for example, in *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit upheld a broad interpretation of the ESA's definition of "occupied" critical habitat as not limited strictly to those areas where a species currently "resides," but also as including areas intermittently used by the species for foraging and other activities. *Id.* at 1164-67. The court also held that the definition of critical habitat must be sufficiently broad to account for vastly different life histories of various types of listed species, including wide-ranging, highly mobile, migratory, territorial, non-territorial, and highly dispersed species. *Id*. at 1165-66; *accord Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 557-61 (9th Cir. 2016) (critical habitat may properly include areas beyond just denning sites, such as feeding areas, migration corridors, and resting sites).

Likewise, in *Home Builders Association of Northern Calif. v. U.S. Fish and Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), the Ninth Circuit held that habitat need not contain all "primary constituent elements" in order to be designated as either occupied or unoccupied critical habitat. *Id*. at 990. This is particularly important where the precise location of the habitat may change and be somewhat unpredictable from year to year based on rainfall and other circumstances, as was the situation with the vernal pool complexes at issue in that case. *Id*.

The case law concerning the authorized extent of "unoccupied" critical habitat designations further confirms the broad scope of "critical habitat" that must be designated under the ESA to ensure species recovery. *See Arizona Cattle Growers' Ass'n*, 606 F.3d at 1167 (unoccupied critical habitat includes those areas "suitable for *future* occupancy") (emphasis added); *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994-95 (9th Cir. 2015) (upholding designation of unoccupied critical habitat as essential for the conservation of the Santa Ana sucker fish because such habitat contained feeder streams that were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River"); *New Mexico Farm and Livestock Bureau v. U.S. Dept. of Interior*, 952 F.3d 1216, 1232 (10th Cir. 2020) (critical habitat that is "secondary" and "marginal" nevertheless may be considered critical habitat "essential for the conservation of the species").

Indeed, the Services themselves have repeatedly recognized that habitat restoration is a key component of endangered and threatened species recovery and that such recovery requires *both* protection and restoration of listed species' habitat. For example, the FWS has stated that the "[d]estruction, degradation, and fragmentation of habitat is the driving force behind today's

decline in species and biodiversity."[2] NMFS similarly has recognized that "[o]ver the past century, habitat loss has been the most common cause of extinction for freshwater fish in the United States. Many saltwater fish are also in decline due to habitat degradation."[3]

FWS has several programs to restore species habitat, including its "Partners for Fish and Wildlife Program" which "provides technical and financial assistance to landowners interested in restoring and enhancing wildlife habitat on their land."[4] According to FWS, "[s]ince the program's start in 1987, some 50,000 landowners have worked with Partners staff to complete 60,000 habitat restoration projects on 6 million acres."[5] Similarly, NMFS has regularly highlighted its work to "increase fisheries productivity by restoring coastal habitat and supporting the recovery of protected species that rely on healthy habitat to breed, eat, rest, and grow," and has stated that, since 1992, it has "provided more than $750 million to implement more [than] 3,300 coastal habitat restoration projects."[6] NMFS works to "restore degraded or injured habitat to ensure fish have access to high quality areas to live" by, among other methods, removing dams and other barriers; reconnecting coastal wetlands, and rebuilding coral and oyster reefs.[7] In sum, the ESA's text and conservation purposes, extensive case law, and the Services themselves confirm that habitat must be broadly construed to promote the survival and recovery of endangered and threatened species.

B. The Proposed Rule Unlawfully Restricts the Designation of Critical Habitat and Frustrates the Conservation Purposes of the ESA.

The Proposed Rule, which will likely result in reduced habitat protections for many endangered and threatened species, would fundamentally undermine the ESA's overarching recovery mandates, for several reasons.

First, and most importantly, the first sentence in the Services' proposed definition of "habitat" threatens to exclude the designation of unoccupied areas as critical habitat, even though designation of such areas is expressly authorized by the text of the ESA and may be essential for a species' survival and recovery. *See* 16 U.S.C. § 1532(5)(A)(ii). The Services' proposed definition of "habitat" would likely exclude areas that are currently marginal or degraded and require some degree of restoration from even being considered as "habitat" in the first instance, and thus would exclude these areas from being eligible for designation as "critical habitat" under the ESA, regardless of their importance for species' survival and recovery.

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[2] U.S. Fish & Wildlife Serv., "Habitat," (last updated Sept. 9, 2011), https://www.fws.gov/habitat/.
[3] National Marine Fisheries Serv., "Threats to Habitat," (last updated June 19, 2017), https://www.fisheries.noaa.gov/insight/threats-habitat.
[4] U.S. Fish & Wildlife Serv., "Partners," (last updated Jan. 29, 2020), https://www.fws.gov/partners/.
[5] *Id.*
[6] Nat'l Marine Fisheries Serv., Office of Habitat Conservation, https://www.fisheries.noaa.gov/about/office-habitat-conservation.
[7] *Id*.

Although the Proposed Rule claims that the definition "is written so as to include unoccupied habitat," 85 Fed. Reg. at 47,334, the language of the proposal risks excluding "unoccupied habitat" in many, if not most, situations. In particular, the use of the present tense of "depend upon" to "carry out" one or more life processes in the first sentence logically excludes "physical places" that a species may have *previously* depended upon, including its full historical habitat range. It also logically excludes "physical places" that the species may *subsequently* depend upon following planned or potential habitat restoration efforts, or due to reasonably foreseeable changes in the location, quality, or extent of habitat caused by climate change or other factors.

The second sentence of the proposed definition only confirms this apparent limitation because it contains the "existing attributes" limitation, suggesting that unoccupied areas that could be made suitable through restoration efforts, but which do not currently contain such attributes, could not be considered habitat or, as a result, critical habitat. Furthermore, the second sentence must be read in conjunction with, and is limited by, the "depend upon" and "carry out" language in the first sentence.

For example, a listed salmonid species would not currently "depend upon" a stretch of river that it could no longer reach due to the construction of a dam, even if enabling the species to migrate to that area through fish ladders or other mechanisms could be considered essential to its survival and recovery. Similarly, degraded areas might not *currently* contain sufficient "*existing* attributes" necessary to support a species, even if those sites had planned restoration activities that could provide for such attributes and would support an expansion or re-introduction of the species into that area. Indeed, paradoxically, the Services' misguided definition may even encourage damage to or alteration of important species habitat in an effort to justify *eliminating* the ESA's protection for that habitat.

In this regard, the "alternative" definition offered by the Services may be even more restrictive than the proposed version, and therefore likewise is directly contrary to the ESA. In particular, the reference in the first sentence to "physical places" that species currently "use" to carry out one or more life processes would exclude a species' full historical range or areas that could be restored into suitable habitat, where a species is not currently present or using such areas. 85 Fed. Reg. at 47,334. In addition, the "use" limitation may go even farther than the proposed definition in precluding the Services' ability to designate areas where the species is not currently *physically* present, but which nevertheless are important for species' *current* survival in other areas, such as the feeder streams at issue in the *Bear Valley Mutual Water Company* case.

These inherent limitations in the alternative definition are further reinforced by the second sentence limiting "habitat" to areas "where the necessary attributes to support the species *presently* exist." 85 Fed. Reg. at 47,334. Similar to the proposed definition, this would unlawfully restrict the Services' ability to designate habitat that would require restoration or other changes to provide such attributes that a species may depend upon for its future survival or recovery.

Furthermore, because both occupied and unoccupied "critical habitat" are necessarily subsets of "habitat," *Weyerhaeuser*, 139 S. Ct. at 368, any regulatory definition of "habitat" must be broader than both the occupied and unoccupied critical habitat under consideration in the case law discussed in Part I.A above. Yet, instead, the Services' proposed definition of "habitat" is even *narrower* than the ESA's *statutory* definition of "*critical* habitat" and, as discussed above, potentially does not even permit currently unoccupied critical habitat to qualify as "habitat." This interpretation is both impermissible and nonsensical. *See Chevron*, 467 U.S. at 842-43 (court must reject agency regulations that are contrary to clear Congressional intent).

The Proposed Rule also conflicts with the need to protect species from the significant dangers posed by climate change, which are occurring now and likely to become increasingly more prevalent in the foreseeable future. As FWS itself has stated, it currently "faces what portends to be the greatest challenge to fish and wildlife conservation in its history: The earth's climate is changing at an accelerating rate that has the potential to cause abrupt changes in ecosystems and contribute to widespread species extinctions," resulting in "profound impacts on our nation's wildlife and habitats."[8] For example:

> In aquatic environments, evidence is growing that higher water temperatures resulting from climate change are negatively impacting cold- and cool-water fish populations across the country. Warmer winters are changing some birds' migratory patterns. Sooty terns, which nest in the Dry Tortugas off Key West, Florida, are showing up earlier and earlier. Roseate spoonbills, which generally stay in Florida, the Gulf Coast and points south, are now regularly spotted in South Carolina. Record warm seawater is linked to coral reef bleaching in the Florida Keys and Puerto Rico.[9]

Similarly, as FWS has found regarding the Pacific Southwest Region of California, Nevada, and the Klamath Basin:

> Climate change brings physical changes that include increasing temperatures, rising sea levels, shifts in ocean currents, altered precipitation patterns and increased flood frequency. These physical effects lead to biological impacts such as changes in the distribution of plant and animals, new species invasions, disease outbreaks, disrupted food webs, and ultimately, increased pressure on fish and wildlife populations.[10]

Yet, the Services' proposed definitions would restrict their ability to designate unoccupied critical habitat for a species that may be forced to move to a new area or higher elevation due to climate change, or to return to a restored ecosystem that may provide essential refuge from such threats. This is contrary to the ESA's recovery purposes as well as the

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[8] U.S. Fish & Wildlife Serv., "Wildlife, Habitats and Our Changing Climate" (last updated Oct. 13, 2017), https://www.fws.gov/southeast/our-changing-climate/.

[9] *Id.*

[10] U.S. Fish & Wildlife Serv., "Climate Change in the Pacific Southwest" (last updated Sept. 18, 2018), https://www.fws.gov/cno/climate.html.

applicable case law. The Ninth Circuit, for example, has expressly rejected the assertion that "FWS can only designate habitat that contains essential features at the time the species is listed, not habitat that may become critical in the future because of climate change or other potential factors." *Alaska Oil & Gas Ass'n*, 815 F.3d at 558.

For all of these reasons, the Proposed Rule is contrary to the plain language and primary purposes of the ESA and must be withdrawn.

II. The Services Have Failed to Justify the Proposed Rule Under the APA.

The Proposed Rule also arbitrarily stakes its entire justification on the Supreme Court's opinion in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 139 S. Ct. 361 (2018). *See* 85 Fed. Reg. at 47,334 ("Given this holding in the Supreme Court's opinion in *Weyerhaeuser*, we are proposing to add a regulatory definition of 'habitat.'"). However, that decision was exceedingly narrow and did not—and, in light of the ESA's plain terms, could not—compel the Services to put forward the unduly restrictive definition of "habitat" they now propose. Because the Services have provided no independent justification or explanation for the Proposed Rule, and the Rule contradicts the FWS's existing approach to defining "habitat" on an individual species basis and tailored to their specific life histories, the Services have acted in a manner that is arbitrary and capricious in violation of the APA, 5 U.S.C. § 706(2)(A). *See FCC v. Fox*, 556 U.S. at 515-16 (agency "must display awareness that it is changing position" and must provide "reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy"). In addition, the Services have failed to consider the broader implications of the Proposed Rule for administration of the ESA, which likewise is contrary to the APA. *See State Farm*, 463 U.S. at 43 (agency's failure to "consider an important aspect of the problem" is arbitrary and capricious).

In *Weyerhaeuser*, the Supreme Court held only that an area cannot be designated as "critical habitat" for a listed species unless it is also "habitat for that species." *Weyerhaeuser*, 139 S. Ct. at 368. In so holding, the Court offered no guidance on what it means for an area to qualify as "habitat," except to say that habitat is necessarily "a larger category" than "critical habitat." *Id.* at 368-69. The Court noted that no lower court had squarely ruled on whether the critical habitat unit at issue in that case qualified as "habitat" for the dusky gopher frog, and accordingly it remanded the matter to allow a lower court to address that question in the first instance. *Id.* at 368-70. Notably, FWS maintained before the Court that the unit at issue was in fact habitat for the dusky gopher frog and supported that conclusion by pointing to the agency's longstanding practice of approaching habitat on a species-by-species basis, including areas necessary for a species' survival and recovery. *See* Brief for the Federal Respondents, 2018 WL 3238924, *25-28.

The Services' new proposed definitions of "habitat" conflict with this longstanding, recovery-focused approach to defining habitat. The Services have failed even to acknowledge this change in position, let alone provide any reasoned justification for doing so in light of the ESA's broad conservation purposes. While it may be possible for the Services to adopt a definition of 'habitat' that is not inconsistent with the ESA and which allows for the kind of

case-by-case application that FWS has historically engaged in, the Proposed Rule meets neither test. As such, the Proposed Rule is arbitrary and capricious and in violation of the APA. *FCC v. Fox*, 556 U.S. at 515-16.

The Services have also failed to consider that their proposed limitations on the definition of "habitat," and the resulting restrictions on the type and extent critical habitat designated under Section 4, could have serious implications for how the Services implement and carry out their duties under other sections of the ESA, again undermining the ESA's core purposes. For example, by reducing the amount and type of critical habitat that can be designated in the first instance, the Proposed Rule would make it less likely that a federal agency action or permit approval will adversely affect critical habitat and thus trigger the need for reasonable and prudent alternatives under Section 7. 16 U.S.C. § 1536. The proposed definition also could impact listing decisions under Section 4, given that the first factor considered by the Services in determining whether to list a species as endangered or threatened is "the present or threatened destruction, modification, or curtailment of [the species'] *habitat* or range." *Id*. § 1533(a)(1)(A) (emphasis added). The definition also could hamper the Services' recovery planning efforts by restricting the amount of "habitat" that the Services may acquire and restore to enable species to return to their historic range. Yet nowhere in the Proposed Rule do the Services even consider any of these potential implications of the new proposed definition of "habitat."

For all of these reasons, the Proposed Rule is arbitrary and capricious and contrary to the requirements of the APA and the ESA and must be withdrawn.

III. The Services Cannot Categorically Exclude the Proposed Rule from Environmental Review under NEPA.

A. Statutory Background.

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a).[11] Congress enacted NEPA in 1969 to "establish a national policy for the environment ... and to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4321. NEPA has two fundamental purposes: (1) to guarantee that agencies take a "hard look" at the consequences of their actions before the actions occur by ensuring that "the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts;" and (2) to ensure that "the relevant information will be made available to the larger audience that may

[11] On July 16, 2020, the Council on Environmental Quality ("CEQ") finalized an update to its 1978 regulations implementing NEPA, which takes effect on September 14, 2020. 85 Fed. Reg. 43,304 (July 16, 2020). According to this rule, for NEPA reviews that have already began "before the final rule's effective date, agencies may choose whether to apply the revised regulations or proceed under the 1978 regulations and their existing agency NEPA procedures. Agencies should clearly indicate to interested and affected parties which procedures it is applying for each proposed action." *Id*. at 43,340. Here, the Services' Proposed Rule cites only the language of the 1978 regulations. *See* 85 Fed. Reg. at 47,336.

also play a role in both the decision making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989).

To achieve these purposes, NEPA requires the preparation of a detailed environmental impact statement ("EIS") for any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA's implementing regulations broadly define such actions to include "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18. In taking a "hard look," NEPA requires federal agencies to consider the direct, indirect, and cumulative impacts of their proposed actions. *Diné Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 837 (10th Cir. 2019); 40 C.F.R. §§ 1508.7, 1508.8(a)–(b).

Only in "certain narrow instances" is an agency excused from preparing a preliminary environmental assessment or an EIS by invoking a categorical exclusion. *See Coal. of Concerned Citizens to Make Art Smart v. Fed. Transit Admin.*, 843 F.3d 886, 902 (10th Cir. 2016) (citing 40 C.F.R. § 1508.4). Agencies may invoke a categorical exclusion only for "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of [NEPA] regulations." 40 C.F.R. § 1508.4; *see also id.* § 1507.3(b)(2)(ii). When adopting such procedures, an agency "shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect," *id.* § 1508.4, in which case an environmental assessment or EIS is required.

B. The Proposed Rule Does Not Qualify for a Categorical Exclusion from NEPA.

In its Proposed Rule, the Services state that they "anticipate" that the categorical exclusion in 43 C.F.R. § 46.210(i) "applies to the proposed regulation changes." 85 Fed. Reg. at 47,336. As noted above, that categorical exclusion only covers "[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature." 43 C.F.R. § 46.210(i). The Services also cite a similar categorical exclusion in NMFS' NEPA procedures for "preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature." 85 Fed. Reg. at 47,336. At the same time, the Services also claim that they are "continuing to consider the extent to which this proposed regulation may have a significant impact on the human environment," and that any such NEPA analysis will be completed "before finalizing this regulation." *Id.*

However, the suggestion that the Proposed Rule is subject to a categorical exclusion under NEPA, or that the Services may complete an environmental analysis at a later date, is contrary to the requirements of NEPA and its implementing regulations. The new proposed definition of "habitat" is not a regulation "of an administrative, financial, legal, technical, or procedural nature."[12] Instead, this substantive proposal would significantly affect the frequency, extent, location and type of critical habitat for endangered and threatened species. It therefore

[12] Indeed, the Office of Information and Regulatory Affirms determined that the Proposed Rule was a "significant regulatory action" under Executive Order 12866. *See* 85 Fed. Reg. at 47,335.

indisputably qualifies as a "major federal action significantly affecting the quality of the … environment." 42 U.S.C.§ 4332(2)(C).

Among the factors an agency must consider in determining whether an action may significantly affect the environment, thus warranting the preparation of an EIS, is "[t]he degree to which the action may adversely affect an endangered or threatened species or its [critical] habitat" under the ESA. 40 C.F.R. § 1508.27(b)(9). And, as the Ninth Circuit has stated, the presence of just "one of these factors may be sufficient to require the preparation of an EIS in appropriate circumstances." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005). Similarly, even if the Proposed Rule could properly be categorized as an administrative or technical change (which it cannot), "extraordinary circumstances," including significant impacts on listed species and critical habitat and violations of the ESA, preclude the application of a categorical exclusion from NEPA in this case. *See* 43 C.F.R. § 46.215(h)-(i).

As discussed above, the Proposed Rule will have significant, adverse environmental impacts on endangered and threatened species and their habitat in several ways. In particular, the proposed definition of "habitat" will severely restrict the Services' ability to designate critical habitat for endangered and threatened species by imposing new conditions that limit the frequency, extent, location, and type of habitat that may be designated. This poses significant threats to species: (1) that are now limited to just a small fraction of their historic range, (2) whose habitat has been degraded and would require restoration efforts to provide the attributes necessary to support the species' survival and later recovery, and (3) that may need to move to new areas due to climate change or other natural and human-caused factors. The reduction in areas considered "habitat" means that fewer areas will be protected as "critical habitat," which will reduce species' ability to survive and recover and no longer need the protections of the ESA.

Because of these significant environmental impacts on imperiled species and their habitat, the Proposed Rule does not qualify for a categorical exclusion from NEPA. Moreover, as the Ninth Circuit has frequently stated in NEPA cases, it is "not appropriate to defer consideration" of impacts to a future date "when meaningful consideration can be given now." *See Kern v. U.S. Bureau of Land Mgmt*., 284 F.3d 1062, 1075 (9th Cir. 2002). Thus, if the Services desire to proceed with this rulemaking, they must first prepare and circulate a draft EIS for public review and comment prior to finalization of the proposal.

CONCLUSION

The Proposed Rule is yet another attempt by the Services to chip away at the ESA's essential protections for endangered and threatened species and their habitat. The Services must abandon this proposal and instead focus on addressing the threats posed by habitat degradation and climate change in order to fulfill the ESA's purposes of affording imperiled species the "highest of priorities" and providing for their recovery. *Hill*, 437 U.S. at 174, 194.

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Exhibit 2

Comments of the Attorneys General of California, Maryland, Massachusetts, Connecticut, Illinois, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, and City of New York

October 8, 2020

Via electronic submission to http://www.regulations.gov

George Wallace
Assistant Secretary for Fish and Wildlife and Parks
Public Comments Processing
Attn: FWS-HQ-ES-2019-0115
U.S. Fish and Wildlife Service
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Re: Comments on the Proposed Rule: Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, FWS-HQ-ES-2019-0115, 85 Fed. Reg. 55,398 (Sept. 8, 2020)

Dear Mr. Wallace:

The undersigned Attorneys General of California, Maryland, Massachusetts, Connecticut, Illinois, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, and the City of New York (hereinafter, "the States and Cities") respectfully submit these comments on the proposed rule by the U.S. Fish & Wildlife Service ("FWS") entitled, "Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat," 85 Fed. Reg. 55,398 (Sept. 8, 2020) (hereinafter, the "Proposed Rule"). The Proposed Rule would establish a new process for excluding areas from critical habitat designations made by FWS pursuant to section 4(b) of the Federal Endangered Species Act of 1973, 16 U.S.C. §§ 1531 *et seq*. (the "Act" or "ESA").

FWS's proposed critical habitat exclusion process is contrary to the plain language and broad conservation purposes of the ESA, lacks any reasoned basis, and would arbitrarily limit FWS's duty and authority to recover imperiled species by improperly requiring it to defer to outside sources of information and reducing—potentially drastically—the amount of critical habitat ultimately designated and protected under the Act. FWS also failed to comply with the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq*. ("APA"), and the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*. ("NEPA"), in issuing the Proposed Rule. There are at least three major legal flaws with FWS's proposal.

First, the Proposed Rule's critical habitat exclusion process is contrary to both the plain language of section 4(b)(2) and the Act's overarching conservation purposes, and fundamentally undermines the section 7 consultation process in several ways. The proposal unlawfully: (1) weights the required economic analysis *against* critical habitat designation for species conservation and in *favor* of excluding both Federal and non-Federal lands from such designations; (2) *mandates* an exclusion analysis in any case where the proponent of an exclusion puts forth "credible information" supporting an economic or other impact, regardless of information proffered by the proponents of critical habitat inclusion; and (3) *requires* FWS to defer to such outside sources of information in most cases.

These changes conflict with both the text and structure of the ESA's critical habitat designation provisions and fundamental principles of administrative law, and they are likely to result in a dramatic reduction in the amount of critical habitat ultimately designated, to the detriment of species' survival and recovery as required by the ESA. Furthermore, by reducing the extent of critical habitat designations, particularly on Federal lands, the Proposed Rule also will reduce the number, type, and scope of inter-agency consultations required under section 7 of the Act to ensure that Federal agency actions do not adversely modify or destroy such habitat. This undermines the very "heart of the ESA" and the primary purpose of critical habitat designations. *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011).

Second, the Proposed Rule is arbitrary and capricious under the APA because FWS has failed to provide any reasoned explanation for this proposal. FWS claims that the Proposed Rule responds to the U.S. Supreme Court's recent decision in *Weyerhaeuser Co. v U.S. Fish & Wildlife Serv*., 139 S. Ct. 361 (2018), that determinations *not* to exclude critical habitat areas are subject to judicial review. But the U.S. Supreme Court did not, and, indeed, could not, authorize FWS to abdicate its statutory authority and discretion regarding whether and how to conduct a critical habitat exclusion analysis under section 4(b)(2) of the Act in the first instance. Moreover, FWS altogether fails to explain the Proposed Rule's dramatic departure from FWS's 2016 "Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act," 81 Fed. Reg. 7,226 (Feb. 11, 2016) (hereinafter, the "2016 Policy").

Finally, FWS's suggestion that the Proposed Rule is subject to a categorical exclusion under NEPA, or that it may complete NEPA review at a later date, is contrary to that statute because the proposal is a major substantive change in the law which will likely have significant environmental effects for imperiled species and their habitat. As a result, FWS must conduct NEPA review before promulgating a final rule.

The States and Cities have significant interests in the conservation of the natural heritage within their borders and are uniquely qualified to evaluate, and demand withdrawal of, FWS's Proposed Rule. Indeed, in many jurisdictions, the States and Cities hold these wildlife resources in trust for the benefit of their people. Within the States' and Cities' boundaries, there are hundreds of species listed as endangered or threatened under the ESA, as well as millions of acres of Federal public lands, and numerous Federal facilities and infrastructure projects that are subject to the ESA's section 7 consultation requirements. The ESA thus specifically directs FWS to "cooperate to the maximum extent practicable with the States" in implementing the Act

and also gives states a unique seat at the table in ensuring the faithful and fully informed implementation of the Act's species-conservation mandates. 16 U.S.C. § 1535(a). Moreover, States and Cities seeking to protect their natural resources would need to devote significant resources and institutional capacity to make up for FWS's failure to properly implement the purposes of the ESA. And, as the U.S. Supreme Court has recognized, states are entitled to "special solicitude" in seeking to remedy environmental harms within their territories. *See Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 519-22 (2007).

For these reasons, the States and Cities urge FWS to withdraw this misguided, unlawful, and destructive Proposed Rule and instead fulfill its longstanding statutory obligations under the ESA to protect and ensure the recovery of endangered and threatened species and their habitat.

BACKGROUND

I. The Endangered Species Act.

Congress enacted the ESA nearly forty-five years ago in a bipartisan effort "to halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978); *see* 16 U.S.C. § 1531. The ESA accordingly enshrines a national policy of "institutionalized caution" in recognition of the "overriding need to devote whatever effort and resources [are] necessary to avoid further diminution of national and worldwide wildlife resources." *Hill*, 437 U.S. at 177, 194 (internal quotation omitted). "[T]he language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Id.* at 174; *see also id.* at 194. That pervasive goal "is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id*. at 184; *see also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698-99 (1995) (describing broad purposes of Act).

The Act declares that endangered and threatened species of "fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). The fundamental purposes of the ESA are to "provide a means whereby the ecosystems upon which endangered … and threatened species depend may be conserved [and] to provide a program for [their] conservation." *Id*. § 1531(b).

The Act defines "conservation" broadly as "use of all methods and procedures which are necessary to bring any endangered species or threatened species *to the point at which the measures provided pursuant to this chapter are no longer necessary*." *Id*. § 1532(3) (emphasis added); *see Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) ("[T]he ESA was enacted not merely to forestall the extinction of species … but to allow a species to recover to the point where it may be delisted"); *Sierra Club. v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001) ("[T]he objective of the ESA is to enable listed species not merely to survive, but to recover from their endangered or threatened status"). Further, "*every agency of government is committed* to see that those purposes are carried out." *Hill*, 437 U.S. at 184 (quoting 119 Cong. Rec. 42913 (1973)) (emphasis in original); *see also* 16 U.S.C. §§ 1531(c), 1536(a)(1).

As particularly relevant here, section 4 of the ESA, 16 U.S.C. § 1533, prescribes the process for FWS to list a species as "endangered" or "threatened" within the meaning of the statute, and to designate "critical habitat" for each such species. The Act defines "critical habitat" as areas within and outside the geographic area occupied by the species that are "essential for the conservation of the species." *Id.* § 1532(5)(A). With regard to the exclusion of areas from critical habitat designations, section 4(b)(2) of the Act provides that FWS:

> [S]hall designate critical habitat … on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. [FWS] may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id. § 1533(b)(2).

Areas designated as critical habitat are provided with significant protections to ensure that species have the ability to expand their ranges and recover to sustainable population levels so they no longer need to be listed. In particular, section 7 of the ESA, 16 U.S.C. § 1536, requires all Federal agencies to "insure" that any action they propose to authorize, fund, or carry out "is not likely to jeopardize the continued existence" of any endangered or threatened species or "result in the destruction or adverse modification of" any designated critical habitat, *id*. § 1536(a)(2).

If a Federal agency action "may affect" any listed species or such species' critical habitat, the Federal action agency must initiate consultation with FWS, make changes to the action to avoid any such destruction or adverse modification, and implement mitigation measures to minimize any remaining impacts to critical habitat. *See id*. §§ 1536(b)(3), (b)(4), (c)(1). Specifically, if the Federal action agency or FWS determine that the action is "likely to adversely affect" a listed species and/or designated critical habitat, FWS must prepare a biological opinion regarding the effects of the action on the species and/or critical habitat. *Id.* § 1536(b)(3)(A). FWS's biological opinion must determine whether the action is likely to jeopardize the continued existence of any listed species or likely to destroy or adversely modify any designated critical habitat. *Id*.

If FWS finds jeopardy or adverse modification, the biological opinion must include "reasonable and prudent alternatives" to the agency action that "can be taken by the Federal agency or applicant in implementing" the action which would avoid such jeopardy or adverse modification. *Id*. Finally, the biological opinion must include a written statement (referred to as an "incidental take statement") specifying the impacts of any incidental take on the species, any "reasonable and prudent measures that [FWS] considers necessary or appropriate to minimize such impact," and the "terms and conditions" that the action agency must comply with in implementing those measures. *Id*. § 1536(b)(4).

II. The Proposed Rule.

FWS's Proposed Rule would establish a new, unlawful process for excluding areas of critical habitat under section 4(b)(2) of the Act, thereby limiting the reach of section 7's consultation requirement, even though any excluded areas of critical habitat are by definition "essential to the conservation of the species" 85 Fed. Reg. 55,398 (Sept. 8, 2020); *see* 16 U.S.C. § 1532(5)(A) (defining critical habitat).[1] While claiming that this "exclusion analysis" remains discretionary as provided under section 4(b)(2), in fact, the Proposed Rule would impose a new *mandatory obligation* on FWS to undertake such an analysis when a "*proponent of excluding* a particular area … has presented credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion." 85 Fed. Reg. at 55,407 (emphasis added). In conducting such an analysis, FWS would defer to outside "experts" and "sources" with "firsthand information" regarding "nonbiological impacts" that allegedly are "outside the scope of [FWS'] expertise." *Id*. In some cases, FWS may even defer to such outside experts and sources as to *biological* impacts that are expressly within FWS's expertise. If FWS determines that the benefits of excluding a particular area outweigh the benefits of including that area as critical habitat, FWS "*shall* exclude" that area, unless it will result in the extinction of a species. *Id*. (emphasis added).

In addition, FWS explicitly proposes to reverse its 2016 Policy of prioritizing Federal lands for critical habitat designation. *Id*. at 55,402. The 2016 Policy provides that "Federal lands should be prioritized as sources of support in the recovery of listed species," and that FWS should "focus designation of critical habitat on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands." 81 Fed. Reg. at 7,231-32. But under the Proposed Rule, FWS would now specifically consider information supporting the exclusion of Federal lands based on "impacts" such as ESA consulting costs borne by federal agencies and costs borne by applicants to modify a project to avoid habitat impacts. 85 Fed. Reg. at 55,402. And the Proposed Rule further provides that FWS may exclude critical habitat on *non-federal* lands based on ill-defined "community impacts" that purportedly would result from the designation of critical habitat, such as disruption of "planned community development projects" like a school or hospital. *Id*. at 55,403.

FWS claims that the Proposed Rule responds to the U.S. Supreme Court's recent decision in *Weyerhaeuser Co. v U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018), wherein the Court stated that a decision not to exclude a particular area of critical habitat is judicially reviewable under the APA. *Id*. at 371.[2] FWS also claims that the Proposed Rule will "provide greater

[1] The Proposed Rule states that this process would only apply to critical habitat designations made by FWS and not to designations by the National Marine Fisheries Service, which would continue to be governed by the existing regulatory process in 50 C.F.R. § 424.19. 85 Fed. Reg. at 55,398-99.

[2] The draft economic analysis accompanying the Proposed Rule states in section 1.2, "Need for the Proposed Rule," that the Supreme Court "found that the Service's decision not to exclude a particular area from critical habitat for the dusky gopher frog 'did not appropriately consider all of the relevant factors that the statute sets forth to guide the agency in the exercise of its

transparency and certainty for the public and stakeholders," and carries out the current administration's regulatory reform agenda pursuant to Executive Order 13777. 85 Fed. Reg. at 55,398-99.

Finally, FWS states that the Proposed Rule is "likely" subject to a categorical exclusion under section 46.210(i) of the Department of the Interior's NEPA implementing regulations. 85 Fed. Reg. at 55,406. This regulation provides an exemption for "[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case." 43 C.F.R. § 46.210(i). FWS also states, somewhat inconsistently, that it "invite[s] public comment regarding our initial determination under NEPA and we will complete our analysis, in compliance with NEPA, before finalizing this regulation." 85 Fed. Reg. at 55,406.

COMMENTS ON THE PROPOSED RULE

Under the APA, courts will set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). An agency action is arbitrary and capricious where the agency: (i) has relied on factors which Congress has not intended it to consider; (ii) entirely failed to consider an important aspect of the problem; (iii) offered an explanation for its decision that runs counter to the evidence before the agency; or (iv) offered an explanation so implausible that it could not be ascribed to a difference of view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"). In addition, an agency does not have authority to adopt a regulation that is "manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

Where an agency changes its prior approach, it "must display awareness that it is changing position" and "show that there are good reasons for the new policy," including providing "a reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fed. Communications Comm'n v. Fox Television Stations, Inc*. ("*FCC v. Fox*"), 556 U.S. 502, 515-16 (2009). Furthermore, when "its new policy rests upon factual findings that contradict those which underlay its prior policy," an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id*. at 515; *see also American Fuel & Petrochemical Mfrs. v. E.P.A.*, 937 F.3d 559,

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discretion.'" Industrial Economics, Inc., *Economic Analysis of the Proposed Revision of U.S. Fish and Wildlife Service's Regulations Defining the Process for Conducting Section 4(b)(2) Exclusion Analysis in Designating Critical Habitat*, Draft Report, Aug. 24, 2020, at 1-3 (quoting *Weyerhaeuser*) (hereinafter, "Economic Analysis"). The quoted language, however, reflects only the position of Petitioner Weyerhaeuser, not a finding by the Court. *See Weyerhaeuser*, 139 S. Ct. at 371.

577 (D.C. Cir. 2019) (agency "was required to provide a more detailed justification" for rulemaking that abandoned former policy) (internal quotations and citation omitted).

Here, for the reasons explained below, FWS's Proposed Rule is contrary to the plain language and conservation purposes of the ESA, is arbitrary and capricious in violation of the APA, and fails to consider the significant environmental impacts of this action in violation of NEPA.

I. FWS'S PROPOSED ECONOMIC ANALYSIS AND CRITICAL HABITAT EXCLUSION PROCESSES ARE CONTRARY TO THE PLAIN LANGUAGE AND CONSERVATION PURPOSES OF THE ESA.

A. The Proposed Rule's Process for Conducting Economic Impact Analyses Is Contrary to Section 4(b)(2), Section 7, and the Conservation Purposes of the ESA.

As noted above, section 4(b)(2) of the Act provides that FWS "shall designate critical habitat … on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Thus, in all cases critical habitat designations must be based on the best scientific information available. *Id.*; *Center for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 938 (9th Cir. 2006). And only *after* FWS considers the best scientific data available and the economic and national security impacts of critical habitat designation may it *then* opt to analyze whether to exclude any areas from critical habitat as a second step in the process. *See* 16 U.S.C. § 1533(b)(2); *Weyerhaeuser*, 139 S. Ct at 371.

In addition, all critical habitat designations must satisfy the statutory definition and fundamental purpose of critical habitat and the ESA's overarching purposes to conserve endangered and threatened species and their habitat. 16 U.S.C. §§ 1531(b), (c), 1532(3), 1536(a)(1). The statutory definition of critical habitat in section 3(5)(A) specifically requires that critical habitat be sufficient to provide for the "conservation" (*i.e.*, recovery) of listed species. *Id*. § 1532(5)(A). Courts accordingly have interpreted the ESA's definition of "critical habitat" broadly, consistent with the ESA's plain text and the basic purposes of critical habitat designation, to provide for listed species' recovery. As the Fifth Circuit has explained:

> The ESA defines "critical habitat" as areas which are "essential to the conservation" of listed species. "Conservation" is a much broader concept than mere survival. The ESA's definition of "conservation" speaks to the recovery of a threatened or endangered species.

Sierra Club, 245 F.3d at 441-42 (citing 16 U.S.C. § 1532(5)(A)) (emphasis added); *see also Gifford Pinchot Task Force*, 378 F.3d at 1070 (noting the "purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery").

The Proposed Rule's process for assessing the economic impacts of a proposed critical habitat designation runs afoul of these court-confirmed statutory requirements on both procedural and substantive fronts. First, as a procedural matter, the Proposed Rule unlawfully conflates the initial economic impact analysis with the subsequent, discretionary critical habitat exclusion analysis, and appears to unlawfully presume that such an exclusion analysis will occur in every case. In particular, proposed section 17.90(a) provides that:

> At the time of publication of a proposed rule to designate critical habitat, the Secretary will make available for public comment the draft economic analysis of the designation … Based on the best information available regarding economic, national security and other relevant impacts, *the proposed designation of critical habitat will identify the areas that the Secretary has reason to consider for exclusion* and explain why. *The identifications of areas in the proposed rule that the Secretary has reason to consider for exclusion* is neither binding nor exhaustive.

85 Fed. Reg. at 55,406 (emphasis added). In short, the Proposed Rule compresses the two-step process outlined in the statute into one single step that places an undue emphasis on the exclusion analysis (and makes such analysis mandatory in nearly every case, also contrary to the statute, as discussed further in Part I.B below).

In contrast to the Proposed Rule, the statute clearly provides that the exclusion analysis is both secondary to the economic impact analysis, as well as discretionary. 16 U.S.C. § 1533(b)(2). Indeed, in *Weyerhaeuser*, 139 S. Ct. 361, the U.S. Supreme Court recognized that "Section 4(b)(2) requires the Secretary to consider the economic impact and relative benefits *before* deciding whether to exclude an area from critical habitat or to proceed with designation." *Id*. at 371 (emphasis added); *accord Building Industry Assn. of the Bay Area v. U.S. Dept. of Commerce*, 792 F.3d 1027, 1033 (9th Cir. 2015) ("[W]e read the statute to provide that, *after* the agency considers economic impact, the entire exclusionary process is discretionary") (emphasis added). And in *Building Industry Association*, the Ninth Circuit expressly rejected the argument that the relevant Service (in that case, the National Marine Fisheries Service) is required "to assess whether the economic benefits of excluding an area from designation outweigh the conservation benefits of including the area" in the first step of the analysis. *Id*. at 1032-33. Rather, that analysis is limited to situations in which the Service has first considered the best available science and economic and national security impacts, and then exercises its discretion to undertake such an analysis. *Id*. at 1033. By integrating the exclusion analysis into the first step of the process, FWS disregards the ESA's plain text and effectively places a heavy thumb on the scale of exclusion.

Second, as a substantive matter, the Proposed Rule sets forth an unlawfully broad laundry list of new "economic impacts" and "other relevant impacts" that FWS must now consider in the economic impact analysis. These include, but are not limited to, "opportunity costs arising from the critical habitat designation (*such as those anticipated from reasonable and prudent alternatives* that may be identified through a section 7 consultation)," and (2) "impacts to …

federal lands … ." 85 Fed. Reg. at 55,406-07 (proposed 50 C.F.R. §§ 17.90(a), (d)(1)) (emphases added).

With regard to Federal lands, the Proposed Rule states that it is "reversing the 2016 Policy's prior position that we generally do not exclude Federal lands from designations of critical habitat." 85 Fed. Reg. at 55,402. Notwithstanding its statutory duties to utilize all of its authorities to conserve listed species and their habitat, FWS claims that "there is nothing in the Act that states that Federal lands shall be exempted" from an exclusion analysis "simply because land is managed by the Federal government." *Id*. The Proposed Rule further states that, "[w]ith regard to consideration of an exclusion based on economic or other relevant considerations," in contrast to FWS's 2016 Policy, it "will consider the avoidance of the administrative and transactional costs as a benefit of exclusion of a particular area of Federal land." *Id.* These avoided "administrative and transactional costs" include the costs of undertaking the section 7 consultation process as well as the costs to Federal agencies, permittees and other affected parties of undertaking "any project modifications" or conservation measures "necessary to avoid destruction or adverse modification of critical habitat." *Id*.

With regard to areas on non-Federal lands, the Proposed Rule states that:

> In some circumstances, the Secretary may exclude particular areas based on specific 'community impacts' as a result of the designation of critical habitat. FWS wants to ensure, through weighing the benefits of exclusion against the benefits of inclusion, that the designation of critical habitat in areas where community development projects are expected or planned does not unnecessarily disrupt those projects. ... In this instance, the benefits of exclusion may include avoidance of additional permitting requirements, time delays, or additional cost requirements to the community development project … due to the designation of critical habitat.

85 Fed. Reg. at 55,403.

This unnecessarily expansive and unprecedented approach to assessing the economic impacts of critical habitat designation is contrary to the conservation purposes of critical habitat and the ESA in general, as well as FWS's and other federal agencies' overarching duty to conserve listed species and provide sufficient habitat to enable their recovery. 16 U.S.C. §§ 1531(b), (c)(1), 1532(3), 1536(a)(1). In particular, the alleged "opportunity costs" of designating an area as critical habitat, as well as the economic benefits of "avoidance of administrative and transactional costs" or "permitting requirements" if an area is excluded from critical habitat, are utterly routine regulatory costs that will exist for most areas of proposed critical habitat.

These costs are especially likely for critical habitat areas designated on Federal lands. Indeed, designated critical habitat *only* has a regulatory effect on proposed Federal agency actions, including the issuance of Federal permits and licenses. *Id*. § 1536(a)(2); *see* 81 Fed. Reg. at 7,231 ("Under the Act, the only direct consequence of critical habitat designation is to require Federal agencies to ensure, through section 7 consultation, that any action they fund, authorize, or carry out does not destroy or adversely modify designated critical habitat").

Section 7(a)(2) of the ESA requires each Federal agency to ensure that any proposed Federal agency action will not destroy or adversely modify any designated critical habitat, and to consult with FWS if any such action "may affect" such critical habitat. *Id.*; *see Karuk Tribe of Calif. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012). Thus, this consultation requirement inherently is triggered more often for actions undertaken on Federal lands, and less often for Federal permits and licenses issued for non-Federal actions on other lands, such as permits for dredging and filling waters of the United States pursuant to section 404 of the Clean Water Act. 33 U.S.C. § 1344(a).

Under FWS's new proposed approach to the economic impact analysis, many more areas—including, apparently, Federal lands where "non-Federal entities have a permit, lease, contract or other authorization for use" on those lands—would be deemed too costly to include in a critical habitat designation in the first instance. 85 Fed. Reg. at 55,402-03. In fact, it appears that, under FWS's approach, all critical habitat except the remaining habitat necessary to prevent *extinction* could potentially be excluded. *See* 85 Fed. Reg. at 55,407 (proposed 50 C.F.R. § 17.90(e)). That result would not only reduce the number, type and extent of critical habitat designations, but also necessarily would reduce the number, type and scope of section 7 consultations that would otherwise occur as a result of those avoided designations.

These avoided or reduced consultations, in turn, will result in many more Federal projects going forward without FWS biological review, and without development of project alternatives to avoid the destruction and adverse modification of areas essential to species conservation or the implementation of measures to mitigate any remaining impacts to such habitat. This result is directly contrary to FWS's and Federal action agencies' duties under section 7, the fundamental purposes of critical habitat designation, and the overriding conservation purposes of the ESA. 16 U.S.C. §§ 1531(b), (c)(1), 1532(3), 1532(5), 1536(a)(1), (a)(2). In this way, the Proposed Rule undercuts one of the Act's most fundamental tools for achieving its overarching goal of recovering endangered and threatened species—the designation and protection of species' critical habitat.

Finally, FWS states that its proposed economic analysis will only consider the impacts "attributable to the incremental effect of" the critical habitat designation, and not the economic effects of the initial listing, which, FWS claims, is consistent with its prior "baseline approach" previously upheld by the courts. 85 Fed. Reg. at 55,401; *see also id*. at 55,403. But the Proposed Rule's extremely broad view of the types and extent of economic impacts that FWS now will consider could be applied in a contrary manner to section 4(b) by allowing the consideration of a wide range of economic impacts that also are attributable to, and co-extensive with, the listing of the species in the first instance. *See* 16 U.S.C. § 1533(b)(1)(A); *Arizona Cattle Growers Ass'n v. Salazar*, 606 F.3d 1160, 1172-74 (9th Cir. 2010) ("[T]he economic analysis of the critical habitat designation … is not intended to incorporate the burdens imposed by listing the species" and the economic burdens of such designation can "be subsumed by the burdens imposed by listing the species."); *Homebuilders Assn. of Northern Calif. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 992 (9th Cir. 2010) ("[T]he plain language of the ESA directs the agency to consider only those impacts caused by the critical habitat designation itself"); *but see*

New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1283-85 (10th Cir. 2001) (disapproving of the "baseline" approach to economic impact analysis of proposed critical habitat designations).

B. The Proposed Rule Unlawfully Makes a Critical Habitat Exclusion Analysis Mandatory Rather Than Discretionary, and Forfeits the Agency's Statutory Discretion as to When the Benefits of Exclusion Outweigh the Benefits of Inclusion, Contrary to Section 4(b)(2).

The Proposed Rule also conflicts with section 4(b)(2)'s plain language by making a critical habitat exclusion analysis mandatory rather than discretionary in any circumstance where the "proponent of excluding a particular area … has presented credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area." 85 Fed. Reg. at 55,406-07 (proposed 50 C.F.R. § 17.90(c)(2)(i)).[3] As the Proposed Rule explains: "we propose to *always enter* into a discretionary exclusion analysis to compare the benefits of inclusion and the benefits of exclusion of particular areas for which credible information supporting exclusion is presented." *Id*. at 55,401 (emphasis added); *see also id*. at 55,400 (FWS "will conduct" an exclusion analysis "when a proponent of excluding the area has presented credible information in support of the request"). Proposed section 17.90(e) then goes on to provide that FWS "*shall* exclude" an area if it "determines that the benefits of excluding a particular area from critical habitat outweigh the benefits of specifying that area as part of critical habitat." *Id*. at 55,407 (emphasis added); *see also id*. at 55,400 ("FWS will exclude areas whenever it determines that the benefits of exclusion outweigh the benefits of inclusion").

The proposed language in sections 17.90(c)(2) and (e) contradicts section 4(b)(2) of the Act, which clearly states that FWS "*may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat *will* result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2) (emphasis added). Courts have uniformly held that an exclusion analysis is discretionary. For example, in *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Ninth Circuit held that section 4(b)(2) "cannot be read to say that the FWS is *ever* obligated to exclude habitat that it has found to be essential. Such a decision is *always* discretionary." *Id*. at 990 (emphasis added). And in *Building Industry Association*, 792 F.3d 1027, the Ninth Circuit again held that "we read [section 4(b)(2)] to provide that, after the agency considers the economic impact, the entire exclusionary process is discretionary." *Id*. at

[3] The Proposed Rule confusingly states that "'credible information' refers to information that constitutes a reasonably reliable indication regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for a particular area." 85 Fed. Reg. at 55,401. Similar to the costs on Federal lands, this definition is so broad that it could conceivably apply to all but the flimsiest of information submissions and to nearly every proposed critical habitat designation, rendering what was a discretionary analysis mandatory under the Proposed Rule.

1033; *see also id*. at 1035 (section (4)(b)(2)'s "second sentence, with the use of the word 'may,' establishes a discretionary process by which the Secretary may exclude areas from designation, but does not set standards for when areas must be excluded from designation"); *Arizona Cattle Growers Assn.*, 606 F.3d at 1173 ("[T]he decision to exclude an area from critical habitat for economic reasons is discretionary").[4]

Because, in certain circumstances, proposed section 17.90(c)(2) makes a critical habitat exclusion analysis a mandatory procedure, and proposed section 17.90(e) substantively mandates that FWS make an exclusionary finding, whereas under ESA section 4(b)(2) an exclusion analysis and finding is *always* discretionary, the proposed regulations are "manifestly contrary to the statute" and therefore must be rejected. *See Chevron*, 467 U.S. at 844.

C. The Proposed Rule Unlawfully Requires FWS to Defer to Outside Experts.

Proposed section 17.90(d) states that, when FWS conducts an exclusion analysis under section 17.90(c), it "shall weigh the benefits of including or excluding particular areas in the designation … according to the following principles." 85 Fed. Reg. at 55,407. These principles include requiring FWS to defer to outside "experts in," or those with "firsthand knowledge of," areas that purportedly are "outside of the scope of the [FWS'] expertise," unless FWS has specific evidence rebutting that information. *Id*. (proposed 50 C.F.R. § 17.90(d)(1)(i)-(iv)).

The Proposed Rule then lists several impacts that are deemed to be "outside the scope" of FWS's expertise, including "non-biological impacts" identified by any "permittee, lessee, or contractor applicant for a permit, lease, or contract on Federal lands." *Id*. Although the language of the Proposed Rule itself is not entirely clear on this point, the preamble to the Proposed Rule states that evidence concerning impacts deemed to be "outside the scope" of FWS's expertise will be entitled to controlling weight unless FWS has specific information to the contrary. 85 Fed. Reg. at 55,401. The preamble explains that "we propose to assign weights of benefits of inclusion and exclusion based on who has the relevant expertise (e.g., a commenter on the proposed designation of critical habitat or FWS)." *Id*. With respect to benefits that purportedly "are outside of FWS's expertise," FWS "would assign weights to benefits consistent with expert or firsthand information, unless the [FWS] has knowledge or material evidence that rebuts that information." *Id.*

[4] It is true that the Ninth Circuit's holdings in *Bear Valley* and *Building Industry Association* that the Services' ultimate decisions not to exclude an area from critical habitat are judicially unreviewable as "committed to agency discretion by law" under the APA were reversed by the U.S. Supreme Court's decision in *Weyerhaeuser*, 139 S. Ct. at 371; *cf. Bear Valley Mut. Water Co.*, 790 F.3d 990; *Building Industry Assn.*, 792 F.3d at 1034-35. But the question as to whether FWS's *exercise* of its discretion, once it determines to act, is judicially reviewable, is an entirely different question from whether the statute provides for a mandatory or discretionary agency *duty* to exercise that discretion.

While this deference would mostly occur with regard to purported outside expertise or "firsthand knowledge" regarding "non-biological impacts," the Proposed Rule also allows that "many sources outside FWS also have information and expertise regarding biological impacts," and that FWS also would consider that information and expertise in weighing the benefits of inclusion or exclusion of particular areas. *Id*. at 55,402. As to these biological and other impacts that are "within the scope" of FWS's expertise, the Proposed Rule vaguely states that FWS will "assign weight" to the benefits of inclusion or exclusion "in light of" its expertise. *Id*. at 55,407 (proposed 50 C.F.R. § 17.90(d)(2).[5]

These provisions are unlawful and misguided for two reasons. First, they contradict the ESA's requirement that FWS base critical habitat determinations on its own independent professional judgment using the best available science. 16 U.S.C. § 1533(b)(2); *Center for Biological Diversity,* 450 F.3d at 938. Second, and as a related point, the proposal effectively delegates FWS's statutory duty, authority, and discretion to undertake the economic and critical habitat exclusion analyses to third parties who do not have the requisite biological expertise and who are not statutorily authorized to perform these duties. 16 U.S.C. § 1533(b)(2). FWS is the expert biological agency charged with making critical habitat determinations and weighing both biological considerations and economic impacts, not federal permit applicants. *See Karuk Tribe*, 681 F.3d at 1020; *Center for Biological Diversity v. U.S. Envtl. Protection Agency*, 847 F.3d 1075, 1084 (9th Cir. 2017) (both stating that the Services are the expert biological agencies charged with determining impacts to species and habitat under the ESA). The Proposed Rule thus unlawfully delegates FWS's statutory duty and expert judgment to third parties.

D. The Proposed Rule Conflicts with Established Case Law Regarding Exclusions of Conservation Plan Areas from Critical Habitat.

Finally, the Proposed Rule would codify a modified and weakened version of the 2016 Policy's criteria governing potential critical habitat exclusion for lands subject to a habitat conservation plan or other conservation agreement or partnership authorized by an incidental take permit under section 10 of the Act. 85 Fed. Reg. at 55,407 (proposed 50 C.F.R. § 17.90(d)(3)). Similar to the 2016 Policy, FWS states that it "anticipate[s] consistently excluding such areas from a designation of critical habitat if incidental take caused by the activities in those areas is covered by the permit under section 10 of the Act." *Id*. at 55,403. The Proposed Rule also would largely codify the 2016 Policy's general approach to evaluating exclusions of lands covered by conservation plans, agreements, and partnerships that are *not* authorized under section 10 of the ESA. *Id*. at 55,407 (proposed 50 C.F.R. § 17.90(d)(4)).

But, contrary to FWS's statements in the Proposed Rule, whether a "take" of individual species members pursuant to section 9 will be authorized in a section 10 conservation plan or agreement area is *not* the same standard as whether a proposed Federal agency action may destroy or adversely modify designated critical habitat under section 7 of the statute. *Compare* 16 U.S.C. §§ 1536(a)(2) and (b)(4), *with id.* §§ 1538(a)(1)(B), 1539(a)(1)(B); *see also Karuk*

[5] The preamble to Proposed Rule lists the areas that are deemed to be "within the scope" of FWS' FWS's expertise at 85 Fed. Reg. at 55,403.

Tribe, 681 F.3d at 1028 ("Whether mining activities effectuate a 'taking' under Section 9 of the ESA is a distinct inquiry from whether they 'may affect' a species or its critical habitat under Section 7"). Moreover, the Proposed Rule fails to recognize that plant species *are* covered by section 7, but are not subject to the take prohibition under section 9. *Compare* 16 U.S.C. § 1536(a)(2) *with id.* § 1538(a)(2).

In addition, to the extent that the Proposed Rule authorizes FWS to exclude lands subject to a conservation plan or agreement from critical habitat based simply on the fact that the plan covers the same species and habitat, it is inconsistent with applicable case law which demonstrates that while such plans and agreements are important for species conservation, they are not a substitute for critical habitat designation. For example, in *Natural Resources Defense Council v. United States Department of the Interior*, 113 F.3d 1121, 1126-27 (9th Cir. 1997), the Ninth Circuit rejected FWS's argument that the agency did not need to designate critical habitat for the coastal California gnatcatcher because such lands were already covered by a Natural Community Conservation Plan ("NCCP"), which FWS had approved through a special take rule under section 4(d) the ESA. The Court held that "the NCCP alternative cannot be viewed as a functional substitute for critical habitat designation" because such designation "triggers mandatory consultation requirements for Federal agency actions involving critical habitat." *Id.* at 1127. "The NCCP alternative, in contrast, is a purely voluntary program that applies only to non-Federal land-use activities." *Id.*

In sum, the Proposed Rule flouts the plain language and conservation purpose of the ESA, as well as longstanding judicial precedents, and must be withdrawn.

II. FWS HAS FAILED TO JUSTIFY THE PROPOSED RULE UNDER THE APA.

A. The Proposed Rule Is Not Compelled or Otherwise Justified by Either the Supreme Court's Opinion in *Weyerhaeuser* or the Deregulatory Principles of Executive Order 13777.

FWS claims that the Proposed Rule responds to the Supreme Court's decision in *Weyerhaeuser* and Executive Order 13777, but neither ruling directed the agency to take the approach it seeks to establish here. Since FWS offers no additional or alternative justification for the Proposed Rule, it therefore fails to provide any reasoned basis in violation of the APA.

FWS first claims that the Proposed Rule is required by the Supreme Court's opinion in *Weyerhaeuser*, 139 S. Ct. 361. *See* 85 Fed. Reg. at 55,399. But the Court's holding in that case narrowly addressed whether FWS's decision not to exclude an area under 4(b)(2) was subject to judicial review. *Id*. at 370-72. It offered no commentary on the sufficiency of FWS's existing process for making such determinations. *Id*.

Weyerhaeuser involved a challenge by private landowners to FWS's decision not to exclude a particular area from critical habitat designation for the dusky gopher frog. Consistent with the Ninth Circuit's approach and the Department of the Interior's prior position in Solicitor Opinion M-37016 (2008), both the district court and the Fifth Circuit had held that such a determination was not subject to judicial review because section 4(b)(2) left such decisions

solely to the agency's discretion. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744 (E.D. La. 2014), *aff'd*, 827 F.3d 452 (5th Cir. 2016); *see also Bear Valley*, 790 F.3d at 990; *Building Industry Assn.*, 792 F.3d at 1034-35.

In an opinion that did not touch on the merits of FWS's exclusion analysis in that case, the Supreme Court reversed. The Court started with the basic presumption that agency actions are subject to judicial review except where a statute specifically precludes review or where the action "is committed to agency discretion by law." *Weyerhaeuser*, 139 S. Ct. at 370 (*quoting* 5 U.S.C. § 701(a)(2)). But as the Court noted, the limitation on judicial review of actions committed to agency discretion by law has always been narrowly limited to "those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id*. (*quoting Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). The Court then turned to the ESA, and found that section 4(b)(2) offered sufficient guidance to allow a reviewing court to evaluate an exclusion decision under the APA's abuse of discretion standard of review. *Id*. at 371-72.

But the Court went no further and did not opine on the virtues of FWS's longstanding approach to conducting 4(b)(2) analyses or the merits of its specific analysis of the parcel at issue in that case. As such, *Weyerhaeuser* at most stands for the proposition that a section 4(b)(2) analysis is reviewable under an abuse of discretion standard. The decision therefore does not justify FWS's proposed significant departures from its past practice and the 2016 Policy, as discussed further below, or the sheer abdication of agency authority envisioned by the Proposed Rule.

Nor can FWS justify the proposed rule by reference to Executive Order 13777. *See* 85 Fed. Reg. at 55,399 ("This proposed rule carries out Executive Order 13777… and is part of a larger effort by DOI to identify regulations for repeal, replacement, or modification"). Executive Order 13777 establishes a broadly deregulatory agenda and instructs agencies to establish regulatory reform task forces to identify areas for targeted deregulation. Executive Order 13777, 82 Fed. Reg. 12,285 (Mar. 1, 2017). But it does not compel specific actions and cannot provide any independent justification for departing from prior agency practice in implementing specific statutory mandates, particularly where the proposed new agency approach is directly contrary to the requirements of the governing statute, as discussed in Part I above.

B. **FWS Fails to Explain or Justify the Proposed Rule as Required by the APA**.

1. **FWS fails to justify the abdication of its statutory authority in favor of deferring to outside information provided by third-party proponents (but not opponents) of critical habitat exclusions.**

As discussed in Part I.C above, in section 17.90(d)(1) of the Proposed Rule, FWS proposes to give unwarranted weight to non-biological information provided by outside "experts" or "sources" with "firsthand knowledge" when conducting critical habitat exclusion analyses. 85 Fed. Reg. at 55,401-02. Moreover, the preamble to the Proposed Rule proposes to give undue weight to outside *biological* "information or expertise in the weighing of benefits of

inclusion or exclusion of particular areas," which is expressly within FWS's area of expertise. *Id*. at 55,402.

This new proposal, which is a dramatic change in approach from the 2016 Policy, is neither justified nor explained. While the Proposed Rule attempts to distinguish between areas within and outside of FWS's expertise, it provides no reasoned explanation for why FWS is not itself suited to evaluate economic or other non-biological or biological information submitted by third parties, particularly when it is charged by statute with undertaking an economic analysis and has been doing so since at least 1978. *See* Pub L. 95–632, 92 Stat. 3751 (Nov. 10, 1978) (amending ESA to add language requiring FWS to consider economic impacts in critical habitat designations). In fact, FWS operates a Branch of Economics which has several decades of experience assisting the agency with its ESA obligations, including critical habitat designations.[6]

Providing such unquestioned weight to information presented by unspecified and undefined outside "experts" and "sources" with claimed "firsthand knowledge" is inconsistent with a Federal agency's fundamental obligation under basic principles of administrative law to exercise its own independent judgment based on the law and the record before it. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962) (decision must reflect basis on which agency "exercised its expert discretion" within bounds set by Congress).

Moreover, the Proposed Rule's deferential approach to evaluating outside "expertise" contains significant ambiguities and raises a number of unanswered questions regarding its implementation. In particular, FWS's attempt to limit the degree of deference provided to such third-party information by requiring that a proponent for exclusion present "credible information" supporting its position suffers from its own set of flaws. 85 Fed. Reg. at 55,401. This "credible information" threshold is both an inherently amorphous term, notwithstanding FWS's proffered definition, and is an extremely low bar to meet for triggering such a high level of deference to third party information. On its face, the definition is plainly and unfairly biased in favor of evidence supporting the exclusion of areas from critical habitat: constraining its consideration of outside "credible information" to only that information which supports "a benefit of exclusion," but not a benefit of inclusion, unlawfully and arbitrarily tips the scales *against* inclusion of such habitat. *Id.* (emphasis added). For example, under this standard, FWS could ignore biological information supporting critical habitat designation, including information submitted by expert state agencies, but weigh more heavily information supporting exclusion submitted by a project proponent with no such expertise. This is arbitrary and non-sensical.

Second, FWS's "credible evidence" threshold is fatally ambiguous and subjective. FWS has not explained what will rise to the level of a "meaningful economic or other relevant impact" or what will constitute a "reasonably reliable indication" that one exists. *Id*. Without any meaningful regulatory definition, the Proposed Rule's "credible information" standard would appear to mean nothing more than information that FWS believes may be trustworthy. *See*

[6] *See* FWS, Branch of Economics (ECN) (last updated May 1, 2020), https://www.fws.gov/economics/index.asp.

Black's Law Dictionary (11th ed. 2019) (defining "credible evidence" as "evidence that is worthy of belief; trustworthy evidence").

As such, FWS has failed to provide a reasonable and cogent justification for deferring to third party information, in violation of the APA.

2. FWS fails to justify the Proposed Rule's other significant departures from the 2016 Policy.

FWS further fails to explain and justify several other significant differences between the Proposed Rule and its 2016 Policy, as required by the APA. *FCC v. Fox*, 556 U.S. at 515-16.

First, the Proposed Rule appears to make mandatory what, under the 2016 Policy (and the ESA itself, as discussed in Part I.B above), has always been discretionary. Specifically, section 17.90(c)(2) of the Proposed Rule states that the "Secretary *will conduct* an exclusion analysis" under specified circumstances. 85 Fed. Reg. at 55,406-07. Further, section 17.90(e) states that critical habitat *shall* be excluded if FWS finds that the benefits of exclusion outweigh the benefits of inclusion. *Id.* at 55,407. In contrast, the 2016 Policy states that, "[t]he decision to exclude any particular area from a designation of critical habitat is *always* discretionary, as the Act states that the Secretaries 'may' exclude any area. *In no circumstances* is an exclusion of any particular area required by the Act." 81 Fed. Reg. at 7,247 (emphasis added); *see also id*. at 7,228-29, 7,233. And, as discussed above, it is particularly troubling that FWS has created an apparent mandate to conduct an exclusion analysis based on a vague concept of "credible information" submitted by anyone who is a "proponent" of exclusion (but not a "proponent" of *inclusion*)—a term that is also vague, undefined, and unsupported. Mandating exclusion under the circumstances set forth in the Proposed Rule is both an unexplained and unjustified change from the 2016 Policy, and therefore arbitrary and capricious.

Second, FWS has failed to provide a reasoned explanation for directly contradicting its previous approach to evaluating Federal lands under the ESA's discretionary section 4(b)(2) exclusion analysis. As discussed, the Proposed Rule specifically admits that it is "reversing the 2016 Policy's prior position that we generally do not exclude Federal lands from designations of critical habitat," and will now consider all Federal lands eligible for exclusion based on the increased transactional, permitting, project mitigation, and other costs imposed by the section 7 consultation process on Federal lands. 85 Fed. Reg. at 55,402.

The 2016 Policy came to precisely the opposite conclusion, however, explicitly rejecting the prospect that Federal lands could be excluded from critical habitat designations on a large scale. 81 Fed. Reg. at 7,231. The 2016 Policy stated that the benefits of excluding non-Federal lands "do not generally arise with respect to Federal lands, because of the independent obligations of Federal agencies under section 7 of the Act," and that, conversely, "the benefits of including Federal lands in a designation are greater than non-Federal lands because there is a Federal nexus for projects on Federal lands." *Id*.; *see also id*. at 7,238, 7,248. Furthermore, the 2016 Policy states that "Federal lands should be prioritized as sources of support in the recovery of listed species," and that to the extent possible, FWS "will focus designation of critical habitat

on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands." *Id*. at 7,231-32. FWS has not even attempted to justify its 180-degree course reversal.

Finally, under section 17.90(d)(4) of the Proposed Rule, in determining whether to exclude areas covered by conservation plans or agreements, FWS again proposes to consider the "degree to which the record of the plan, or information provided by *proponents* of an exclusion, supports a conclusion [that the area should be excluded]." 85 Fed. Reg. at 55,407 (emphasis added). The phrase "or information provided by proponents of an exclusion" is new, and is neither discussed nor justified. Under the 2016 Policy, FWS relied on the entire record of the conservation plan or agreement as the basis for its exclusion determination. 81 Fed. Reg. at 7,229, 7,247. The new language improperly provides an opportunity for proponents of an exclusion—but not proponents of an inclusion—to provide relevant information to inform critical habitat designations. This approach unjustifiably and impermissibly places the thumb on the scale in support of critical habitat exclusions. FWS did not and cannot provide any reasoned basis for that change.

Furthermore, in *Bear Valley*, the Ninth Circuit held that FWS properly designated critical habitat that was also included in the San Diego Multi-Species Habitat Conservation Plan. The Court upheld FWS's finding that "the partnership benefits of exclusion do not outweigh the regulatory and educational benefits afforded as a consequence of designating critical habitat in this area." 790 F.3d at 992 (internal quotations and ellipses omitted). Yet FWS has now inexplicably reversed its position, stating that "the unhindered, continued ability to maintain existing partnerships, as well as the opportunity to seek new partnerships with potential plan participants," generally outweighs the benefits of designating areas subject to conservation plans as critical habitat. 85 Fed. Reg. at 55,404

Consequently, the proposed changes with regard to areas covered by conservation plans or agreements, like the other proposed changes from the 2016 Policy, are arbitrary and capricious under the APA, in addition to being directly at odds with the statutory purpose of critical habitat designation, and the ESA as a whole, to conserve species and their habitat.

III. FWS CANNOT CATEGORICALLY EXCLUDE THE PROPOSED RULE FROM ENVIRONMENTAL REVIEW UNDER NEPA.

A. Statutory Background.

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a).[7] Congress enacted NEPA in 1969 to "establish a national policy for the environment

[7] On July 16, 2020, the Council on Environmental Quality ("CEQ") finalized an update to its 1978 regulations implementing NEPA, which took effect on September 14, 2020. 85 Fed. Reg. 43,304 (July 16, 2020). According to this rule, for NEPA reviews that have already begun "before the final rule's effective date, agencies may choose whether to apply the revised regulations or proceed under the 1978 regulations and their existing agency NEPA procedures. Agencies should clearly indicate to interested and affected parties which procedures it is applying for each proposed action." *Id*. at 43,340. Here, FWS does not indicate which

... and to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4321. NEPA has two fundamental purposes: (1) to guarantee that agencies take a "hard look" at the consequences of their actions before the actions occur by ensuring that "the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts;" and (2) to ensure that "the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989).

To achieve these purposes, NEPA requires the preparation of a detailed environmental impact statement ("EIS") for any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA's implementing regulations broadly define such actions to include "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18. In taking a "hard look," NEPA requires Federal agencies to consider the direct, indirect, and cumulative impacts of their proposed actions. *Diné Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 837 (10th Cir. 2019); 40 C.F.R. §§ 1508.7, 1508.8(a)–(b).

Only in "certain narrow instances" is an agency excused from preparing a preliminary environmental assessment or an EIS by invoking a categorical exclusion. *See Coal. of Concerned Citizens to Make Art Smart v. Fed. Transit Admin.*, 843 F.3d 886, 902 (10th Cir. 2016) (citing 40 C.F.R. § 1508.4). Agencies may invoke a categorical exclusion only for "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of [NEPA] regulations." 40 C.F.R. § 1508.4; *see also id.* § 1507.3(b)(2)(ii). When adopting such procedures, an agency "shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect," *id.* § 1508.4, in which case an environmental assessment or EIS is required.

B. The Proposed Rule Does Not Qualify for a Categorical Exclusion from NEPA.

In its Proposed Rule, FWS states that it "anticipate[s]" that the categorical exclusion in 43 C.F.R. § 46.210(i) "applies to the proposed regulation changes." 85 Fed. Reg. at 55,406. As noted above, that categorical exclusion only covers "[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature." 43 C.F.R. § 46.210(i). At the same time, FWS states that it "invite[s] public comment regarding our initial determination under NEPA," and "will complete [its] analysis, in compliance with NEPA, before finalizing this regulation." 85 Fed. Reg. at 55,406.

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procedures it is applying, but cites only to regulatory language that follows the requirements of the 1978 regulations. *See* 85 Fed. Reg. at 55,406. Consequently, the 1978 regulations are cited here.

The suggestion that the Proposed Rule is subject to a categorical exclusion is contrary to the requirements of NEPA and its implementing regulations. In particular, FWS's new proposed process for excluding areas from critical habitat designations is not a regulation "of an administrative, financial, legal, technical, or procedural nature."[8] Instead, this substantive proposal would significantly reduce the amount of critical habitat that will be protected for endangered and threatened species. It therefore indisputably qualifies as a "major federal action significantly affecting the quality of the … environment." 42 U.S.C. § 4332(2)(C).

Among the factors an agency must consider in determining whether an action may significantly affect the environment, thus warranting the preparation of an EIS, is "[t]he degree to which the action may adversely affect an endangered or threatened species or its [critical] habitat" under the ESA. 40 C.F.R. § 1508.27(b)(9). And, as the Ninth Circuit has stated, the presence of just "one of these factors may be sufficient to require the preparation of an EIS in appropriate circumstances." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005). And even if the Proposed Rule could properly be categorized as an administrative or technical change (which it cannot), "extraordinary circumstances," including significant impacts on listed species and critical habitat and violations of the ESA, preclude the application of a categorical exclusion from NEPA in this case. *See* 43 C.F.R. § 46.215(h)-(i).

As discussed above, the Proposed Rule will have significant, adverse environmental impacts on endangered and threatened species and their habitat in several ways. In particular, the Proposed Rule's new process for excluding areas of critical habitat will severely restrict FWS's discretion to recover imperiled species as mandated by the ESA by, *inter alia*: (1) requiring the agency to defer to outside sources of "nonbiological" information, and (2) mandating that it exclude areas if it finds that the benefits of exclusion outweigh the benefits of designation, thereby reducing the amount of critical habitat that will be protected under the Act.

As the Economic Analysis for the Proposed Rule acknowledges:

> *The proposed rule is likely to result in additional areas being excluded from future critical habitat designations*. This is due to 1) the additional considerations regarding community impacts and non-Federal activities on Federal lands; 2) the clarification for stakeholders regarding what constitutes "credible information" that will trigger a 4(b)(2) exclusion analysis; and 3) the provision that the Service will weight information in impacts based on who has the relevant expertise.

Economic Analysis at ES-6, 4-14 (emphasis added). In fact, the Economic Analysis then goes on to consider both a 5 percent and a 20 percent "reduction in costs of critical habitat rules each year," *id*. at ES-7, 4-14, and even acknowledges a reduction in conservation and recovery benefits to listed species. *See id*. at 2-4 – 2-5 ("[I]f areas are excluded from critical habitat, there may be some reduction in biological benefit of some critical habitat rules (e.g., reduced contribution to conservation and recovery of the species)"); 4-7 ("If additional exclusions lead to reductions in the geographic scope of critical habitat, then the additional costs associated with

[8] Indeed, the Office of Information and Regulatory Affirms determined that the Proposed Rule is a "significant regulatory action" under Executive Order 12866. *See* 85 Fed. Reg. at 55,404.

considering adverse modification of critical habitat in section 7 consultations in excluded areas would not be incurred"); 4-12 ("[A]ny areas excluded from critical habitat due to the proposed rule may therefore reduce the biological benefit of the critical habitat to the species"); *id*. at 4-15 ("[F]or exclusions made due to the magnitude of impacts (e.g., economic or community impacts) being weighted more than the biological benefits of the particular area, there may be some reduction in biological benefits to the species").

The reduction in areas designated as critical habitat in turn will further reduce protections for endangered and threatened species and their habitat by reducing the number, type, and scope of section 7 consultations for Federal projects and activities that may destroy or adversely modify critical habitat, and by reducing or limiting the reasonable and prudent alternatives and measures that would be imposed on such projects and activities through the section 7 consultation process. *See* Economic Analysis at 2-5 ("[A]bsent critical habitat designation, the compliance requirements associated with the adverse modification standard of section 7 of the ESA would no longer be relevant to the area"). Because of these significant environmental impacts on imperiled species and their habitat, the Proposed Rule does not qualify for a categorical exclusion from NEPA.

Finally, NEPA requires that an agency consider the full scope of activities encompassed by its proposed action, as well as any connected, cumulative, and similar actions. *See* 40 C.F.R. § 1508.25. "Connected actions" means actions that "are closely related and therefore should be discussed in the same impact statement." *Id*. § 1508.25(a)(1). Connected actions must be considered together in order to preclude an agency from "divid[ing] a project into several smaller actions, each of which might have an insignificant environmental impact when considered in isolation, but which taken as a whole have a substantial impact." *Northwest Resource Info. Ctr., Inc. v. National Marine Fisheries Serv.*, 56 F.3d 1060, 1068 (9th Cir. 1995). Similarly, "cumulative actions" are those "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. § 1508.25(a)(2). Moreover, "similar actions" are those "which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." *Id*. § 1508.25(a)(3). "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (internal quotation marks omitted).

Here, FWS violates NEPA by failing to consider the impacts of this Proposed Rule in combination with its August 5, 2020 proposal that would add a new, restrictive definition of "habitat" to FWS's regulations for making critical habitat designations under section 4 of the ESA. *See* 85 Fed. Reg. 47,333 (Aug. 5, 2020) (Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat;

Proposed Rule).[9] As with its current Proposed Rule, FWS has stated that it anticipates applying the same categorical exclusion to that proposed definition. *See* 85 Fed. Reg. at 47,336. However, the proposed "habitat" definition will severely restrict FWS's ability to designate critical habitat for endangered and threatened species by imposing new conditions that limit the frequency, extent, location, and type of habitat that may be designated. And, as discussed, this in turn also will limit the number, type, and scope of section 7 consultations for proposed Federal agency actions that may destroy or adversely modify such habitat, and the associated avoidance, minimization, and mitigation measures required for such actions. In combination with the Proposed Rule, these two rulemakings will have significant adverse direct, indirect, and cumulative impacts on endangered and threatened species and their habitat.

In sum, if FWS desires to proceed with this rulemaking, it must first prepare and circulate a draft EIS for public review and comment that considers the cumulative environmental impacts of both the Proposed Rule and its proposed definition of "habitat."

[9] The States and Cities also submitted comments on September 4, 2020 opposing this proposed definition of "habitat." *See* Docket ID: FWS-HQ-ES-2020-0047-47523.

CONCLUSION

The Proposed Rule is yet another attempt by FWS to severely undercut the ESA's foundational protections for endangered and threatened species and their habitat. FWS must abandon this unlawful and misguided proposal and instead focus on addressing the significant threats posed by habitat destruction and degradation and climate change in order to fulfill the ESA's fundamental purposes of affording imperiled species the "highest of priorities" and providing for their full recovery. *Hill*, 437 U.S. at 174, 194.

Sincerely,

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**Application for admission pro hac vice forthcoming*

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA; COMMONWEALTH OF MASSACHUSETTS; STATE OF MARYLAND; STATE OF CONNECTICUT; STATE OF ILLINOIS; PEOPLE OF THE STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF WASHINGTON; STATE OF WISCONSIN; and CITY OF NEW YORK,

Plaintiffs,

v.

DAVID BERNHARDT, U.S. Secretary of the Interior; WILBUR ROSS, U.S. Secretary of Commerce; U.S. FISH AND WILDLIFE SERVICE; and NATIONAL MARINE FISHERIES SERVICE,

Defendants.

Case No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06; Endangered Species Act, 16 U.S.C. §§ 1531-44; National Environmental Policy Act, 42 U.S.C. §§ 4321-47)

INTRODUCTION

1. Plaintiffs State of California, by and through Xavier Becerra, Attorney General; Commonwealth of Massachusetts, by and through Maura Healey, Attorney General; State of Maryland, by and through Brian E. Frosh, Attorney General; State of Connecticut, by and through William Tong, Attorney General; State of Illinois, by and through Kwame Raoul, Attorney General; People of the State of Michigan, by and through Dana Nessel, Attorney General; State of Minnesota, by and through Keith Ellison, Attorney General; State of Nevada, by and through Aaron Ford, Attorney General; State of New Jersey, by and through Gurbir S. Grewal, Attorney General; State of New Mexico, by and through Hector Balderas, Attorney General; State of New York, by and through Letitia James, Attorney General; State of North Carolina, by and through Joshua H. Stein, Attorney General; State of Oregon, by and through Ellen Rosenblum, Attorney General; Commonwealth of Pennsylvania, by and through Josh Shapiro, Attorney General; State of Rhode Island, by and through Peter F. Neronha, Attorney General; State of Vermont, by and through Thomas J. Donovan, Jr., Attorney General; State of Washington, by and through Robert W. Ferguson, Attorney General; State of Wisconsin, by and through Joshua L. Kaul, Attorney General; and the City of New York, by and through James E. Johnson, Corporation Counsel (hereinafter collectively "State Plaintiffs") bring this action to challenge two recent final rules implementing the federal Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-44. The first rule was promulgated by the Secretary of the Interior, acting through the U.S. Fish and Wildlife Service ("FWS"), and the Secretary of Commerce, acting through the National Marine Fisheries Service ("NMFS") (collectively, "the Services") to create a narrow definition of "habitat" for purposes of making critical habitat designations under Section 4 of the ESA. *See* Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 81,411 (Dec. 16, 2020) ("Habitat Definition Rule"). The second rule was promulgated only by the Secretary of the Interior, acting through FWS, to create a new process for excluding areas of critical habitat when making such designations. *See* Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 85 Fed. Reg. 82,376 (Dec. 18, 2020) ("Habitat Exclusion Rule") (together, the "Final Rules").

2. Rushed to completion during the final months of the Trump administration, the Final Rules violate the ESA's plain language and conservation purposes, its precautionary approach to protecting imperiled species and critical habitat, its legislative history, and binding judicial precedent. The Final Rules also lack any reasoned basis and are otherwise arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551–59, 701–06. Moreover, the Services violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–47, by failing to consider and disclose the significant environmental impacts of their actions.

3. The Habitat Definition Rule—jointly promulgated by FWS and NMFS purportedly to respond to the Supreme Court's decision in *Weyerhaeuser Co. v. FWS*, 139 S. Ct. 361 (2018)—adds a new definition of "habitat" to the Services' implementing regulations that bears no resemblance to, and is not a logical outgrowth of, the definition proposed by the Services. 85 Fed. Reg. 81,411. The Habitat Definition Rule unlawfully and arbitrarily defines the term habitat, for purposes of designating critical habitat, to cover only areas that "*currently or periodically* contain[] the resources and conditions necessary to support one or more life processes of a species." *Id.* at 81,421 (emphases added). The definition thus fails to account for species' need to expand their current ranges or to migrate to currently unoccupied habitat in response to existential threats such as climate change and habitat destruction to ensure species recovery and survival as mandated by the ESA. The definition also fails to account for the possibility of restoring habitat that may not "currently or periodically contain[] the resources and conditions necessary to support one or more life processes of a species," but which could do so after reasonable restoration efforts. Nor is the Services' new definition consistent with or required by the *Weyerhaeuser* decision, in which the Court neither opined on the Services' longstanding, species-specific approach to defining "habitat" based on an individual species' life history, nor made any attempt to define the term.

4. The Habitat Exclusion Rule—promulgated by FWS to allegedly "provide greater transparency and certainty"—creates a new process that will result in FWS's exclusion of more areas from critical habitat designations and the associated protections under the ESA. 85 Fed.

Reg. at 82,376. Finalized without any changes from the proposed rule, which was released just three months earlier, the Habitat Exclusion Rule, among other infirmities, unlawfully and arbitrarily: biases the statutorily required economic analysis against designating critical habitat and instead favors excluding both federal and non-federal lands from such designations; mandates an exclusion analysis any time the proponent of exclusion puts forth "credible information" supporting exclusion; and generally requires FWS to defer to outside sources regarding information on impacts allegedly not within FWS's expertise (including some impacts that are, in fact, within FWS's expertise). *Id*. at 82,388–89. Moreover, FWS's claim that the Habitat Exclusion Rule is responsive to the Supreme Court's *Weyerhaeuser* decision ignores that the Court did not, and, indeed, could not, authorize FWS to abdicate (and delegate to third parties) its statutory duty to consider whether and how to conduct a critical habitat exclusion analysis under section 4(b)(2) of the Act. Furthermore, in violation of the APA, FWS altogether fails to explain the Habitat Exclusion Rule's dramatic departure from its 2016 policy governing critical habitat designations. 81 Fed. Reg. 7,226 (Feb. 11, 2016).

5. The Services also violated NEPA by failing to assess the broader environmental impacts of the Final Rules and by failing to circulate such analyses for public review and comment. Both Final Rules are unquestionably major federal actions that will significantly affect the human environment by limiting designation of, and, accordingly, important protections for, critical habitat. Neither of these major, substantive Final Rules qualifies for the limited, procedural categorical exclusions from NEPA compliance upon which the Services rely. 85 Fed. Reg. at 81,421, 82,388 (claiming Habitat Definition Rule and Habitat Exclusion Rule fall within categorical exclusion under 43 C.F.R. § 46.210(j) for "Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature"). Additionally, the Services unlawfully segmented their NEPA review of the Final Rules by claiming piecemeal coverage under that categorical exclusion, rather than evaluating the Final Rules' environmental impacts together, as NEPA requires.

6. State Plaintiffs have a concrete interest in the Services' lawful implementation of the ESA and its role in preventing harm to and promoting the recovery of imperiled wildlife. These

resources are owned and held in trust by many of the State Plaintiffs for the benefit of their citizens. Imperiled plants and animals protected by the ESA are found in all of the Plaintiff States, along with extensive critical habitat. State Plaintiffs will be harmed by the Final Rules' undermining and weakening of the ESA's key critical habitat designation requirements and associated protections by, among other things, limiting qualifying habitat, facilitating exclusion analyses, expanding impacts that may warrant exclusion, and thereby reducing critical habitat designations.

7. Accordingly, State Plaintiffs seek a declaration that the Services' issuance of the Final Rules violates the ESA, APA, and NEPA, and request that the Court vacate and set aside the Final Rules.

JURISDICTION AND VENUE

8. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States), 28 U.S.C. § 1346 (civil action against the United States), and 5 U.S.C. §§ 701–06 (APA). An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a), and this Court may grant declaratory relief, injunctive relief, and other relief pursuant to 28 U.S.C. §§ 2201–02 and 5 U.S.C. §§ 705–06.

9. The Final Rules constitute final agency actions under the APA. 5 U.S.C. §§ 702, 704, 706. State Plaintiffs submitted timely and detailed comments opposing the Final Rules and have therefore exhausted all administrative remedies with regard to this action. State Plaintiffs have suffered legal wrong due to the Services' actions and are adversely affected or aggrieved by the Services' actions within the meaning of the United States Constitution and the APA. *Id.* § 702.

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(C) because this is the judicial district in which Plaintiff State of California resides, and this action seeks relief against federal agencies and officials acting in their official capacities.

INTRADISTRICT ASSIGNMENT

11. Pursuant to Civil Local Rules 3-5(b) and 3-2(c), there is no basis for assignment of this action to any particular location or division of this Court. However, this case is related to *California, et al. v. Bernhardt, et al.*, Case No. 4:19-cv-06013 (complaint filed Sept. 25, 2019),

which challenges three other final rules promulgated by the Services in 2019 implementing the ESA, which similarly undermine the ESA's core requirements, including its provisions for designating and protecting critical habitat. That case, along with two related challenges to the same three final rules, have been assigned to the Oakland Division. Pursuant to Civil Local Rule 3-12(b), State Plaintiffs intend to promptly file an Administrative Motion to Consider Whether Cases Should Be Related in the earlier-filed action.

PARTIES

12. Plaintiff STATE OF CALIFORNIA brings this action by and through Attorney General Xavier Becerra. The Attorney General is the chief law enforcement officer of the State and has the authority to file civil actions in order to protect public rights and interests, including actions to protect the natural resources of the State. Cal. Const. art. V, § 13; Cal. Gov't Code §§ 12511, 12600-12612. This challenge is brought in part pursuant to the Attorney General's independent constitutional, statutory, and common law authority to represent the people's interests in protecting the environment and natural resources of the State of California from pollution, impairment, or destruction. *Id.*; *D'Amico v. Bd. of Med. Exam'rs*, 11 Cal. 3d 1 (1974).

13. The State of California has a sovereign interest in its natural resources and is the sovereign and proprietary owner of all the State's fish and wildlife and water resources, which are State property held in trust by the State for the benefit of the people of the State. *People v. Truckee Lumber Co.*, 116 Cal. 397 (1897); *Betchart v. Cal. Dep't of Fish & Game*, 158 Cal. App. 3d 1104 (1984); *Nat'l Audubon Soc'y v. Superior Ct.*, 33 Cal. 3d 419 (1983); Cal. Water Code § 102; Cal. Fish & Game Code §§ 711.7(a), 1802. In addition, the State of California has enacted numerous laws concerning the conservation, protection, restoration, and enhancement of the fish and wildlife resources of the State, including endangered and threatened species, and their habitat. Such laws include, but are not limited to, the California Endangered Species Act, which declares that the conservation, protection, and enhancement of endangered and threatened species and their habitat is a matter of statewide concern, and that it is the policy of the state to conserve, protect, restore, and enhance endangered and threatened species and their habitat. Cal. Fish & Game Code §§ 2050, 2051(c), 2052. As such, the State of California has a sovereign and

statutorily mandated interest in protecting listed species and critical habitat both within and outside of the State from harm.

14. There are currently over 300 species listed as endangered or threatened under the ESA that reside wholly or partially within the State of California and its waters—more than any other mainland state. Examples include the southern sea otter (*Enhydra lutris nereis*) found along California's central coastline, the desert tortoise (*Gopherus agassizii*) and its critical habitat in the Mojave Desert, the marbled murrelet (*Brachyramphus marmoratus*) in north coast redwood forests, as well as two different runs of Chinook salmon (*Oncorhynchus tshawytscha*) and their spawning, rearing, and migration habitat in the Bay-Delta and Central Valley rivers and streams. California has millions of acres of lands, as well as thousands of miles of river, lake, estuary, and marine areas that are designated as critical habitat for these species. Moreover, California contains tens of millions of acres of federal public lands, multiple federal water projects, numerous military bases and facilities and other federal facilities and infrastructure projects that are subject to the ESA's section 7 consultation requirements. Further, countless acres of non-federal lands and numerous non-federal facilities and activities in California are subject to federal permitting and licensing requirements—and therefore section 7 consultation requirements.

15. Plaintiff COMMONWEALTH OF MASSACHUSETTS brings this action by and through Attorney General Maura Healey. The Attorney General is the chief legal officer of the Commonwealth and brings this action on behalf of itself and its residents to protect the Commonwealth's sovereign and proprietary interest in the conservation and protection of its natural resources and the environment. *See* Mass. Const. Am. Art. 97; Mass. Gen. Laws, ch. 12, §§ 3 & 11D.

16. Twenty-seven federally listed endangered or threatened species are known to occur in Massachusetts, including, for example, the endangered red-bellied cooter (*Pseudemys rubriventris*), Atlantic Right Whale (*Eubalaena glacialis*), shortnose sturgeon (*Acipenser brevirostrum*), and leatherback sea turtle (*Dermochelys coriacea*) and the threatened Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*), piping plover (*Charadrius melodus*), and northern long-eared bat (*Myotis septentrionalis*). More than three hundred thousand acres and more than

forty-five miles of the Merrimack and Connecticut Rivers in Massachusetts are designated as critical habitat for federally listed species.

17. Massachusetts also has enacted, and devotes significant resources to implementing, numerous laws concerning the conservation, protection, restoration, and enhancement of the Commonwealth's plant, fish, and wildlife resources and their habitat. For example, the Massachusetts Endangered Species Act protects over four hundred imperiled species, including those listed as endangered, threatened, and species of special concern, and their habitat. *See* Mass. Gen. Laws, ch. 131A. As such, the Commonwealth has an interest in protecting species in the Commonwealth from harm both within and outside of Massachusetts.

18. Plaintiff STATE OF MARYLAND brings this action by and through its Attorney General, Brian E. Frosh. The Attorney General of Maryland is the State's chief legal officer with general charge, supervision, and direction of the State's legal business. Under the Constitution of Maryland, and as directed by the Maryland General Assembly, the Attorney General has the authority to file suit to challenge action by the federal government that threatens the public interest and welfare of Maryland residents. Md. Const. art. V, § 3(a)(2); Md. Code Ann., State Gov't § 6-106.1.

19. The State of Maryland has enacted laws to protect sensitive species and their habitat and explicitly incorporates federally listed species into state regulations governing imperiled species. Nongame and Endangered Species Act, MD Code. Nat. Res. §§ 10-2A *et seq.* Twenty-one federally listed species, including thirteen animals and eight plants, are believed to occur in Maryland. A few examples include the federally endangered dwarf wedgemussel (*Alasmidonta heterodon*), the federally threatened bog turtle (*Glyptemys muhlenbergii*), and the federally threatened Puritan tiger beetle (*Cicindela puritan*). Several of these species occur not just in Maryland but in other states as well. Maryland therefore has a distinct interest in the recovery of these species not just within its own borders but throughout each species' range.

20. Plaintiff STATE OF CONNECTICUT brings this action by and through Attorney General William Tong. The Attorney General of Connecticut is generally authorized to have supervision over all legal matters in which the State of Connecticut is a party. He is also

statutorily authorized to appear for the State "in all suits and other civil proceedings, except upon criminal recognizances and bail bonds, in which the State is a party or is interested ... in any court or other tribunal, as the duties of his office require; and all such suits shall be conducted by him or under his direction." Conn. Gen. Stat. § 3-125.

21. Pursuant to the Connecticut Endangered Species Act, Conn. Gen. Stat. § 26-303 *et seq.*, it is the position of the Connecticut General Assembly that those species of wildlife and plants that are endangered or threatened are of "ecological, scientific, educational, historical, economic, recreational and aesthetic value to the people of the [State of Connecticut], and that the conservation, protection, and enhancement of such species and their habitats are of state-wide concern." *Id.* § 26-303. As a consequence, "the General Assembly [of Connecticut] declares it is a policy of the [S]tate to conserve, protect, restore, and enhance any endangered or threatened species and essential habitat." *Id.*

22. At least fourteen federally-listed endangered or threatened species are known to occur in Connecticut, including, but not limited to, the endangered Northern Long-Eared Bat (*Myotis septentrionalis*), Indiana Bat (*Myotis sodalis*), Kemp's Ridley Sea Turtle (*Lepidochelys kempii*), Atlantic Green Turtle (*Chelonia mydas*), Loggerhead Turtle (*Caretta caretta*), and Atlantic Sturgeon (*Acipenser oxyrinchus*). Connecticut also has enacted and devotes significant resources to implementing a comprehensive environmental statutory scheme concerning the conservation, protection, restoration and enhancement of the plant, fish, and wildlife resources and habitats within the State, including the Connecticut Endangered Species Act, which protects hundreds of imperiled species and their habitats, as well as the Connecticut Environmental Protection Act, which protects the air, water, and natural resources of the State held within the public trust. *See* Conn. Gen. Stat. §§ 26-303 *et seq.*; 22a-14 *et seq.* As such, the State of Connecticut has a sovereign and statutorily mandated interest in protecting species in the State from harm both within and outside of the State.

23. Plaintiff STATE OF ILLINOIS brings this action by and through Attorney General Kwame Raoul. The Attorney General is the chief legal officer of the State of Illinois (Ill. Const., art V, § 15) and "has the prerogative of conducting legal affairs for the State." *EPA v. Pollution*

Control Bd., 372 N.E.2d 50, 51 (Ill. Sup. Ct. 1977). He has common law authority to represent the People of the State of Illinois and "an obligation to represent the interests of the People so as to ensure a healthful environment for all the citizens of the State." *People v. NL Indus.*, 604 N.E.2d 349, 358 (Ill. Sup. Ct. 1992).

24. The State of Illinois has "ownership of and title to all wild birds and wild mammals" (520 ILCS 5/2.1 (2018)) and "all aquatic life" within the State (515 ILCS 5 (2018)). *See United Taxidermists Ass'n v. Illinois Dep't of Natural Res.*, 436 Fed. Appx. 692, 695 (7th Cir. 2011). Furthermore, the State of Illinois has enacted numerous laws to protect endangered species (e.g., 520 ILCS 10 (2018)), animal habitat (*e.g.*, 520 ILCS 20 (2018)), and the State's natural areas and caves (*e.g.*, 525 ILCS 33 (2018), 525 ILCS 5/6 (2018)). Accordingly, the State has a substantial interest in protecting wildlife both within and outside its borders.

25. There are currently over 34 species listed as endangered or threatened under the ESA that reside wholly or partially within the State of Illinois and its waters. For example, the Illinois cave amphipod (*Gammarus acherondytes*) is a small crustacean that is endemic to six cave systems in Illinois' Monroe County and St. Clair County. Illinois is also home to the piping plover (*Charadrius melodus*); two piping plover chicks recently hatched on the shores of Lake Michigan in Chicago's north side. Additionally, Illinois has significant federally owned lands, including two areas managed by the U.S. Forest Service and numerous military bases, all subject to ESA's section 7 consultation requirements.

26. Michigan Attorney General Dana Nessel brings this suit on behalf of Plaintiff the People of the STATE OF MICHIGAN. The Michigan Attorney General is authorized to "appear for the people of [the] state in any ... court or tribunal, in any cause of matter ... in which the people of [the] state may be a party or interested." Mich. Comp. Laws § 14.28. The People declared when they enacted Michigan's Constitution that the "conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people." Mich. Const. art. 4, § 52. Accordingly, they tasked Michigan's Legislature with "the protection of ... [the] natural resources of the state from ... impairment and destruction." *Id.*

27. The Legislature responded by passing the Natural Resources and Environmental Protection Act. Mich. Comp. Laws § 324.101 *et seq.* That law declares that "[a]ll animals found in this state, whether resident or migratory and whether native or introduced, are the property of the people of the state." *Id.* § 324.40105; *see also id.* § 324.48702(1) ("all fish, reptiles, amphibians, mollusks, and crustaceans found in this state are the property of the state."). Part 365 of that law, titled Endangered Species Protection, requires Michigan to "perform those acts necessary for the conservation, protection, restoration, and propagation of endangered and threatened species of fish, wildlife, and plants in cooperation with the federal government, pursuant to the endangered species act of 1973, Public Law 93-205, 87 Stat. 884, and with rules promulgated by the secretary of the interior under that act." *Id.* § 324.36502.

28. Michigan has 26 plants and animals the Services have listed as threatened or endangered. These include the Eastern massasauga rattlesnake in Michigan's marsh areas (*Sistrurus catenatus*), the piping plover on the shores of the Great Lakes (*Charadrius melodus*), and the iconic Michigan monkey-flower (*Mimulus michiganensis*). Recovering these and other threatened or endangered species is key to protecting the People's interest in conserving and developing Michigan's natural resources. Additionally, millions of acres in Michigan are owned by the federal government, making them subject to the ESA's section 7 consultation requirements. These include forest areas such as the Hiawatha National Forest, and national parks such as Isle Royale National Park, Pictured Rocks National Lakeshore, and Sleeping Bear Dunes National Lakeshore.

29. Plaintiff STATE OF MINNESOTA is a sovereign state in the United States of America. Attorney General Keith Ellison brings this action on behalf of Minnesota to protect the interests of Minnesota and its residents. The Attorney General's powers and duties include acting in federal court in matters of State concern. Minn. Stat. § 8.01.

30. Ownership of wild animals in Minnesota "is in the state, in its sovereign capacity for the benefit of all people of the state." Minn. Stat. § 97A.025; *see also* Minn. Stat. § 97A.501, subd. 1. In fulfillment of this wildlife trust obligation Minnesota has determined that its fish and wildlife are "to be conserved and enhanced through [the state's] planned scientific management,

protection, and utilization." Minn. Stat. § 84.941. No person may take, import, transport, or sell an endangered species of wild animal unless authorized by Minnesota's endangered species statute. Minn. Stat. § 97A.501, subd. 2. Minnesota's Endangered Species Statute provides for Minnesota to define and protect endangered, threatened, or species of special concern. Minn. Stat. § 84.0895. Minnesota regulates the treatment of species that it has designated as endangered and threatened. Minn. R. 6212.1800-2300. Minnesota's definitions of endangered and threatened species differ from—but overlap with—federal definitions under the ESA, which also serves to identify, regulate, and protect the wildlife in the state. Minnesota's official List of Endangered, Threatened, and Special Concern Species includes several animals as worthy of Minnesota's "endangered" status, such as the Topeka Shiner (*nontropis topeka*), the Higgins Eye Pearlymussel (*lampsilis higgininsi*), and the Winged Mapleleaf Mussel (*quadrula fragosa*), which are listed as endangered under the federal definition. It also includes certain species designated for Minnesota's "special concern" status, such as the Canada lynx (*lynx canadensis*) and the Western Prairie Fringed Orchid (*plantanthera praeclara*), which are listed federally as threatened. Minn. R. 6134.0200. Certain species have federal designations but do not appear on Minnesota's list, such as the rusty-patched bumble bee (*bombus affinis*), which is listed as endangered under the federal definition. In partnership with federal land management agencies and the FWS, Minnesota has invested in, and implemented, programs to assist in protecting and recovering these and other listed species and in protecting their critical habitat. Minnesota therefore has an interest in the recovery of these species in Minnesota. In addition, many of the species defined under Minnesota or federal regulations occur in other states and the management of those species in other states affects their ongoing viability in Minnesota. Minnesota therefore has an interest in the recovery of such species throughout their range.

31. Plaintiff STATE OF NEVADA brings this action by and through Attorney General Aaron Ford. The Nevada Attorney General is the chief law enforcement officer of the State and has the authority to file civil actions in order to protect public rights and interests, including actions to protect the natural resources of the State. Nev. Const. art. V, § 19; N.R.S. 228.180. This challenge is brought in part pursuant to the Attorney General's independent constitutional,

statutory, and common law authority to represent the people's interests in protecting the environment and natural resources of the State of Nevada from pollution, impairment, or destruction. Nev. Const. art. V, § 19; N.R.S. 228.180. In addition, the Nevada Department of Wildlife, established as a state agency by the Nevada Legislature pursuant to N.R.S. § 501.331, has requested that the Attorney General bring this suit to protect Nevada's sovereign interest in preserving threatened and endangered species.

32. The State of Nevada has a sovereign interest in its natural resources and is the sovereign and proprietary owner of all the State's fish and wildlife and water resources, which are State property held in trust by the State for the benefit of the people of the State. N.R.S. 501.100 provides that "[w]ildlife in this State not domesticated and in its natural habitat is part of the natural resources belonging to the people of the State of Nevada [and] [t]he preservation, protection, management and restoration of wildlife within the State contribute immeasurably to the aesthetic, recreational and economic aspects of these natural resources." *See Ex parte Crosby*, 38 Nev. 389 (1915); *see also Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976) ("Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions."). In addition, the State of Nevada has enacted numerous laws concerning the conservation, protection, restoration and enhancement of the fish and wildlife resources of the State, including endangered and threatened species, and their habitat. As such, the State of Nevada has an interest in protecting species in the State from actions both within and outside of the State.

33. Nevada has approximately 58,226,015.60 acres of federally-managed land, totaling 84.9 percent of the State's lands. The federal agencies that manage Nevada's many acres are subject to the ESA's section 7 consultation requirements, including the Bureau of Indian Affairs, the Bureau of Land Management, the Bureau of Reclamation, the Department of Defense, the Department of Energy, FWS, the Forest Service, and the National Park Service. Moreover, additional non-federal lands and facilities in Nevada are subject to federal permitting and licensing requirements. There are currently over 38 species listed as endangered or threatened under the ESA that reside wholly or partially within the State of Nevada. Examples include the desert tortoise (*Gopherus agassizii*) and its critical habitat in the Mojave Desert, the Devil's Hole

pupfish (*Cyprinodon diabolis*) reliant on limited aquifers within the Amargosa Desert ecosystem, the Lahontan cutthroat trout (*Oncorhynchus clarkii henshawi*) indigenous to Pyramid and Walker Lakes and nearly extirpated by American settlement in the Great Basin, Sierra Nevada bighorn sheep (*Ovis Canadensis sierrae*), and the greater sage-grouse (*Centrocercus urophasianus*) found in the foothills, plains and mountain slopes where sagebrush is present across fifteen of Nevada's seventeen counties.

34. Plaintiff STATE OF NEW JERSEY is a sovereign state of the United States of America and brings this action on behalf of itself and as a trustee, guardian and representative of the residents and citizens of New Jersey. New Jersey holds wildlife in trust for the benefit of all of its people. The New Jersey Legislature has declared that it is the policy of the State to manage all forms of wildlife to insure their continued participation in the ecosystem. N.J. Stat. Ann. § 23:2A-2.

35. At least fourteen federally listed endangered or threatened species are known to occur in New Jersey, including, for example, the threatened piping plover (*Charadrius melodus*), red knot (*Calidris canutus rufa*), and Northern long-eared bat (*Myotis septentrionalis*), and the endangered Indiana bat (*Myotis sodalist*) and dwarf wedgemussel (*Alasmidonta heterodon*). In 2018, New Jersey designated the threatened bog turtle (*Clemmys muhlenbergii*) as the official state reptile. New Jersey protects, conserves, restores and enhances plants, fish and wildlife resources within the State through direct protective legislation such as the Endangered Non-Game Species Conservation Act (ENSCA), N.J. Stat. Ann. §§ 23:2A-1 to -16, and the Endangered Plant Species List Act, *id.* §§ 13:1B-15.151 to -158. New Jersey also considers federal and state-listed species through other legislation including, but not limited to, the Freshwater Wetlands Protection Act, *id.* § 13:9B-7(a)(2), and the Highlands Water Protection and Planning Act, *id.* § 13:20-34(a)(4), and regulatory provisions such as the Pinelands Comprehensive Management Plan, N.J. Admin. Code §§ 7:50-6.27 and -6.33 (adopted, in part, pursuant to 16 U.S.C. § 471i(f)(1)(A)) and the Coastal Zone Management Rules, N.J. Admin. Code § 7:7-9.36.

36. New Jersey also expends significant resources purchasing and maintaining key habitats relied upon by listed species, including vital foraging and nesting habitats along the

State's coastal Barrier Islands and the Cape May Peninsula. For example, New Jersey invests time, resources and funding to manage the federally-listed threatened red knot. Twice annually, red knots migrate between South America and the Arctic. New Jersey and Delaware are critically important stops during the red knot's northern migration to feed on horseshoe crab eggs where the red knots must eat enough to continue their arduous journey to the Arctic. New Jersey has an interest in protecting species inhabiting this State from harm both inside and outside of its borders, and New Jersey depends on its federal partners and other states to equally protect the red knot when it is not in New Jersey.

37. Plaintiff STATE OF NEW MEXICO brings this action by and through Attorney General Hector Balderas. The Attorney General of New Mexico is authorized to prosecute in any court or tribunal all actions and proceedings, civil or criminal, when, in his judgment, the interest of the State requires such action. NMSA 1978, § 8-5-2. Under the Constitution of New Mexico, "protection of the state's beautiful and healthful environment is ... declared to be of fundamental importance to the public interest, health, safety and the general welfare." N.M. Const. art. XX, § 21. This provision "recognizes that a public trust duty exists for the protection of New Mexico's natural resources ... for the benefit of the people of this state." *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015). The New Mexico Game and Fish Department is entrusted with the maintenance of wildlife and wildlife habitat and related consultations with federal and other agencies toward that goal, NMSA 1978, § 17-1-5.1, and oversees a program for conserving endangered plant species, *id.* § 75-6-1; *see also id*. 19.33.2-19.33.6 (rules pertaining to state endangered and threatened species).

38. FWS lists 40 animal and 13 plant species as threatened or endangered in New Mexico. These include the endangered, iconic Southwestern willow flycatcher (*Empidonax traillii extimus*), the endangered Rio Grande silvery minnow (*Hybognathus amarus*), the endangered jaguar (*Panthera onca*), the endangered Mexican wolf (*Canis lupus baileyi*), and the threatened Mexican spotted owl (*Strix occidentalis lucida*).

39. Protecting rare species and their habitats is fundamental to protecting New Mexico's wildlife and wild places. Tourism, often focused on outdoor recreational activities, is an

important driver of New Mexico's economy. In 2015, tourism accounted for $6.1 billion in direct spending and created roughly 89,000 jobs. Among the most-visited places in the State is the Bosque del Apache National Wildlife Refuge, established in 1939 to provide a critical stopover for migrating waterfowl and recognized as one of the premier bird-watching areas in North America. New Mexico hosts eight additional national wildlife refuges, fifteen national parks, and numerous national monuments, national conservation areas, and Department of Defense lands. New Mexico's five national forests—the Carson, Cibola, Gila, Lincoln, and Santa Fe national forests—encompass 9.4 million acres, including most of the State's mountainous areas, plus isolated sections of the State's eastern prairies. Overall, 27,001,583 acres in New Mexico are federally owned, accounting for nearly 35 percent of the State's land mass.

40. Plaintiff STATE OF NEW YORK brings this action by and through Attorney General Letitia James. The Attorney General is the chief legal officer of the State of New York and brings this action on behalf of the State and its citizens and residents to protect their interests, and in furtherance of the State's sovereign and proprietary interests in the conservation and protection of the State's natural resources and the environment. The State of New York has an ownership interest in all non-privately held fish and wildlife in the State and has exercised its police powers to enact laws for the protection of endangered and threatened species, protections long recognized to be vitally important and in the public interest. *See* N.Y. Envtl. Conserv. Law §§ 11-0105, 11-0535; *Barrett v. State*, 220 N.Y. 423 (1917). Wildlife conservation is a declared policy of the State of New York. *See* N.Y. Const. art. XIV, § 3.

41. There are dozens of federally endangered or threatened species that reside in whole or in part within the State of New York and its waters. Many of these species are highly migratory, and their recovery requires conservation efforts in New York, up and down the Atlantic Seaboard, and beyond. Examples include four species of sea turtles that can be found in New York waters—the loggerhead (*Caretta caretta*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*) and Kemp's Ridley (*Lepidochelys kempii*). Achieving effective recovery for each of these species requires strong ESA enforcement to protect such individuals that feed around Long Island, as well as those breeding and nesting in the southern United States.

42. Robust species protections under the ESA are very important to New York. New York hosts ten National Wildlife Refuges, home to federally protected species like the piping plover (*Charadrius melodus*), and dozens of other federal sites, which along with numerous in-State activities that require federal licensing and/or permitting and are subject to ESA section 7 consultation requirements. Full and adequate implementation of the ESA's species-listing and habitat-designation provisions is critical for species' survival within New York and elsewhere. To date, faithful implementation of the ESA by the federal government, coordinated together with state efforts, have helped species recover from the brink of extinction. Habitat protection efforts led by NMFS and New York have greatly increased populations of the endangered shortnose sturgeon (*Acipenser brevirostrum*) and Atlantic sturgeon (*Acipenser oxyrinchus*). The Northern long-eared bat (*Myotis septentrionalis*) also resides in-state and benefits from federal-state coordination. And one of the greatest endangered species success stories, the recovery and delisting of the iconic Bald Eagle (*Haliaeetus leucocephalus*), is due to federal and state efforts including FWS critical habitat protections under the ESA, and New York's reintroduction of this virtually extirpated species by importing young birds and hand-rearing them before release. Thus, strong ESA protections both within its State borders and throughout each species' range are fundamental to New York's interests.

43. Plaintiff STATE OF NORTH CAROLINA brings this action by and through Attorney General Joshua H. Stein. The North Carolina Attorney General is the chief legal officer of the State of North Carolina. The Attorney General is empowered to appear for the State of North Carolina "in any cause or matter ... in which the State may be a party or interested." N.C. Gen. Stat. § 114-2(1). Moreover, the Attorney General is authorized to bring actions on behalf of the citizens of the State in "all matters affecting the public interest." *Id.* § 114-2(8)(a).

44. The State of North Carolina has a sovereign interest in its public trust resources. Under North Carolina law, "the wildlife resources of North Carolina belong to the people of the State as a whole." N.C. Gen. Stat. § 113-131(a). The State of North Carolina has enacted laws and regulations concerning the conservation of the State's fish and wildlife resources, including endangered and threatened species. *See, e.g., id.* §§ 113-331 to -337.

45. FWS lists 39 animal and 27 plant species as endangered or threatened in North Carolina, including the endangered Red-cockaded woodpecker (*Picoides borealis*), Carolina northern flying squirrel (*Glaucmys sabrinus coloratus*), and Leatherback sea turtle (*Dermochelys coriacea*). North Carolina contains over 2 million acres of federally-owned lands, including lands managed by the U.S. Forest Service, FWS, National Park Service, and Department of Defense, all of which are subject to the ESA's section 7 consultation requirements.

46. Plaintiff STATE OF OREGON brings this suit by and through Attorney General Ellen Rosenblum. The Oregon Attorney General is the chief legal officer of the State of Oregon. The Attorney General's duties include acting in federal court on matters of public concern and upon request by any State officer when, in the discretion of the Attorney General, the action may be necessary or advisable to protect the interests of the State. Ore. Rev. Stat. § 180.060(1). The Oregon Department of Fish and Wildlife, established as a State agency by the Oregon Legislature pursuant to Ore. Rev. Stat. § 496.080, has requested that the Attorney General bring this suit to protect Oregon's sovereign interest in preserving threatened and endangered species.

47. The State of Oregon has a sovereign interest in its natural resources and is the sovereign owner of the State's fish and wildlife. Under Oregon law, "[w]ildlife is the property of the State." Ore. Rev. Stat. § 498.002. The State of Oregon has enacted numerous laws and rules concerning the conservation and protection of the fish and wildlife resources of the State, including endangered and threatened species and their habitat. *See, e.g.*, Oregon Endangered Species Act, Ore. Rev. Stat. §§ 496.171–496.192, 498.026; Fish and Wildlife Habitat Mitigation Policy, Or. Admin. R. 635-415-0000 (creating goals and standards to "mitigate impacts to fish and wildlife habitat caused by land and water development actions"); Goal 5 of Oregon's statewide land use planning goals, Or. Admin. R. 660-15-0000(5) ("[l]ocal governments shall adopt programs that will protect natural resources," including wildlife habitat). The State of Oregon has an interest in protecting species in the State from harm both within and outside of the State.

48. Oregon is home to numerous fish, land animals, and plants that the Services have listed as endangered or threatened species. There are listed species—such as the northern spotted

owl (*Strix occidentalis caurina*), marbled murrelet (*Brachyramphus marmoratus*), snowy plover (*Charadrius nivosus*), and bull trout (*Salvelinus confluentus*) —that depend on the tens of millions of acres of federal public lands and waters, including 12 national forests, 18 national wildlife refuges, Crater Lake National Park, and over 15 million acres of Bureau of Land Management lands. The northern spotted owl is an example of a species for which critical habitat designations are important. The owl relies on forests with closed canopies of old-growth trees that require 150 to 200 years to reach maturity. Designation of critical habitat for the northern spotted owl and development of the Northwest Forest Plan required significant forest conservation measures, including careful planning of timber sales. The Oregon Department of Fish and Wildlife ("ODFW") is concerned by a recent proposal (predating the adoption of the Habitat Exclusion Rule) to reduce northern spotted owl critical habitat by 204,653 acres, to accommodate planned timber harvest on Bureau of Land Management "O&C" lands, believing this exclusion could have a negative impact on the owl's prospects for survival and recovery. Because of the length of time needed to return the land to old growth forest conditions, this reduction presents a high risk that these acres, once harvested, will never return to a condition suitable to support northern spotted owls. The Habitat Exclusion Rule could lead to an increasing number of critical habitat exclusions that could be similarly damaging to listed species.

49. Plaintiff the COMMONWEALTH OF PENNSYLVANIA is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Josh Shapiro, the "chief law officer of the Commonwealth." Pa. Const. art. IV, § 4.1. Attorney General Shapiro brings this action on behalf of the Commonwealth pursuant to his statutory authority. 71 Pa. Stat. § 732-204.

50. The Commonwealth of Pennsylvania has a sovereign interest in its public natural resources, which "are the common property of all the people, including generations yet to come." Pa. Const. art. I, § 27. The Commonwealth, as trustee, must "conserve and maintain them for the benefit of all the people." *Id.*; *Robinson Twp., Washington Cty. v. Pennsylvania*, 83 A.3d 901, 955-56 (Pa. 2013); *see also* 34 Pa. Stat. and Cons. Stat. § 103 (game and wildlife); 34 Pa. Stat. and Cons. Stat. Ann. § 2161 (game and wildlife); 30 Pa. Stat. and Cons. Stat. § 2506 (fish); 32 Pa.

Stat. and Cons. Stat. § 5302 (plants). The Pennsylvania Constitution further protects every Pennsylvania resident's "right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." Pa. Const. art. I, § 27. As such, the Commonwealth of Pennsylvania has an interest in protecting species in the Commonwealth from harm both within and outside of the Commonwealth.

51. At least 19 federally listed and protected endangered or threatened species are known to occur in Pennsylvania, including the endangered rusty patched bumble bee (*Bombus affinis*) and piping plover (*Charadrius melodus*) and the threatened northern long-eared bat (*Myotis septentrionalis*). Pennsylvania has enacted laws and regulations to protect endangered and threatened species and their habitat in the Commonwealth. *See, e.g.*, 34 Pa. Stat. and Cons. Stat. § 2167 (wild birds and animals); 30 Pa. Stat. and Cons. Stat. § 2305 (fish, reptiles, amphibians, mussels); 32 Pa. Stat. and Cons. Stat. § 5311 (plants). Pennsylvania law explicitly extends state protection to all federally listed wild birds, animals, fish, reptiles, amphibians, and mussels. 30 Pa. Stat. and Cons. Stat. § 102 (defining endangered and threatened fish, reptiles, amphibians, mussels); 34 Pa. Stat. and Cons. Stat. § 102 (defining endangered and threatened wild birds and animals). Pennsylvania further empowers Commonwealth agencies to list and protect additional imperiled species. 30 Pa. Stat. and Cons. Stat. § 102 (fish, reptiles, amphibians, mussels); 34 Pa. Stat. and Cons. Stat. § 102 (wild birds and animals); 17 Pa. Code ch. 45 (plants). As a result, Pennsylvania protects hundreds of endangered or threatened species.

52. Plaintiff STATE OF RHODE ISLAND brings this action by and through Attorney General Peter F. Neronha. The Attorney General is the chief law enforcement officer of the State and has the authority to file civil actions in order to protect public rights and interests, including actions to protect the natural resources of the State. R.I. Const. art. I, § 17; R.I. Gen. Laws R.I. § 10-20-1, *et seq.* This challenge is brought in part pursuant to the Attorney General's independent constitutional, statutory, and common law authority to represent the people's interests in protecting the environment and natural resources of the State of Rhode Island from pollution, impairment, or destruction. *Id.; Newport Realty, Inc. v. Lynch*, 878 A.2d 1021 (R.I. 2005).

53. The State of Rhode Island has a sovereign interest in its natural resources and is the sovereign and proprietary owner of all the State's fish and wildlife and water resources, which are State property held in trust by the State for the benefit of the people of the State. R.I. Const. Art. I § 17. In addition, the State of Rhode Island has enacted numerous laws concerning the conservation, protection, restoration and enhancement of the fish and wildlife resources of the State, including endangered and threatened species, and their habitat. As such, the State of Rhode Island has an interest in protecting species in the State from actions both within and outside of the State.

54. There are currently thirteen species listed as endangered or threatened under the ESA that reside wholly or partially within the State of Rhode Island and its waters. Examples include the New England cottontail (*Sylvilagus transitionalis*), which, as recently as 1960, could be found throughout much of New England, but whose range has shrunk by 86 percent; the roseate tern (*Sterna dougallii*) and piping plover (*Charadrius melodus*), found along Rhode Island's coastal beaches and islands; the sandplain gerardia (*Agalinis acuta*), which inhabits dry, sandy, poor-nutrient soils in sandplain and serpentine sites; and the American burying beetle (*Nicrophorus americanus*), which once lived in 35 states, the District of Columbia, and three Canadian provinces, but now are known to occur in only four states. Rhode Island has 5,157 acres of federal public lands, numerous federal wildlife refuges, multiple federal water projects, numerous military facilities and other federal facilities and infrastructure projects that are subject to the ESA's section 7 consultation requirements. Moreover, countless acres of non-federal lands and numerous non-federal facilities and activities in Rhode Island are subject to federal permitting and licensing requirements—and therefore section 7 consultation requirements.

55. Plaintiff STATE OF VERMONT brings this action by and through Attorney General Thomas J. Donovan, Jr. The Attorney General is the chief legal officer of the State of Vermont. *See* Vt. Stat. Ann. tit. 3, § 152 ("The Attorney General may represent the State in all civil and criminal matters as at common law and as allowed by statute."). Vermont is a sovereign entity and brings this action to protect its own sovereign and proprietary rights. The Attorney General's powers and duties include acting in federal court on matters of public concern. This challenge is

brought pursuant to the Attorney General's independent constitutional, statutory, and common law authority to bring suit and obtain relief on behalf of the State of Vermont.

56. "[T]he fish and wildlife of Vermont are held in trust by the State for the benefit of the citizens of Vermont and shall not be reduced to private ownership. The State of Vermont, in its sovereign capacity as a trustee for the citizens of the State, shall have ownership, jurisdiction, and control of all the fish and wildlife of Vermont." Vt. Stat. Ann. tit. 10, § 4081(a)(1). The State of Vermont has enacted laws protecting endangered and threatened species and critical habitat, and currently lists 52 animal species, 8 of which are listed under the ESA, and 163 plant species, 3 of which are listed under the ESA. *See id*., §§ 5401 *et seq.* The Vermont Department of Fish and Wildlife implements the Vermont endangered species protections and has a strong interest in species protections both within Vermont and outside the State.

57. Vermont hosts nearly a half a million acres of federal lands, including the Green Mountain National Forest, the Missisquoi National Wildlife Refuge, and the Silvio O. Conte National Fish and Wildlife Refuge. These lands are subject to the ESA's section 7 consultation requirements as are other State lands subject to federal permits and federal funding.

58. Plaintiff STATE OF WASHINGTON is a sovereign entity and brings this action to protect its own sovereign and proprietary rights. The Attorney General is the chief legal adviser to the State of Washington. The Attorney General's powers and duties include acting in federal court on matters of public concern. This challenge is brought pursuant to the Attorney General's independent constitutional, statutory, and common law authority to bring suit and obtain relief on behalf of the State of Washington.

59. Wildlife, fish, and shellfish are the property of the State of Washington. Rev. Code Wash. (RCW) § 77.04.012. The Washington Department of Fish and Wildlife actively carries forth the legislative mandate to, inter alia, preserve, protect, perpetuate, and manage wildlife, fish, and wildlife and fish habitat. *Id.*; *id*. § 77.04.055; *see also id*. § 77.110.030 (declaring that "conservation, enhancement, and proper utilization of the state's natural resources … are responsibilities of the state of Washington").

60. The Washington Fish and Wildlife Commission classifies forty-five species as Endangered, Threatened, or Sensitive under State law. Wash. Admin. Code 220-610-010; 220-200-100. More than half of these species are also federally listed as endangered or threatened under the ESA, including southern resident killer whales (*Orcinus orca*), pygmy rabbits (*Brachylagus idahoensis*), streaked horned larks (*Eremophila alpestris strigata*), and green sea turtles (*Chelonia mydas*). In addition, the Washington Department of Fish and Wildlife designates 102 species as candidates for state listing as endangered, threatened, or sensitive, and more than twenty of the state candidate species, including chinook (*Oncorhynchus tshawytscha*), chum (*Oncorhynchus keta*), and sockeye (*Oncorhynchus nerka*) salmon and steelhead (*Oncorhynchus mykiss*), are listed as threatened or endangered under the ESA. In total, thirty-seven federally listed species compromising 50 Evolutionarily Significant Units and Distinct Population Segments live in Washington. Washington also has several species, including wolverines (*gulo gulo*), Island Marble butterflies (*Euchloe ausonides*), and fishers (*Martes pennanti*) that are candidates for federal listing.

61. Washington expends significant resources to monitor, protect, and recover state and federally listed species and their critical habitat. For example, the Washington Department of Fish and Wildlife spends approximately $600,000 annually for management and recovery of the endangered Taylor's checkerspot butterfly (*Euphydryas editha taylori*), which is native to the Pacific Northwest and is restricted to just eleven known populations, with eight of those populations occurring in Washington State.

62. Washington hosts tens of millions of acres of federal lands across ten national forests, three national parks, twenty-three national wildlife refuges, three national monuments, and numerous Department of Defense lands. These lands are subject to the ESA's section 7 consultation requirements.

63. Plaintiff STATE OF WISCONSIN is a sovereign state of the United States of America and brings this action by and through its Attorney General, Joshua L. Kaul, who is the chief legal officer of the State of Wisconsin and has the authority to file civil actions to protect Wisconsin's rights and interests. *See* Wis. Stat. § 165.25(1m). The Attorney General's powers

and duties include appearing for and representing the State on the governor's request, "in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested." *Id*.

64. In filing this action, the Attorney General seeks to prevent injuries to the State and its residents relating to their substantial interests in protecting and preserving threatened and endangered animals and plants. These injuries include harms to Wisconsin's sovereign, quasi-sovereign, and proprietary interests.

65. Wisconsin holds legal title to all wild animals in the state "for the purposes of regulating their enjoyment, use, disposition, and conservation." Wis. Stat. § 29.011(1). In 1972, Wisconsin became one of the first states to enact its own state-level endangered species law. *See generally id*. § 29.604. In doing so, the Wisconsin Legislature found that "the activities of both individual persons and governmental agencies are tending to destroy the few remaining whole plant−animal communities in this state," and that the preservation of those communities "is of highest importance." *Id*. § 29.604(1). The Legislature recognized "that certain wild animals and wild plants are endangered or threatened," and that those species "are entitled to preservation and protection as a matter of general state concern." *Id*. § 29.604(1). The State of Wisconsin therefore has substantial sovereign and statutory interests in protecting species in the State from harms within and from outside of the State.

66. The federal ESA has been important for species recovery efforts in Wisconsin. The FWS lists 24 species in Wisconsin as federally threatened or endangered. The State, through its Department of Natural Resources, works on numerous projects to maintain and restore its federally endangered and threatened species. For example, over the past 20 years the Wisconsin DNR has worked with governmental and non-governmental partners toward the recovery of endangered piping plovers (*Charadrius melodus*). Specific efforts have included protecting nests and adding and managing plover habitat. As a result, Wisconsin has contributed at least 153 chicks toward the Great Lakes federal recovery goal of 150 breeding pairs, with the current population more than halfway to the goal. Piping plovers had their best nesting season in more than a century in 2019. Another species found in Wisconsin, Kirtland's Warbler (*Setophaga*

kirtlandii), was removed from the federal list in 2020, but it remains on Wisconsin's state endangered species list because it has not met the criteria to be delisted at the state level.

67. Thousands of projects are reviewed annually in Wisconsin for potential impacts to state and federally listed plants and animals. Wisconsin therefore has a strong interest in the FWS administering, interpreting, and enforcing the federal ESA to best facilitate species recovery in Wisconsin. Additionally, nearly 1.8 million acres of land in Wisconsin are federally owned and are thus subject to the ESA's section 7 consultation requirement. These lands include the Chequamegon-Nicolet National Forest, the Apostle Islands National Lakeshore, the Upper Mississippi National Wildlife and Fish Refuge, and the Horicon National Wildlife Refuge.

68. Plaintiff the CITY OF NEW YORK brings this action by and through the Corporation Counsel James E. Johnson. The Corporation Counsel is the chief legal officer of the City of New York and brings this action on behalf of itself and its residents to protect New York City's sovereign and proprietary interest in the conservation and protection of its natural resources and the environment. *See* New York City Charter Chap. 17, § 394.

69. New York City has a longstanding commitment to protection of endangered species and their habitat. New York City hosts, among other species, a population of Atlantic Coast piping plovers (*Charadrius melodus*), that nests on the beach of the Rockaways in Brooklyn and was designated a threatened species by FWS. New York City has substantial interest in protecting wildlife both within and outside of its borders.

70. Defendant DAVID BERNHARDT is the Secretary of the United States Department of the Interior and is sued in his official capacity. Mr. Bernhardt is responsible for implementing and fulfilling the duties of the United States Department of the Interior, including the administration of the ESA regarding endangered and threatened terrestrial and freshwater plant and animal species and certain marine species, and thus bears responsibility, in whole or in part, for the acts complained of in this Complaint.

71. Defendant WILBUR ROSS is the Secretary of the United States Department of Commerce and is sued in his official capacity. Mr. Ross is responsible for implementing and fulfilling the duties of the United States Department of Commerce, including the administration

of the ESA regarding most endangered and threatened marine and anadromous fish species, and thus bears responsibility, in whole or in part, for the acts complained of in this Complaint.

72. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is an agency within the United States Department of the Interior to which the Secretary of the Interior has delegated authority to administer the ESA with regard to endangered and threatened terrestrial and freshwater plant and animal species and certain marine species, and bears responsibility, in whole or in part, for the acts complained of in this Complaint.

73. Defendant NATIONAL MARINE FISHERIES SERVICE is an agency within the United States Department of Commerce to which the Secretary of Commerce has delegated authority to administer the ESA with regard to most endangered and threatened marine and anadromous fish species, and bears responsibility, in whole or in part, for the acts complained of in this Complaint.

STATUTORY BACKGROUND

I. ENDANGERED SPECIES ACT.

74. Congress enacted the ESA nearly fifty years ago in a bipartisan effort "to halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978); *see* 16 U.S.C. § 1531(a). The ESA accordingly enshrines a national policy of "institutionalized caution," *Hill*, 437 U.S. at 194, in recognition of the "overriding need *to devote whatever effort and resources [are] necessary* to avoid further diminution of national and worldwide wildlife resources," *id.* at 177 (internal quotation omitted, emphasis in original). The ESA constitutes "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id.* at 180.

75. The ESA's fundamental purposes are to "provide a means whereby the ecosystems upon which endangered ... and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered … and threatened species[.]" 16 U.S.C. § 1531(b). Furthermore, the ESA declares "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered … and threatened species and shall utilize their authorities in furtherance of the purposes of [the ESA]." *Id.* § 1531(c)(1). The ESA defines

"conserve" broadly as "to use and the use of all methods and procedures which are necessary to bring any endangered … or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary"—*i.e.*, to the point of full recovery. *Id.* § 1532(3).

76. Since the law's passage in 1973, ninety-nine percent of ESA-protected species have not gone extinct. Multiple species at the brink of extinction upon the ESA's enactment have seen dramatic population increases, including the black footed ferret (*Mustela nigripes*), California condor (*Gymnogyps californianus*), whooping crane (*Grus americana*), and shortnose sturgeon (*Acipenser brevirostrum*). The ESA has resulted in the successful recovery and delisting of several species, including our national bird, the bald eagle (*Haliaeetus leucocephalus*), the American peregrine falcon (*Falco peregrinus anatum*), the Delmarva Peninsula fox squirrel (*Sciurus niger cinereus*), and the American alligator (*Alligator mississippiensis*).

77. The ESA achieves these statutory purposes through multiple vital programs. As relevant here, section 4 of the ESA, 16 U.S.C. § 1533, prescribes the process for the Services to list a species as "endangered" or "threatened" within the meaning of the statute and also to designate "critical habitat" for each such species, *id.* § 1533(a)(1), (a)(3)(A)(i), (b)(6)(C). The ESA provides that the Services "*shall* designate critical habitat … on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2) (emphasis added). Section 4(b)(2) further provides that "[t]he Secretary *may* exclude any area from critical habitat *if* he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, *unless* he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.* (emphases added).

78. The ESA defines critical habitat as: "(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the [ESA], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas

outside the geographical area occupied by the species at the time it is listed ... upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A). Although the ESA does not define "habitat," the Services' long-held position has been that habitat is best determined on a species-by-species basis in order to account for the divergent types of life histories, behavior patterns, and survival strategies of myriad listed species. *See* Brief for the Federal Respondents, 2018 WL 3238924, **25-29, *Weyerhaeuser Co. v U.S. Fish & Wildlife Serv*., 139 S. Ct. 361 (2018).

79. Section 7 of the ESA, 16 U.S.C. § 1536, requires all federal agencies, including the Services, to "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of" endangered and threatened species, *id.* § 1536(a)(1), and to "insure" that any action they propose to authorize, fund, or carry out "is not likely to jeopardize the continued existence" of any endangered or threatened species or, as particularly relevant here, "result in the destruction or adverse modification of" any designated critical habitat, *id.* § 1536(a)(2). If a federal agency action "may affect" any listed species or critical habitat, the federal action agency must initiate consultation with the relevant Service. 50 C.F.R. § 402.14(a); *see* 16 U.S.C. §§ 1536(a)–(b), (c)(1); 50 C.F.R. §§ 402.12, 402.14(b)(1).

80. If the federal action agency or the appropriate Service determines that the action "may affect" a listed species or designated critical habitat, the Service must prepare a biological opinion on the effects of the action on the species and/or critical habitat. 50 C.F.R. § 402.14(a); *see* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(b)(1). Where the Services find the action is likely to jeopardize the continued existence of any listed species or adversely modify or destroy any designated critical habitat, the biological opinion also must include alternatives to the agency action, identify the impacts of any incidental take on the species, and include mitigation measures for any authorized take. *Id.* § 1536(b)(4).

II. ADMINISTRATIVE PROCEDURE ACT.

81. The APA governs the procedural requirements for federal agency decision-making, including the agency rulemaking process. Under the APA, a "reviewing court shall … hold unlawful and set aside" federal agency action found to be "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law," "without observance of procedure required by law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). An agency action is arbitrary and capricious under the APA where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency does not have authority to adopt a regulation that is "manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *see also* 5 U.S.C. § 706(2)(C).

82. Additionally, "[a]gencies are free to change their existing policies," but they must "provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005)). While an agency need not show that a new rule is "better" than the rule it replaced, it still must demonstrate that "it is permissible under the statute, that there are good reasons for it, and that the agency *believes it* to be better, which the conscious change of course adequately indicates." *Federal Commc'ns. Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original). Further, an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when "its new policy rests upon factual findings that contradict those which underlay its prior policy," "or when its prior policy has engendered serious reliance interests that must be taken into account." *Id.* Any "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *National Cable & Telecomms. Ass'n*, 545 U.S. at 981.

83. Finally, prior to promulgating, amending, or repealing a rule, agencies must engage in a public notice-and-comment process. 5 U.S.C. §§ 551(5), 553. Notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* § 553(b). To satisfy the requirements of APA, notice of a proposed rule must "provide an

accurate picture of the reasoning that has led the agency to the proposed rule," to allow an "opportunity for interested parties to participate in a meaningful way in the discussion and final formulation of rules." *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 528-30 (D.C. Cir. 1982). An agency must afford the public notice of specific regulatory changes and its reasoned basis for those changes to provide the public an opportunity for meaningful comment. *Home Box Office v. Federal Commc'ns Comm'n*, 567 F.2d 9, 35-36 (D.C. Cir. 1977). The public may then submit comments, which the agency must consider before promulgating a final rule. 5 U.S.C. § 553(c). This process is designed to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id.*

84. While an agency may modify a proposed rule in response to public comments, it may not finalize a rule that is not a "logical outgrowth" of the proposed rule. *Natural Res. Def. Council v. Environmental Prot. Agency*, 279 F.3d 1180, 1186 (9th Cir. 2002). If "a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule," the agency must afford a new opportunity for notice and comment on the rule. *Id.*

III. NATIONAL ENVIRONMENTAL POLICY ACT.

85. NEPA, 42 U.S.C. §§ 4321 *et seq.*, is the "basic national charter for the protection of the environment." 40 C.F.R. § 1500.1(a).[1] NEPA's fundamental purposes are to ensure that "environmental information is available to public officials and citizens before decisions are made and before actions are taken," and that "public officials make decisions that are based on

[1] On July 16, 2020, the Council on Environmental Quality ("CEQ") finalized an update to its 1978 regulations implementing NEPA, which took effect on September 14, 2020. 85 Fed. Reg. 43,304 (July 16, 2020). According to this rule, for NEPA reviews that have already begun "before the final rule's effective date, agencies may choose whether to apply the revised regulations or proceed under the 1978 regulations and their existing agency NEPA procedures. Agencies should clearly indicate to interested and affected parties which procedures it is applying for each proposed action." *Id.* at 43,340. Here, the Services do not indicate which procedures they are applying, but cite only to regulatory language that follows the requirements of the 1978 regulations. *See* 85 Fed. Reg. at 81,421; 85 Fed. Reg. at 82,388. Consequently, the 1978 regulations apply and are cited here.

understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id.* § 1500.1(b)-(c).

86. To achieve these purposes, NEPA requires the preparation of a detailed environmental impact statement ("EIS") for any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). A "major federal action" includes "new or revised agency rules [and] regulations." 40 C.F.R. § 1508.18(a). To determine whether a proposed action may significantly affect the environment, NEPA requires that both the context and the intensity of an action be considered. 40 C.F.R. § 1508.27. In evaluating the context, "[s]ignificance varies with the setting of the proposed action" and includes an examination of "the affected region, the affected interests, and the locality." *Id.* § 1508.27(a). Intensity "refers to the severity of impact," and NEPA's implementing regulations list ten factors to be considered in evaluating intensity, including "[t]he degree to which the action may adversely affect an endangered or threatened species or its [critical] habitat" under the ESA. *Id.* § 1508.27(b)(9). The presence of just "one of these factors may be sufficient to require the preparation of an EIS in appropriate circumstances." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005).

87. In "certain narrow instances," an agency does not have to prepare an EIS, or a preliminary environmental assessment, if the action to be taken falls under a categorical exclusion. *See Coalition of Concerned Citizens to Make Art Smart v. Federal Hwy. Transit Admin.*., 843 F.3d 886, 902 (10th Cir. 2016) (citing 40 C.F.R. § 1508.4). But agencies may invoke a categorical exclusion only for "a category of actions which do not individually *or* cumulatively have a significant effect on the human environment and which have been found to have no such effect on procedures adopted by a Federal agency in implementation of [NEPA] regulations." 40 C.F.R. § 1508.4; *see also id.* § 1507.3(b)(2)(ii). The Services have established limited categorical exclusions for certain actions, including regulations "that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis." *See* 43 C.F.R. § 46.210(i); *see also* National Oceanic and Atmospheric Administration ("NOAA")

Administrative Order 216-6A. Under NEPA's implementing regulations, however, an agency "*shall provide for* extraordinary circumstances in which a normally excluded action may have a significant environmental effect," in which case an EIS is still required. 40 C.F.R. § 1508.4 (emphasis added).

FACTUAL AND PROCEDURAL BACKGROUND

I. SPECIES PROTECTION UNDER THE ESA.

88. Currently, the ESA protects more than 1,600 plant and animal species in the United States and its territories, and millions of acres of land have been designated as critical habitat to foster species conservation and recovery.

89. State Plaintiffs have seen significant benefits and steps taken toward recovery of at-risk species through implementation of the ESA's core requirements. Among many other examples, populations of the Atlantic Coast piping plover (*Charadrius melodus*), which is listed as a threatened species along most of the East Coast and thus is subject to FWS's longstanding regulation prohibiting take of threatened species, have more than doubled in the last twenty years due to FWS's conservation planning, federal enforcement, and cooperative efforts between federal, state, and local partners. Recovery efforts have been particularly successful in Massachusetts, where the East Coast's largest breeding population of piping plover has rebounded from fewer than 150 pairs in 1990, to more than 740 pairs in 2019, increasing more than 500 percent since the species was listed in 1986. Preliminary data indicate that the population increased to approximately 800 pairs in 2020. Despite these gains, however, piping plovers' continued recovery is threatened by habitat loss, including from climate-change-induced sea level rise.

90. The California condor (*Gymnogyps californianus*), the largest land bird in North America, has been listed as "endangered" since the ESA's inception and was on the brink of extinction in 1982 with just twenty-three known individuals. By 1987, all remaining wild condors had been placed into a captive breeding program. Recovery efforts led by FWS, California state agencies, and other partners have increased the population to 463 birds as of 2017 and successfully reintroduced captive-bred condors to the wild. These efforts are now in their

final phase, with a focus on creating self-sustaining populations and managing continued threats to the species, such as lead ammunition, trash, and habitat loss.

91. The smallest rabbit in North America, the pygmy rabbit (*Brachylagus idahoensis*), was listed as an endangered species under Washington state law in 1993 and by 2001 was considered nearly extinct, with an estimated population of fewer than fifty individuals. In 2003, FWS listed a distinct population segment of the species known as the Columbia Basin pygmy rabbit as endangered under the ESA. Since that time, the species has begun to recover in Washington as a result of a cooperative effort by FWS, the Washington Department of Fish and Wildlife, researchers, and other state agencies. Thousands of rabbits have been reintroduced on state and private land, with promising evidence of a growing population. These steps toward recovery would not be possible without the mutually supporting protections of state and federal law. Nevertheless, loss and degradation of the species' shrubsteppe habitat presents a conservation threat, and habitat conservation will be a critical aspect of species recovery. Moreover, the pygmy rabbit is rated a "moderate-high" vulnerability to climate change due to conditions that will lead to larger, more frequent, and hotter wildfires, thereby reducing the presence of sagebrush.

92. The shortnose sturgeon (*Acipenser brevirostrum*) is an anadromous fish found in rivers, estuaries, and coastal waters along the Atlantic Coast of North America. Overfishing, river damming, and water pollution greatly reduced its numbers, and the shortnose sturgeon was listed as endangered under the ESA's precursor in 1967. However, fishing prohibitions and habitat protection efforts led by NMFS and New York have allowed the shortnose sturgeon population to increase in New York's Hudson River from about 12,669 in 1979 to more than 60,000 today.

II. THE ESA'S IMPLEMENTING REGULATIONS AND THE FINAL RULES.

93. FWS and NMFS share joint responsibility for the protection and conservation of endangered and threatened species under the ESA. In general, FWS is responsible for terrestrial and inland aquatic fish, wildlife, and plant species, while NMFS is responsible for marine and anadromous species.

94. The Services adopted joint regulations implementing sections 4 and 7 of the ESA during the 1980s. *See e.g.*, 45 Fed. Reg. 13,010 (Feb. 27, 1980) (section 4); 48 Fed. Reg. 38,900 (Oct. 1, 1984) (section 4); 51 Fed. Reg. 19,926 (June 3, 1986) (section 7). Until recently, the Services had not substantially amended these longstanding regulations, although the Services adopted minor amendments to the processes for listing species, designating critical habitat, and conducting section 7 consultations in 2015 and 2016. *See* 80 Fed. Reg. 26,832 (May 11, 2015); 81 Fed. Reg. 7,214 (Feb. 11, 2016); 81 Fed. Reg. 7,414 (Feb. 11, 2016).

95. In August 2019, however, the Services published three "deregulatory" rules, under the guise of increasing clarity and efficiency, that significantly weaken several key requirements of the ESA's implementing regulations, including provisions for listing imperiled species and designating critical habitat. 84 Fed. Reg. 45,020 (Aug. 27, 2019); 84 Fed. Reg. 44,976 (Aug. 27, 2019); 84 Fed. Reg. 44,753 (Aug. 27, 2019). State Plaintiffs (and others) are currently challenging those rules in this Court. *California, et al. v. Bernhardt, et al.*, Case No. 4:19-cv-06013-JST.

96. Then, on August 5, 2020, the Services jointly published a proposed rule to define the term "habitat" in their ESA implementing regulations, 85 Fed. Reg. 47,333 (Aug. 5, 2020) ("proposed Habitat Definition Rule"). The following month, on September 8, 2020, FWS published a proposed rule to establish a process for excluding critical habitat from designation, 85 Fed. Reg. 55,398 (Sept. 8, 2020) ("proposed Habitat Exclusion Rule") (together with the proposed Habitat Definition Rule, the "Proposed Rules").

97. The proposed Habitat Definition Rule proposed adding the following definition of "habitat" to 50 C.F.R. § 424.02:

> The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species.

98. The proposed Habitat Definition Rule also sought comment on the following alternative definition of "habitat" to add to 50 C.F.R. § 424.02:

> The physical places that individuals of a species use to carry out one or more life

processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist.

99. The proposed Habitat Exclusion Rule sought to establish a new process for excluding areas from critical habitat designations made by FWS pursuant to section 4(b) of the ESA, 16 U.S.C. § 1533(b). Among other unlawful changes, FWS proposed a new mandatory obligation on FWS to undertake an "exclusion analysis" when a "proponent of excluding a particular area … presented credible information regarding ... meaningful economic" or other impacts supporting exclusion benefits, and proposed to enable FWS to defer to outside experts on a variety of impacts. 85 Fed. Reg. at 55,406–07. If FWS determined that the benefits of excluding a particular area outweighed the benefits of including that area as critical habitat, the proposed rule provided that the FWS "shall exclude" that area, unless exclusion would result in the extinction of a species. *Id*. at 55,407. The proposed Habitat Exclusion Rule also proposed to reverse FWS's 2016 policy of prioritizing federal lands for critical habitat designation by requiring it to consider information supporting the exclusion of federal lands based on "impacts" such as federal agencies' ESA consulting costs and applicants' costs to modify a project to avoid habitat impacts. *Id.* at 55,402.

100. Although both Proposed Rules would significantly weaken protections for our nation's most imperiled species, the Services again characterized the Proposed Rules as changes to increase clarity in ESA implementation, provided only thirty-day periods for public comment, and held no public hearings.

101. On September 4, 2020, and October 8, 2020, many of the undersigned State Plaintiffs submitted comments on the proposed Habitat Definition Rule and proposed Habitat Exclusion Rule, respectively, urging the Services to withdraw the Proposed Rules on the grounds that they would, if finalized, be unlawful, arbitrary, capricious, and contrary to the ESA, APA, NEPA, and would harm State Plaintiffs' interests.

102. Despite significant opposition, on December 16, 2020, the Services issued the Habitat Definition Rule, and on December 18, 2020, FWS issued the Habitat Exclusion Rule.

103. The Habitat Definition Rule adds to 50 C.F.R. § 424.02 the following definition of "habitat," which did not appear in, and is not a logical outgrowth of, the proposed Habitat Definition Rule:

> For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.

85 Fed. Reg. at 81,421.

104. FWS published the final Habitat Exclusion Rule exactly as proposed, creating a new, unlawful and arbitrary process that FWS will follow to exclude areas from critical habitat designation and associated protections. *See* 85 Fed. Reg. at 82,388–89. For example, the Habitat Exclusion Rule unlawfully and arbitrarily:

a. Mandates that the FWS conduct a critical habitat exclusion analysis in any case where a "proponent of excluding a particular area … has presented credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion";

b. Requires FWS to defer to outside "experts" in, or "sources with firsthand knowledge of," a new non-exhaustive list of impacts deemed "outside of the scope of [FWS]'s expertise"—including some biological impacts within FWS's expertise—when analyzing the benefits of including or excluding an area from designation as critical habitat unless FWS has "knowledge or material evidence that rebuts that information";

c. Biases the required economic analysis against designating critical habitat for species conservation and instead favors excluding both federal and non-federal lands from such designations;

d. Reverses FWS's prior policy—which prioritized designation of critical habitat on federal lands—by requiring FWS to consider information supporting the exclusion of federal lands based on broadly defined "impacts," such as ESA consulting costs borne by federal agencies and costs borne by applicants to modify a project to avoid habitat impacts;

e. Allows FWS to exclude critical habitat on both federal and nonfederal land based on a wide range of economic impacts and "other relevant impacts," including undefined "community interests," such as disruption of planned community development projects; and

f. Requires FWS to consider implementation of conservation plans, agreements, or partnerships authorized by incidental take permits under section 10 of the ESA when determining whether to exclude areas covered by such plans from critical habitat.

105. Each of the Final Rules is a major federal action that will significantly affect the human environment under NEPA. The Services, however, provided no environmental analysis of the Proposed Rules under that statute. Instead, the Services erroneously found that the Final Rules are categorically excluded from NEPA review because they "are of an administrative, financial, legal, technical, or procedural nature." 85 Fed. Reg. at 81,421, 82,388.

III. FINAL RULES' INJURIES TO STATE PLAINTIFFS.

106. State Plaintiffs are uniquely harmed by the Final Rules' undermining and weakening of the ESA's key critical habitat designation requirements and associated protections by, among other things, limiting qualifying habitat, facilitating exclusion analyses, expanding impacts that may warrant exclusion, and thereby reducing critical habitat designations.

107. First, State Plaintiffs have a concrete interest in preventing harm to their natural resources, including listed species and critical habitat, both in general and under the ESA in particular. As the Supreme Court has recognized, State Plaintiffs are entitled to "special solicitude" in seeking to remedy environmental harms. *See Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 520 (2007). These interests are particularly robust in the context of the ESA, which conserves the invaluable natural heritage within states' borders. And that a state's own territory is the "territory alleged to be affected" by the challenged action "reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power." *Id.* at 519 (internal quotation marks omitted).

108. Indeed, in most of the Plaintiff States, the states own and hold fish and wildlife resources in both a proprietary and regulatory capacity in trust for the benefit of the entire people of the state.

109. The ESA specifically directs the Services to "cooperate to the maximum extent practicable with the States" in implementing the ESA and also gives State Plaintiffs a distinct role in ensuring the faithful and fully informed implementation of the ESA's species conservation mandates. 16 U.S.C. § 1535(a).

110. State Plaintiffs thus have an important interest in preventing and remedying harm to endangered and threatened species that reside in habitat both within and across the State Plaintiffs' borders. The Final Rules' weakening of the ESA's substantive and procedural safeguards for species and critical habitat significantly and adversely affects the fish and wildlife resources of State Plaintiffs and curtails the ability of State Plaintiffs to help prevent federally listed species from sliding further toward extinction. In addition, federally listed species living in the State Plaintiffs' sovereign lands are vulnerable to the escalating adverse effects of climate change, such as species in coastal states that are at increasing risk from the effects of rising sea levels.

111. Second, and relatedly, the ESA expressly declares that endangered and threatened "species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." *Id.* § 1531(a)(3). Reducing the State Plaintiffs' wealth of wild species would damage each of these values and "diminish[] a natural resource that could otherwise be used for present and future commercial purposes." *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1053 (D.C. Cir. 1997); *see also San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1176–77 (9th Cir. 2011). And although the harms that would result from the loss of biological diversity are enormous, the nation cannot fully apprehend their scope because of the "*unknown* uses that endangered species might have and ... the *unforeseeable* place such creatures may have in the chain of life on this planet." *Hill*, 437 U.S. at 178-79 (emphases in original); *see also id.* at 178 (noting that "[t]he

value of this genetic heritage is, quite literally, incalculable") (internal quotation marks and citations omitted).

112. Third, with the Final Rules' unlawful and arbitrary weakening of federal protections, the responsibility for, and burden of, protecting imperiled species and their habitats within state borders would fall more heavily on State Plaintiffs. *See Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015) (impact on state resources provides basis for standing). Filling that regulatory gap would detract from State Plaintiffs' efforts and resources to carry out their own programs and impose significantly increased costs and burdens on the State Plaintiffs. For example, under the new Habitat Definition Rule and Habitat Exclusion Rule, the ESA will no longer protect as "critical habitat" areas that are essential to the conservation of species whose current habitat is threatened by climate change or other environmental threats, but that do not yet contain the features that will contribute to such conservation. In such cases, State Plaintiffs will bear the burden of identifying and protecting that habitat under state regulatory programs to ensure species conservation and recovery. *See, e.g.*, Mass. Gen. Laws. Ch. 131A, §§ 2, 4-5 (providing for review and designation of "significant habitats" for state-listed rare species and barring alteration of such habitat without permit); 321 Code Mass. Regs. §§ 10.00 *et seq.* (providing for delineation of, and standards and procedures for conducting activities in, "priority habitat" for state-listed rare species); *see Air Alliance Hous. v. U.S. Envtl. Prot. Agency*, 906 F.3d 1049, 1059-60 (D.C. Cir. 2018) ("Monetary expenditures to mitigate and recover from harms that could have been prevented absent the [federal rule] are precisely the kind of 'pocketbook' injury that is incurred by the state itself.").

113. Moreover, while State Plaintiffs can act to protect imperiled species and habitat within their own borders, they cannot do the same for such species outside of state borders and they cannot secure federal consultation triggered by anticipated effects on federally designated critical habitat. Thus, despite the resource-intensive efforts described above, the State Plaintiffs may not be able to wholly fill the regulatory gaps created by the Final Rules.

114. Finally, the Services' failures to prepare an EIS or environmental assessment for the Final Rules, and to provide sufficient opportunity for public notice and comment on the Habitat

Definition Rule, have harmed State Plaintiffs' procedural interests in participating in a legally sound environmental review and rulemaking process that adequately considers and accounts for public input, and adequately considers and mitigates the impacts of federal rulemaking on the State Plaintiffs' natural resources.

115. Consequently, State Plaintiffs have suffered a legal wrong and concrete injury as a result of the Services' actions and have standing to bring this suit. Declaring the Final Rules *ultra vires* and arbitrary and capricious, and vacating these actions, will redress the harms suffered by State Plaintiffs.

FIRST CAUSE OF ACTION
(Violations of the ESA and APA,
16 U.S.C. §§ 1531, 1532, 1533, 1536; 5 U.S.C. § 706)

116. Paragraphs 1 through 115 are realleged and incorporated herein by reference.

117. Under the APA, a "reviewing court shall … hold unlawful and set aside" agency action found to be "an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(A), (C). An agency does not have authority to adopt a regulation that is "manifestly contrary to the statute." *Chevron*, 467 U.S. at 844; *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 703 (1995).

118. Here, the Final Rules violate the ESA's plain language, structure, and purpose, and exceed the scope of the Services' jurisdiction, authority, and discretion under the ESA.

119. The Habitat Definition Rule's new definition of "habitat" to limit critical habitat designations to the area that "currently or periodically contains the resources and conditions necessary to support one or more life processes of a species" is contrary to 16 U.S.C. § 1532(5)(A) and 16 U.S.C. § 1533(b)(1)(A), and the ESA's conservation purposes and mandate in 16 U.S.C. §§ 1531(b) & (c), and 1536(a)(1).

120. The Habitat Exclusion Rule violates the ESA in the following respects, among others:

a. The new process for conducting economic impact analyses in 50 C.F.R. § 17.90(a), (c), and (e) is contrary to 16 U.S.C. §§ 1532(5)(A) and 1533(a)(3)(A) and (b)(2), and the

ESA's conservation purposes and mandate in 16 U.S.C. §§ 1531(b) and (c), and 1536(a)(1);

b. The new extensive list in 50 C.F.R. §§ 17.90(a) and (d)(1) of "economic impacts" and "other relevant impacts" to be considered in the exclusion analysis is contrary to 16 U.S.C. §§ 1532(5)(A) and 1533(a)(3)(A) and (b)(2), and the ESA's conservation purposes and mandate in 16 U.S.C. §§ 1531(b) and (c), and 1536(a)(1);

c. The requirements in 50 C.F.R. § 17.90(c)(2) and (e) that FWS "will" conduct an exclusion analysis when a "proponent of excluding a particular area … has presented credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area" and "shall exclude" an area from critical habitat designation if FWS "determines that the benefits of excluding a particular area from critical habitat outweigh the benefits of specifying that area as part of critical habitat" are contrary to 16 U.S.C. § 1533(a)(3)(A) and (b)(2) and the ESA's conservation purposes and mandate in 16 U.S.C. §§ 1531(b) and (c), and 1536(a)(1);

d. The requirement in 50 C.F.R. § 17.90(d)(1) that FWS defer to outside "experts in" or those with "firsthand knowledge of" areas that are "outside of the scope of the [FWS]'s expertise" unless FWS has "knowledge or material evidence" rebutting that information, and to only consider information from proponents of critical habitat exclusion, is contrary to 16 U.S.C. § 1533(a)(3)(A) and (b)(2) and the ESA's conservation purposes and mandate in 16 U.S.C. §§ 1531(b) and (c), and 1536(a)(1); and

e. The requirement in 50 C.F.R. § 17.90(d)(3) that FWS consider implementation of conservation plans, agreements, or partnerships authorized by an incidental take permit under section 10 of the ESA is contrary to 16 U.S.C. §§ 1533(a)(3)(A) and (b)(2) and 1536(a)(2) and (b)(4) and the ESA's conservation purposes and mandate in 16 U.S.C. §§ 1531(b) and (c), and 1536(a)(1).

121. Accordingly, in promulgating the Final Rules, the Services acted in a manner that constituted an abuse of discretion, is not in accordance with law, and is in excess of the Services' statutory authority, in violation of the ESA and the APA. 16 U.S.C. §§ 1531, 1532, 1533, 1536; 5

U.S.C. § 706. Consequently, the Habitat Definition Rule and Habitat Exclusion Rule should be held unlawful and set aside.

SECOND CAUSE OF ACTION
(Violations of the APA,
5 U.S.C. §§ 553, 706)

122. Paragraphs 1 through 121 are realleged and incorporated herein by reference.

123. In promulgating a regulation under the APA, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotation and citation omitted). A regulation is arbitrary and capricious if the agency "relie[s] on factors which Congress has not intended it to consider," "entirely fail[s] to consider an important aspect of the problem," or has "offered an explanation for its decision that runs counter to the evidence before the agency" or "is so implausible that it could not be ascribed to a difference of view or the product of agency expertise." *Id.*

124. Additionally, "[a]gencies are free to change their existing policies," but they must "provide a reasoned explanation for the change." *Encino*, 136 S. Ct. at 2125. While an agency need not show that a new rule is "better" than the rule it replaced, it still must demonstrate that "it is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." *FCC v. Fox*, 556 U.S. at 515.

125. Moreover, the APA requires that interested parties have a "meaningful opportunity to comment on proposed regulations." *See Safe Air for Everyone v. U.S. Envtl. Prot. Agency*, 488 F.3d 1088, 1098 (9th Cir. 2007). To satisfy the requirements of APA section 553, notice of a proposed rule must "provide an accurate picture of the reasoning that has led the agency to the proposed rule," so as to allow an "opportunity for interested parties to participate in a meaningful way in the discussion and final formulation of rules." *Connecticut Light & Power*, 673 F.2d at 528-30; *see also Prometheus Radio Project v. Federal Commc'ns. Comm'n*, 652 F.3d 431, 449 (3d Cir. 2011) ("an agency proposing informal rulemaking has an obligation to make its views

known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible") (citations and emphasis omitted).

126. Here, in promulgating the Final Rules, the Services failed to provide a reasoned analysis for the changes, relied on factors Congress did not intend for them to consider, entirely overlooked important issues at the heart of their species-protection duties under the ESA, and offered explanations that run counter to the evidence before the Services and that fail to address significant deviations from prior agency policy.

127. With regard to the Habitat Definition Rule, the Services, among other defects:

a. Failed to provide any reasoned explanation for adding a new definition of "habitat" in 50 C.F.R. § 424.02 that limits critical habitat designations to the area that "currently or periodically contains the resources and conditions necessary to support one or more life processes of a species";

b. Failed to explain or provide any reasoned justification for changing their position from their prior approach to defining what constitutes habitat for listed species;

c. Failed to consider the impact of the new definition on listed species and their habitat, including the need to protect and restore areas of currently unoccupied habitat so that species may expand their current ranges or migrate to new territory to avoid existential human and environmental threats such as climate change and habitat destruction; and

d. Failed to consider how the Services will fulfill the ESA's policy of institutionalized caution and species recovery mandates despite the rule's significant limitations on designation of habitat that is essential to species conservation.

128. Furthermore, the Services failed to provide a meaningful opportunity to comment on the Habitat Definition Rule, because the definition set forth in the final rule was not included in, and is not a logical outgrowth of, the proposed Habitat Definition Rule.

129. With regard to the Habitat Exclusion Rule, FWS, among other defects:

a. Failed to provide any reasoned explanation for its requirement in 50 C.F.R. § 17.90(c)(2) and (e) that FWS must undertake an exclusion analysis when "proponent of excluding a particular area … has presented credible information regarding the

existence of a meaningful economic or other relevant impact supporting a benefit of exclusion," and must exclude an area from critical habitat when FWS "determines that the benefits of excluding a particular area from critical habitat outweigh the benefits of specifying that area as part of critical habitat," and failed to consider the impacts to listed species and critical habitat from those changes;

b. Failed to provide any reasoned explanation for its requirement in 50 C.F.R. § 17.90(d) that FWS defer to outside "experts in" or those with "firsthand knowledge of" areas that are "outside of the scope of the [FWS]'s expertise" unless FWS has specific information rebutting that information, failed to provide a reasoned explanation for the omission of any requirement that the FWS consider information from proponents of critical habitat designation, and failed to consider the impacts to listed species and critical habitat from that change;

c. Failed to provide any reasoned explanations for departing from its prior policies—that a critical habitat exclusion analysis is discretionary, not mandatory, and that the FWS generally does not exclude federal lands from designations of critical habitat—when it rendered all federal lands eligible for exclusion;

d. Failed to provide any reasoned explanation for its requirement in 50 C.F.R. § 17.90(d)(4) that, in determining whether to exclude areas covered by conservation plans or agreements, FWS consider "information provided by proponents" of an exclusion, but not proponents of designation, of an area as critical habitat, and failed to consider the impacts to listed species and critical habitat from that change;

e. Failed to consider the impact on listed species and their habitat of excluding additional areas from critical habitat designations and associated protections, including the need for species to recover to prior habitat ranges and to migrate to new territory in response to existential threats including climate change and habitat destruction; and

f. Failed to consider how the Habitat Exclusion Rule will adversely affect the ESA's policy of institutionalized caution and species recovery mandates given the rule's effect on increasing in areas that will be excluded from critical habitat designations.

130. Accordingly, the Services acted in a manner that was arbitrary, capricious, an abuse of discretion, and not in accordance with law, and failed to follow the procedures required by law, in violation of the APA. 5 U.S.C. §§ 553, 706. Consequently, the Final Rules should be held unlawful and set aside.

THIRD CAUSE OF ACTION
(Violation of NEPA and the APA;
42 U.S.C. § 4332(2)(C); 5 U.S.C. § 706)

131. Paragraphs 1 through 130 are realleged and incorporated herein by reference.

132. NEPA requires federal agencies to take a "hard look" at the environmental consequences of a proposed activity before acting. *See* 42 U.S.C. § 4332. To achieve that purpose, a federal agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332(2)(C); 40 C.F.R. § 1502.3.

133. NEPA's implementing regulations specify several factors that an agency must consider in determining whether an action may significantly affect the environment, thus warranting the preparation of an EIS, including "[t]he degree to which the action may adversely affect an endangered or threatened species or its [critical] habitat" under the ESA. 40 C.F.R. § 1508.27. The presence of any single significance factor can require the preparation of an EIS. "The agency must prepare an EIS if substantial questions are raised as to whether a project may cause significant environmental impacts." *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 946 (9th Cir. 2014).

134. The Final Rules will have significant environmental impacts on imperiled species and their habitat by limiting the number, type, and extent of critical habitat designations and thus reducing the ESA's commensurate protections for endangered and threatened species associated with such designations. As FWS's own economic analysis for the proposed Habitat Exclusion Rule stated, "[t]he proposed rule is likely to result in additional areas being excluded from future critical habitat designations . . . due to: 1) the additional considerations regarding community impacts and non-federal activities on Federal lands; 2) the clarification for stakeholders regarding what constitutes 'credible information' that will trigger a 4(b)(2) exclusion analysis; and 3) the

provision that the Service will weight information in impacts based on who has the relevant expertise." The reduction in areas considered "habitat" under the Habitat Definition Rule will, in turn, result in fewer areas protected as "critical habitat," which will reduce species' ability to survive and recover, contrary to the fundamental purposes of the ESA.

135. Because of these significant, direct, indirect, and cumulative environmental impacts on imperiled species and their habitat, the NEPA categorical exclusion for policies and regulations of an administrative or procedural nature, 42 C.F.R. § 46.210(j), do not apply.

136. In any event, "extraordinary circumstances," including significant impacts on listed species and critical habitat and violations of the ESA, preclude the application of an exclusion from NEPA review. *See* 43 C.F.R. § 46.215.

137. Consequently, the Final Rules constitute a "major federal action" that significantly affects the quality of the human environment, requiring preparation of an EIS prior to finalization of the rules.

138. Furthermore, NEPA requires that an agency consider the full scope of activities encompassed by its proposed action, as well as any connected, cumulative, and similar actions. *See* 40 C.F.R. § 1508.25. "Connected actions" means actions that "are closely related and therefore should be discussed in the same impact statement." *Id*. § 1508.25(a)(1). Similarly, "cumulative actions" are those "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." *Id*. § 1508.25(a)(2). And "similar actions" are those "which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." *Id*. § 1508.25(a)(3). "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

139. Here, the Services violated NEPA by failing to consider the combined impacts of the Final Rules, given that both regulations directly impact the critical habitat designation process

under Section 4 of the ESA and, whether treated as connected, cumulative, or similar actions, will have significant adverse direct, indirect, and cumulative impacts on endangered and threatened species and their habitat.

140. In sum, the Services' failure to take a "hard look" at the environmental impacts of the Final Rules, and their determination that the Final Rules are subject to a categorical exclusion from NEPA, was arbitrary and capricious, an abuse of discretion, and contrary to the requirements of NEPA and the APA. 5 U.S.C. § 706(2); 42 U.S.C. § 4332(2)(C). Consequently, the Final Rules should be held unlawful and set aside.

PRAYER FOR RELIEF

WHEREFORE, State Plaintiffs respectfully request that this Court:

1. Issue a declaratory judgment that the Services violated the ESA and APA by acting arbitrarily, capriciously, contrary to law, in abuse of their discretion, and in excess of their statutory jurisdiction and authority in promulgating the Final Rules;

2. Issue a declaratory judgment that the Services violated the APA by acting arbitrarily, capriciously, contrary to law, in abuse of their discretion, and in violation of the public notice procedures required by law in promulgating the Final Rules;

3. Issue a declaratory judgment that the Services violated NEPA and the APA by acting arbitrarily, capriciously, contrary to law, in abuse of their discretion, and in violation of the environmental review and public review procedures required by law in promulgating the Final Rules;

4. Issue an order vacating the Services' unlawful issuance of the Final Rules so that the prior regulatory regimes are immediately reinstated;

5. Issue a mandatory injunction requiring the Services to immediately withdraw the Final Rules and reinstate the prior regulatory regime;

6. Award State Plaintiffs their costs, expenses, and reasonable attorneys' fees; and

7. Award such other relief as the Court deems just and proper.

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