COMMENTS OF THE ATTORNEYS GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, THE STATES OF ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, WASHINGTON, WISCONSIN, AND THE DISTRICT OF COLUMBIA

December 22, 2025

By Electronic Submission to www.regulations.gov

Hon. Doug Burgum, Secretary
U.S. Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Hon. Howard Lutnick, Secretary
U.S. Department of Commerce
1401 Constitution Avenue N.W.
Washington, D.C. 20230

Re: Comments on Proposed Rules entitled:

Docket No. FWS-HQ-ES-2025-0029: Regulations Pertaining to Endangered and Threatened Wildlife and Plants, RIN 1018-BI74
Docket No. FWS-HQ-ES-2025-0048: Regulations for Designating Critical Habitat, RIN 1018-BI76
Docket No. FWS-HQ-ES-2025-0044: Interagency Cooperation Regulations, RIN 1018-BI75, 0648-BN79
Docket No. FWS-HQ-ES-2025-0039: Listing Endangered and Threatened Species and Designating Critical Habitat, RIN 1018-BI73, 0648-BN70

Dear Secretaries Burgum and Lutnick:

The undersigned nineteen State Attorneys General of the Commonwealth of Massachusetts, the States of Arizona, California, Colorado, Connecticut, Delaware, Illinois, Maryland, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia (collectively, our States), respectfully submit the following comments on the proposed rules of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services) entitled *Listing Endangered and Threatened Species and Designating Critical Habitat*, 90 Fed. Reg. 52,607 (Nov. 21, 2025) (Proposed Listing and Critical Habitat Rule); and *Interagency Cooperation Regulations*, 90 Fed. Reg. 52,600 (Nov. 21, 2025) (Proposed Interagency Cooperation Rule), as well as FWS's two proposed rules entitled *Regulations for Designating Critical Habitat*, 90 Fed. Reg. 52,592 (Nov. 21, 2025) (Proposed Habitat Exclusion Rule); and *Regulations Pertaining to*

Endangered and Threatened Wildlife and Plants, 90 Fed. Reg. 52,587 (Nov. 21, 2025) (Proposed Section 4(d) Rule); (individually, Proposed Rule, or collectively, Proposed Rules).

The Proposed Rules would erode the Services' ability to execute the fundamental purpose of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531 *et seq*., to conserve our nation's imperiled species by using "all methods and procedures" necessary to bring any such species to the point of full recovery. *Id*. § 1532(3). For the myriad reasons discussed herein, our States urge the Services to withdraw these unlawful proposals and instead fulfill their express statutory obligation to conserve our nation's endangered and threatened species.

I. SUMMARY OF COMMENTS

A. Proposed Listing and Critical Habitat Rule

The Proposed Listing and Critical Habitat rule would reinstate many of the unlawful changes from the Listing and Critical Habitat Rule adopted in 2019 and rescinded in 2024. The Proposed Rule would: (1) remove language prohibiting consideration of economic impacts in listing determinations, (2) constrain the definition of "foreseeable future" for purposes of listing species as threatened, (3) remove consideration of species recovery in delisting determinations, (4) expand the circumstances under which designation of critical habitat could be deemed not "prudent," and (5) restrict the designation of unoccupied critical habitat.

The Proposed Listing and Critical Habitat Rule is contrary to section 4 of the ESA and would violate the Administrative Procedure Act (APA), 5 U.S.C. § 706, if adopted as proposed. Among other things, the Proposed Rule seeks to unlawfully narrow critical definitions and remove key species recovery considerations. The Proposed Listing and Critical Habitat Rule's treatment of how critical habitat is designated also conflicts with the plain language of the statute, the ESA's conservation purposes, and would be arbitrary and capricious if finalized.

B. Proposed Habitat Exclusion Rule

The Proposed Habitat Exclusion Rule would readopt FWS's unlawful 2020 additions to the procedures for designating critical habitat, which were rescinded *in toto* in 2022. The Proposed Rule identifies the circumstances under which FWS will determine to exclude areas from a critical habitat designation. Among other things, the Proposed Rule would require FWS, when determining whether to exclude an area from critical habitat, to consider a long list of economic impacts, including the "opportunity costs arising from critical habitat designation," such as those resulting from section 7 consultation requirements. 90 Fed. Reg. 52,598–99. In addition, the Proposed Rule would *require* FWS to conduct an exclusion analysis when the proponent (but not the opponent) of an exclusion presents "credible information" supporting the benefit of an exclusion. *Id*. at 52,599. The rule also would require FWS to give specified weights to that information, depending upon whether it is or is not deemed to be "outside the scope of the [FWS's] expertise." *Id.* Finally, the rule contains criteria for excluding areas from critical habitat

that are subject to conservation plans, agreements and partnerships and would reverse a 2016 policy regarding exclusion of federal lands. *Id*.

The Proposed Habitat Exclusion Rule's process for conducting economic impact analyses for critical habitat designations is contrary to section 4(b)(2), section 7, and the conservation purposes of the ESA. It would unlawfully make a critical habitat exclusion analysis mandatory rather than discretionary and require FWS to exclude critical habitat in a number of situations, contrary to section 4(b)(2). Further, the Proposed Rule would unlawfully require FWS to defer to outside "experts," give FWS broad discretion to exclude large areas, including all federal lands, from critical habitat designations, and would conflict with established case law regarding exclusions of conservation plan areas from critical habitat designations. Additionally, in the preamble to the Proposed Rule, FWS fails to provide a reasoned justification for the changes and fails to explain, as required by the APA, why it is now proposing to readopt the prior rule, despite rescinding it in 2022.

C. Proposed Section 4(d) Rule

The Proposed Section 4(d) Rule once again would repeal the formerly longstanding rule extending all ESA section 9 prohibitions applicable to endangered species to all threatened species on a blanket basis. Instead, the Proposed Rule would require FWS to extend any of the section 9 prohibitions to each newly listed threatened species on a case-by-case basis in a species-specific section 4(d) rule, within no specified time frame.

The Proposed Rule does not represent the "single, best meaning" of the statute, contrary to FWS's claim. FWS misinterprets *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024) (*Loper Bright*), and reverts to an arbitrary and capricious interpretation of the statute, in direct contrast to the current section 4(d) rule promulgated in 2024. FWS wholly disregards its prior findings and fails to adequately consider the consequences of its proposal for species conservation. FWS's proposal also is unsupported by any principled rationale and does not reflect "reasoned decisionmaking." *Michigan v. Env't Prot. Agency*, 576 U.S. 743, 750 (2015) (cleaned up).

D. Proposed Interagency Cooperation Rule

The Proposed Interagency Cooperation Rule would, among other things, revert to the unlawful 2019 definitions of "effects of the action" and "environmental baseline" in section 402.02, and would re-codify and expand the 2019 version of section 402.17, establishing criteria for determining when federal agency activities and effects are "reasonably certain to occur" within the meaning of the effects definition.

The proposed readoption of the unlawful 2019 regulatory provisions contradicts the text, structure, and purposes of section 7 as well as the conservation purposes of the ESA as a whole and controlling case law. The preamble to the Proposed Rule also fails to provide a reasoned

justification for the proposed changes, particularly the Services' plan to readopt a regulatory provision (section 402.17) they chose to rescind only a year and a half ago.

E. National Environmental Policy Act Compliance

The National Environmental Policy Act (NEPA) requires the Services to prepare an environmental impact statement (EIS) for all major federal actions that would have a "reasonably foreseeable significant effect on the quality of the human environment." 42 U.S.C. § 4336(b)(1). Each of the four Proposed Rules qualifies as a "major federal action" that meets this threshold, and none of the Proposed Rules qualify for any categorical exclusion from NEPA review. All four of the Proposed Rules would have reasonably foreseeable significant effects on the preservation and recovery of our nation's most imperiled species and their designated critical habitat. Finally, the draft environmental assessment prepared for the Proposed Interagency Cooperation Rule is legally insufficient because the Services are required to prepare an EIS and the EA is conclusory and incomplete.

II. BACKGROUND AND OVERVIEW

A. Overview and Purposes of the ESA

Congress enacted the ESA over fifty years ago to create "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (*TVA v. Hill*). 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" the conservation of such species. 16 U.S.C. § 1531(b). The ESA further requires that "all Federal departments and agencies shall seek to conserve endangered . . . and threatened species" and "shall utilize their authorities in furtherance" of this overriding conservation purpose. *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" that species no longer needs to be listed, e.g. to the point of full recovery. *Id.* § 1532(3). Congress also declared that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untampered by adequate concern and conservation." *Id*. § 1531(a)(1).

"Congress was concerned about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet." *TVA v. Hill*, 437 U.S. at 178–79 (emphasis in original). As President Nixon explained in signing the ESA, "[n]othing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed."[1] Accordingly, the ESA enshrines a national policy of "institutionalized caution" in recognition of the "overriding need to *devote whatever effort and*

[1] President's Statement on Signing the Endangered Species Act of 1973, 374 PUB. PAPERS, 1027–28 (Dec. 28, 1973).

resources [are] *necessary* to avoid further diminution of national and worldwide wildlife resources." *TVA v. Hill*, 437 U.S. at 177, 194 (emphasis in original, cleaned up). "[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 (emphasis added); *see also id*. at 194.

As the Supreme Court recognized in *TVA v. Hill*, that overriding conservation goal "is reflected not only in the stated policies of the [ESA], but in literally every section of the statute." *Id.* at 184. Section 4—the "cornerstone of effective implementation of the [ESA]," S. REP. NO. 97-418, at 10 (1982)—prescribes the process for the Services to list a species as "endangered" or "threatened" based "*solely* on the basis of the best scientific and commercial data." 16 U.S.C. § 1533(b)(1)(A) (emphasis added). Section 4 further directs the Services to designate "to the *maximum* extent prudent and determinable," specified "critical habitat" for each species, as defined, concurrent with its listing. *Id.* §§ 1532(5), 1533(a)(3)(A) (emphasis added).

Section 7, which has been described as the "heart of the ESA," *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2010) (*W. Watersheds Project*), expresses "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species," elevating concern for species protection "over the 'primary missions' of federal agencies," *TVA v. Hill*, 437 U.S. at 185. Section 7 accordingly places an affirmative obligation on all federal agencies to "utilize their authorities in furtherance" of the ESA's conservation goal. 16 U.S.C. § 1536(a)(1); *see also id*. § 1531(c)(1). Section 7 also requires all federal agencies to "insure" that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. *Id.* § 1536(a)(2).

Finally, section 9 prohibits "take" (i.e., killing, injuring, harassing, or harming) and other actions with respect to endangered fish and wildlife, and also prohibits specified actions regarding endangered plant species, to ensure their conservation. *Id.* §§ 1533(d), 1538(a)(1)(G), (a)(2)(E). Section 4(d) authorizes the Services to extend by regulation any or all of these section 9 prohibitions to threatened fish, wildlife and plant species, which, prior to 2019, FWS had done for nearly 45 years on a blanket basis unless and until a species-specific section 4(d) rule was developed. *See* 40 Fed. Reg. 44,425 (Sept. 26, 1975), *as amended* 43 Fed. Reg. 18,181 (Apr. 28, 1978) (Blanket Section 4(d) Rule). The Services' longstanding prior extension of ESA section 9 protections for endangered species to listed threatened species reflected the national policy of "institutionalized caution" that led to the ESA's enactment. *TVA v. Hill*, 437 U.S. at 178, 194 (internal quotation omitted).[2]

[2] *See also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698–99 (1995) (describing broad purposes of ESA).

B. The 2019 ESA Rules

On August 27, 2019, the Services finalized rules related to listing endangered and threatened species, critical habitat designations, section 4(d) rules for threatened species, and interagency cooperation under the ESA. *See* Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020 (Aug. 27, 2019) (2019 Listing and Critical Habitat Rule); Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44,753 (Aug. 27, 2019) (2019 Section 4(d) Rule); Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019) (2019 Interagency Cooperation Rule) (together, the 2019 ESA Rules).

The Services admitted that the 2019 ESA Rules were developed to further a deregulatory agenda.[3] These rules departed from the plain language of the ESA, dramatically and arbitrarily revised prior ESA regulations that had been in effect since the 1970s and 1980s, and severely damaged conservation of listed species and their habitats. The 2019 Section 4(d) Rule entirely and unlawfully eliminated the Blanket 4(d) Rule. 84 Fed. Reg. 44,753. Among other changes, the 2019 Listing and Critical Habitat Rule fundamentally undermined the species listing and critical habitat designation processes. 84 Fed. Reg. 45,020. And the 2019 Interagency Cooperation Rule significantly weakened requirements for interagency consultation on proposed federal agency actions that may affect listed species and their habitats, in multiple unlawful and extra-statutory ways. 84 Fed. Reg. 44,976.

Nineteen States and two cities, including seventeen of the undersigned States, along with multiple environmental and animal rights organizations, challenged the 2019 ESA Rules in the U.S. District Court for the Northern District of California.[4]

C. The 2024 ESA Rules

On April 5, 2024, the Services promulgated new ESA rules that largely restored the Services' ability to carry out the core purposes of the ESA. *See* Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat, 89 Fed. Reg. 24,300 (Apr. 5, 2024) (2024 Listing and Critical Habitat Rule); Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 89 Fed. Reg. 23,919 (Apr. 5, 2024) (2024 Section 4(d) Rule); Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 89 Fed. Reg. 24,268 (Apr. 5, 2024) (2024 Interagency Cooperation Rule) (together, the 2024 ESA Rules).

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[3] 83 Fed. Reg. at 35,194 (citing Executive Order No. 13,777, "Enforcing the Regulatory Reform Agenda," as impetus for rulemaking); 83 Fed. Reg. at 35,179 (same); 83 Fed. Reg. at 35,175–76 (same).

[4] *See State of Cal. et al. v. Haaland et al.*, 4:19-cv-06013-JST (N.D. Cal.); *Ctr. for Biological Diversity et al. v. Haaland et al.*, 4:19-cv-05206-JST (N.D. Cal.) (lead case); *Animal Legal Def. Fund v. Haaland et al.*, 4:19-cv-06812-JST (N.D. Cal.).

The 2024 Listing and Critical Habitat Rule restored language requiring that species listing, delisting, and reclassification determinations be made without consideration of economic impacts in section 424.11(b). *See* 89 Fed. Reg. at 24,335. The 2024 Listing and Critical Habitat Rule also rescinded modifications to section 424.11(d), adopted in the 2019 Listing and Critical Habitat Rule, which unlawfully and arbitrarily embedded the concept of quantitative probability into the term "foreseeable future" for listing threatened species. *Id.* The 2024 Listing and Critical Habitat Rule also advanced the ESA's fundamental purpose by reinserting the specific reference to species recovery as a criterion for species delisting in section 424.11(e). It further made several changes to language concerning the statutory "not prudent" exemption from critical habitat designation and the designation of unoccupied habitat, which language had been added in 2019. *Id.*

The 2024 Section 4(d) Rule reinstated the formerly longstanding Blanket Section 4(d) Rule, recognizing that the Blanket Section 4(d) Rule promoted the ESA's core purpose by "ensur[ing] that there is never a lapse in threatened species protections." 89 Fed. Reg. at 23,919.

Finally, the 2024 Interagency Cooperation Rule included new authority to include off-site mitigation in reasonable and prudent measures in section 402.14(i)(2)-(3), made improvements to section 402.02's definitions for "effects of actions" and "environmental baseline," and rescinded, in its entirety, section 402.17. *See* 88 Fed. Reg. at 24,268.

D. The 2020 Habitat Exclusion Rule and 2022 Rescission of that Rule

In 2020, FWS proposed and finalized a rule adding a process for excluding areas of critical habitat under ESA section 4(b)(2). *See* Proposed Rule, Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 85 Fed. Reg. 55,398 (Sept. 8, 2020); Final Rule, Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 85 Fed. Reg. 82,376 (Dec. 18, 2020) (2020 Habitat Exclusion Rule). The process required FWS to identify and consider various impacts of critical habitat designations and required exclusion of significant areas of habitat in some instances. 85 Fed. Reg. at 82,388. FWS claimed the rules were intended to "articulate clearly when and how [FWS] will undertake an exclusion analysis, including identifying a non-exhaustive list of categories of potential impacts" to consider. *Id*. at 82,376. In January 2021, States and non-profit organizations filed suits challenging the 2020 Habitat Exclusion Rule.[5]

On October 27, 2021, FWS proposed to rescind the 2020 Habitat Exclusion Rule, stating that it "unduly constrained [FWS's] discretion in administering the [ESA], potentially limiting or undermining [FWS's] role as the expert agency and its ability to further the conservation of endangered and threatened species through designation of their critical habitats" by affording, among other things, undue deference to outside third parties. Endangered and Threatened

[5] *State of California et al. v. Bernhardt et al.*, 4:21-cv-00440 (N.D. Cal.); *Conservation Council for Haw. et al. v. Bernhardt et al.*, 1:21-cv-00040 (D. Haw.).

Wildlife and Plants; Regulations for Designating Critical Habitat, 86 Fed. Reg. 59,346 (Oct. 27, 2021). Accordingly, FWS lawfully and reasonably determined to continue to follow its long-established rules and, on July 21, 2022, finalized its recission of the 2020 Habitat Exclusion Rule. Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 87 Fed. Reg. 43,433 (July 21, 2022) (2022 Rescission).

E. Summary of Proposed Rules

The Services now propose to largely revert to the deeply flawed 2019 ESA Rules and 2020 Habitat Exclusion Rule, once more contravening both the letter and spirit of the ESA.

The Proposed Listing and Critical Habitat Rule once again would allow the consideration of economic factors in listing decisions, narrow the definition of "threatened species" by limiting the statutory term "foreseeable future," and eliminate species recovery from the de-listing analysis. 90 Fed. Reg. at 52,607. This Proposed Rule also, once more, seeks to expand the "not prudent" exception to critical habitat designation and restrict designation of currently unoccupied critical habitat. *Id.* at 52,610–11.

Through the Proposed Habitat Exclusion Rule, FWS again seeks to expand significantly FWS's discretion to exclude areas from designation as critical habitat by reinstating section 17.90, which FWS rescinded in 2022. *See* 90 Fed. Reg. at 52,592. Section 17.90 would reestablish the "exclusion analysis" framework that allowed for increased exclusions of areas that might otherwise be designated as critical habitat, based on a wide variety of factors. *Id.* at 52,598–99. The Proposed Habitat Exclusion Rule also would reverse a 2016 policy regarding habitat exclusion analyses and enable the wholesale exclusion of critical habitat on federal lands. *Id.* at 52,596.

The Proposed Section 4(d) Rule seeks once again to remove the Blanket Section 4(d) Rule that extends section 9 take prohibitions to newly listed threatened species. *See* 90 Fed. Reg. at 52,587. If finalized, going forward, FWS would be required to issue time-consuming species-specific rules for each newly listed threatened species. FWS also proposes to require an explicit determination that any such species-specific section 4(d) rule is "necessary and advisable to provide for the conservation of that species," including a consideration of the economic impacts of providing such protections. *Id.* at 52,589.

The Proposed Interagency Cooperation Rule would replace all provisions of the 2024 Interagency Cooperation Rule with the rules promulgated or otherwise in existence in 2019, including the 2019 definitions of "effects of the action" and "environmental baseline," except for the "reinitiation of consultation" provisions. 90 Fed. Reg. at 52,601. The Proposed Interagency Cooperation Rule also seeks to readopt an expanded version of former section 402.17, establishing numerous criteria for determining whether federal agency activities and consequences of federal agency actions will be deemed "reasonably certain to occur." Taken together, the proposed definitions and section 402.17 would unlawfully and significantly limit the number, type, and scope of both formal and informal interagency consultations, as well as the

attendant jeopardy and adverse modification findings, reasonable and prudent alternatives, and reasonable and prudent measures developed during such consultations. *Id*. at 52,606–07.

The Services did not prepare an EIS for any of the Proposed Rules under NEPA. Instead, the Services invited comment on whether each Proposed Rule may have a significant environmental effect or qualify for a categorical exclusion from NEPA review and stated that the Services allegedly would complete their NEPA review "before finalizing" each of the Proposed Rules. *See* 90 Fed. Reg. at 52,591, 52,598, 52,605–606, 52,614. While not discussed in the preamble to the Proposed Interagency Cooperation Rule, the Services prepared and separately published an incomplete and inadequate draft environmental assesment for that rule.

III. STATES' INTERESTS IN A STRONG ESA, AND ADVERSE EFFECTS OF THE PROPOSED RULES ON THESE STATE INTERESTS

Efforts to weaken implementation of the ESA threaten our States' irreplaceable natural heritage and harm our States and our States' residents in numerous ways.[6] All of our States have an important interest in preventing and remedying harm to endangered and threatened species and their habitats and in facilitating the recovery of endangered and threatened species within our borders. A robust and effective ESA is essential to protecting our States' interests and to achieving continuing progress toward the national policy of recovering endangered and threatened species.

Our States are uniquely qualified to evaluate, and demand withdrawal of, the Services' proposals to weaken the ESA, as states have significant interests in the conservation of their natural heritage. Our States and our residents have benefited from successful implementation of the ESA and have suffered when species conservation measures are curtailed.

Our States' concrete interests in preventing harm to their natural resources is particularly robust in the context of the ESA, which conserves the invaluable natural heritage within the states' borders. Many of our States hold their fish and wildlife resources in trust for the benefit of the people of the State.[7] Accordingly, the ESA specifically directs the Services to "cooperate to the maximum extent practicable with the [s]tates" in implementing the ESA, and also gives states a special seat at the table to ensure faithful and fully informed implementation of the ESA's

[6] *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1053–54 (D.C. Cir. 1997); *see also San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Hughes v. Oklahoma*, 441 U.S. 322, 333–34 (1979) (discussing states' general regulatory interest in protecting fish and wildlife).

[7] *E.g.,* CAL. FISH & GAME CODE §§ 711.7(a), 1802; NEV. REV. STAT. § 501.100; RI. CONST. art. I, § 17; VT. STAT. ANN. tit. 10, § 4081(a)(1); *see* Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1488–93 App. A (2013) (summarizing state wildlife trust law); *Geer v. Connecticut*, 161 U.S. 519, 527–29 (1896), *overruled on other grounds by Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979).

species-conservation mandates. 16 U.S.C. § 1535(a).[8] Our States thus have an important voice in preventing and mitigating harm to endangered and threatened species and their habitats.

Most, if not all, of our States have entered into cooperative agreements with the Services, pursuant to ESA section 6, to help preserve and recover federally listed species within their borders. *Id.* § 1535(c). These States receive federal funding to implement their cooperative agreements, and also have expended significant state resources to protect federally listed species. *Id.* § 1535(d). As a result of these cooperative efforts to implement the ESA within state borders, our States have prevented the extinction, and facilitated significant steps toward the recovery, of numerous imperiled species.

For example, Massachusetts populations of the Atlantic Coast piping plover, which is listed as a threatened species along most of the East Coast, have increased nearly tenfold since the population was federally listed in 1985.[9] In California, the ESA has been instrumental in recovering the near-extinct California condor, a decades-long joint federal-state effort.[10] In Oregon, the ESA's protections and cooperative efforts have helped populations of the Oregon Coast coho salmon rebound.[11] And in Washington, the ESA's protections are critical to preventing extinction of the Southern Resident killer whale, a population that is of great cultural significance and a key focus of wildlife tourism in the State.[12]

The ESA's species and habitat protections also provide state and national economic benefits. For example, protecting the habitats of listed species, as currently required by the ESA, supports not only listed species, but also diverse habitats that in turn support wildlife tourism, recreation, and other economically beneficial activities. Indeed, wildlife tourism generates billions of dollars

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[8] *See also* 16 U.S.C. § 1531(a)(5) (encouraging state species conservation); *id.* § 1533(b)(1)(A), (b)(1)(B)(ii) (accounting for state efforts to protect listed species); *id.* §§ 1533(b)(5), 1536(a)(2) (state consultation requirements for critical habitat designation); *id.* § 1533(b)(7) (requiring Services to provide specific notice to any affected state of publication of an emergency listing regulation); *id.* § 1533(g) (monitoring of recovered species in cooperation with state); *id.* § 1533(i) (heightened justification required where listing or critical habitat regulations are inconsistent with state agency's comments or petition); *id.* § 1535 (requiring Services generally to cooperate with states in implementing the ESA); *id.* § 1536(e) (each affected state must be represented on Endangered Species Committee established during consultation exemption procedure); *id.* § 1536(g) (state governors included in consultation exemption application process); *id.* § 1537a(e)(2) (states to participate in implementation of the Western Convention); *id.* § 1540(e)(1) (Services may use state agency resources to enforce ESA).

[9] MASS. DIV. OF FISHERIES AND WILDLIFE, *Piping Plover* (April 23, 2025), https://perma.cc/E6NM-EV24

[10] *See* U.S. FISH AND WILDLIFE SERV., California Condor Recovery Program: 2024 Annual Population Status, https://perma.cc/M8MS-PU79; U.S. FISH AND WILDLIFE SERV., California Condor, https://perma.cc/2DTT-TZYM.

[11] *See* NAT'L OCEANIC AND ATMOSPHERIC ADMIN. FISHERIES (NOAA FISHERIES), *Oregon Coast Coho Salmon*, https://perma.cc/HP8G-7APK.

[12] *See* NOAA FISHERIES, *Southern Resident Killer Whale*, https://perma.cc/P2RF-LL7G.

annually for all states and supports millions of jobs.[13] In 2022 alone, FWS reports that over 145 million people engaged in wildlife watching activities in the United States, generating jobs in both the private and public sectors.[14] Protected nature preserves also increase residential land values.[15] Additionally, habitat protections can benefit hunters, fishers, and trappers because protection of imperiled species' habitats also supports healthy populations of non-protected game species.

The Proposed Rules would harm our States' fish, wildlife, and plant resources and our States' ability to help prevent federally listed species from sliding further toward extinction. If the Proposed Rules are finalized, our States will need to devote significant resources and institutional capacity to attempt to make up for the Services' failures to properly implement and enforce the ESA, detracting from our efforts to carry out our own programs and increasing state costs. Additionally, our States would be unable to fill the resulting gaps in federal protections for migratory species or species whose ranges fall partially outside of our States' borders. For over 50 years, our States and the imperiled species within our States' borders have seen significant benefits and steps toward recovery of at-risk species from the Services' implementation of the ESA, including, notably, the recovery and delisting of our national bird, the bald eagle (*Haliaeetus leucocephalus*).[16] Our States maintain a strong interest in effective implementation of the ESA to ensure continued national progress towards the conservation of endangered and threatened species.

IV. COMMENTS ON THE PROPOSED RULES

A. The Proposed Rules Fundamentally Conflict with the Language and Purposes of the ESA and, if Finalized, Would Violate the APA

If adopted as written, the Proposed Rules would violate several bedrock principles of administrative law. While agencies often have discretion to carry out statutory mandates, they may not regulate in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory . . . authority." 5 U.S.C. § 706(2)(A), (C). First, agencies lack any authority to adopt regulations that are "plainly contrary to the statute." *United States v. Morton*, 467 U.S. 822, 834 (1984). Second, in promulgating a regulation, "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." *Motor Vehicle*

[13] U.S. FISH AND WILDLIFE SERV., 2022 Economic Contributions of Wildlife Watching in the United States (2024), https://perma.cc/Y9ZZ-WP75.

[14] *Id.*

[15] *See* John Loomis et al., *Ecosystem Service Values Provided by National Parks to Residential Property Owners*, 220 ECOLOGICAL ECON. 1, 6 (2024) (estimating that residential sales prices were on average 9.8% higher for houses within 2 kilometers of National Park boundaries), https://www.sciencedirect.com/science/article/abs/pii/S0921800924000727.

[16] Endangered and Threatened Wildlife and Plants; Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife, 72 Fed. Reg. 37346 (July 9, 2007).

Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (cleaned up) (*State Farm*). In reviewing the agency's explanation, a court "must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment." *Id.* at 30–31. A court must find an agency's decision arbitrary and capricious if the agency "relie[s] on factors which Congress has not intended it to consider" or "entirely fail[s] to consider an important aspect of the problem." *Id.* at 43.

These core principles apply equally to an agency's decision to change existing policy. *Federal Commc'ns Comm'n v. Fox Television Stations*, 556 U.S. 502, 513–15 (2009) (*FCC v. Fox*). 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." *Id.* at 515–16. Further, 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 Am. Fuel & Petrochemical Mfrs. v. Env't Prot. Agency*, 937 F.3d 559, 577 (D.C. Cir. 2019).

Any "[u]nexplained inconsistency is . . . a reason for holding an [agency's] interpretation to be an arbitrary and capricious change." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 981 (2005). Especially where, as here, the Services are proposing to rescind or revise regulations that were finalized only a year and a half ago, and to once again revive regulations originally adopted by the Services under the first Trump Administration in 2019 and 2020, there is a heightened need for an even more detailed justification and "reasoned explanation" for the proposed changes. as the Services change their position yet again, resulting in see-sawing regulations. As explained further below, in Parts VI.B – VI.E, the Services fail to provide a reasoned explanation for the Proposed Rules and fail to adequately explain why they are "disregarding facts and circumstances that underlay or were engendered by"[17] the 2024 ESA Rules, the 2022 Rescission, and their longstanding policies that had been in place prior to 2019.

The Services claim that some of the Proposed Rules are mandated by the Supreme Court's decision in *Loper Bright*, 603 U.S. 369 (2024).[18] But in *Loper Bright*, the Supreme Court held that a court must independently determine whether to uphold an agency regulation based on the *court's* interpretation of the "best meaning" of the statute, not whether the *agency's* interpretation was the "best meaning" of the statutory scheme. *Loper Bright*, 603 U.S. at 400, 408–09. While federal agencies have a duty—as they always have—to reasonably interpret and faithfully implement the governing statutory scheme, the Services mistakenly read a new obligation into *Loper Bright* to re-evaluate every existing regulation for consistency with the "best meaning" standard. This is not what *Loper Bright* held.

[17] *FCC v. Fox*, 556 U.S. at 515–16.

[18] Proposed Listing and Critical Habitat Rule, 90 Fed. Reg. at 52,610, 52,612; Proposed Interagency Cooperation Rule, 90 Fed. Reg. at 52,601; Proposed Section 4(d) Rule, 90 Fed. Reg. at 52,589.

Taking on the role of the courts, the Services now assert that they believe some of their existing ESA regulations do not match the "single, best meaning" of the ESA, as the Services now view it. But as discussed in detail in Parts IV.B through E below, the Proposed Rules in fact are contrary to the "best meaning" of the ESA, as they directly conflict with the plain language, structure, and purposes of multiple provisions of the statute. *Loper Bright*, 603 U.S. at 400.

The Services also rely on several Executive Orders (E.O.s) and an Interior Secretarial Order (S.O.) to justify some of the Proposed Rules, which highlights that their goal is not to faithfully interpret the plain language of the ESA and execute its purposes.[19] Rather, the Services' singular goal here is to support President Trump's deregulatory agenda regardless of statutory requirements.[20] The Services explain that the proposals will further E.O. 14154 and S.O. 3418, which direct agencies to take steps to "suspend, revise, or rescind" agency actions that may "impose an undue burden on the identification, development, or use of domestic energy resources." *See*, *e.g.*, 90 Fed Reg. at 52,593.

FWS directly states that it is proposing the Habitat Exclusion Rule, for example, "[i]n response to E.O. 14154 and S.O. 3418," making it clear that the purpose of the proposal is to remove the "burden[s] on the identification, development, or use of domestic energy resources." 90 Fed. Reg. at 52,593. This contravenes the ESA's purpose "to halt and reverse the trend toward species extinction, whatever the cost," and Congress's intention to ensure that endangered species "be afforded the highest of priorities." *TVA v. Hill*, 437 U.S. at 174, 184; *see also id.* at 194; *San Luis Obispo Coastkeeper v. Cnty. of San Luis Obispo*, __ F.4th __ (Dec. 3, 2025), 2025 WL 3467536, *2.

The Proposed Listing and Critical Habitat Rule, Proposed Habitat Exclusion Rule, Proposed Section 4(d) Rule, and Proposed Interagency Cooperation Rule each violates the ESA's text, structure, and purposes, and, if finalized, each would exceed the scope of the Services' authority and discretion under the ESA. In addition, the Services have failed to provide a reasoned justification for the proposed changes, have relied on factors Congress did not intend for them to consider, and have entirely overlooked important issues at the heart of their species-protection duties under the ESA, contrary to the APA. We address each rule and its legal flaws in turn below.

[19] Exec. Order No. 14,192, 90 Fed. Reg. 9065 (Feb. 6, 2025) (Unleashing Prosperity Through Deregulation); Exec. Order No. 14,219, 90 Fed. Reg. 10,583 (Feb. 25, 2025) (Ensuring Lawful Governance and Implementing the President's Department of Government Efficiency Deregulatory Initiative); Exec. Order No. 14,154, 90 Fed. Reg. 8353 (Jan. 29, 2025) (Unleashing American Energy); Exec. Order No. 14,181, 90 Fed. Reg. 8747 (Jan. 31, 2025) (Emergency Measures to Provide Water Resources in California and Improve Disaster Response in Certain Areas); U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3,418 (Feb. 3, 2025) (Unleashing American Energy).

[20] 90 Fed. Reg. at 52,608, 52,610; 90 Fed. Reg. at 52,600–01; 90 Fed. Reg. at 52,587–89; 90 Fed. Reg. at 52,593.

B. Proposed Listing and Critical Habitat Rule

The Proposed Listing and Critical Habitat Rule, if finalized, would violate the ESA's express requirements for the listing of endangered and threatened species and designating critical habitat by unlawfully and arbitrarily allowing the consideration of economic factors in listing determinations, limiting the circumstances under which species can be listed as threatened, eliminating consideration of species' recovery in the delisting process, expanding the exemptions for designation of critical habitat, and restricting the designation of currently unoccupied critical habitat.

1. Factors for Listing, Delisting, or Reclassifying Species

a. The Services' proposed removal of the prohibition on consideration of economic impacts, if finalized, would violate the ESA and the APA

As the Services did in 2019, the Proposed Listing and Critical Habitat Rule once again removes from the current regulations the restriction that species listing, reclassification, and delisting decisions must be made "without reference to possible economic or other impacts of such determination." 50 C.F.R. § 424.11(b); 90 Fed. Reg. at 52,609, 52,614.

The Services' proposed removal of the prohibition on consideration of economic impacts in the listing process is contrary to the plain language of section 4, as supported by the statute's legislative history and as recognized by courts. *See Loper Bright,* 603 U.S. at 400*; Nat'l Lab. Relations Bd. v. Brown*, 380 U.S. 278, 292 (1965) ("[c]ourts must, of course, set aside [agency] decisions which rest on an 'erroneous legal foundation'"); *Prill v. Nat'l Lab. Relations Bd.*, 755 F.2d 941, 947 (D.C. Cir. 1985) ("[a]n agency decision cannot be sustained" when it is based "on an erroneous view of the law"). If the Proposed Listing and Critical Habitat Rule is finalized, the Service's proposed removal of the express regulatory prohibition on economic considerations in the listing process would also violate the APA because it is arbitrary and capricious and otherwise not in accordance with law as the Services do not provide a "rational connection between the facts found and the choice made" and because they rely on "factors which Congress has not intended it to consider." *State Farm*, 463 U.S. at 43 (*quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

First, the Services' proposed removal of the prohibition on economic considerations in listing decisions is contrary to the ESA's plain terms. The ESA expressly states that species listing decisions must be made "*solely* on the basis of the best scientific and commercial data available," 16 U.S.C. § 1533(b)(1)(A) (emphasis added), as even the Services themselves acknowledge in the Proposed Listing and Critical Habitat Rule. 90 Fed. Reg. at 52,609. The ESA further expressly lists the following factors—all of which are biological—that the Services *shall* consider in their listing decisions: "A) the present or threatened destruction, modification, or curtailment of its habitat or range; B) overutilization for commercial, recreational, scientific, or educational purposes; C) disease or predation; D) the inadequacy of existing regulatory mechanisms; or E) other natural or manmade factors affecting its continued existence." 16

U.S.C. § 1533(a)(1). The proposed removal of the regulatory prohibition on economic considerations in listing decisions thus conflicts with the statute's express language that listing decisions must be based solely on scientific and biological factors.

Second, legislative history and case law confirm that the term "solely" in section 4(b)(1) precludes economic analyses during the listing process. In its 1982 amendments to the ESA,[21] Congress added the term "solely" "to ensure that [listing and delisting] decisions . . . are based *solely* upon biological criteria," H.R. REP. NO. 97-835, at 19 (1982) (emphasis added) and "to prevent non-biological considerations from affecting [listing and delisting] decisions," *id.* Congress expressly stated that "economic considerations *have no relevance to* [listing and delisting] determinations," *id*. at 20 (emphasis added). And Congress further stated that its reference to "commercial data," in requiring listing decisions to be based on "the best scientific and commercial data available," was intended only to allow for consideration of "trade data" and was "not intended, in any way, to authorize the use of economic considerations in the process of listing a species." H.R. REP. NO. 97-567, at 20 (1982). Numerous courts have recognized this congressional intent.[22] With the 1982 amendments, Congress further wanted to ensure that "economic analys[e]s . . . will not delay or affect decisions on listing." S. REP. NO. 97-418, at 4, 11 (1982). The 1982 amendments thus were intended to improve and expedite the listing process and for economics to be considered only in the critical habitat exclusion process. *Id.* at 12; *see* 16 U.S.C. § 1533(b)(2).

Third, the Services' proposed removal of the prohibition on economic analyses is contrary to the purpose and intent of the ESA to recover imperiled species. As the Supreme Court recognized, Congress enacted the ESA "to halt and reverse the trend toward species extinction, *whatever the cost*." *TVA v. Hill*, 437 U.S. at 184 (emphasis added). Allowing the consideration of economics in listing decisions would be directly contrary to that purely biological goal. 16 U.S.C. §§ 1531(b), 1532(3); *see Sierra Club v. U.S. Fish & Wildlife Serv*., 245 F.3d 434, 438 (5th Cir. 2001) ("the objective of the ESA is to enable listed species not merely to survive, but to recover from their endangered or threatened status") (*Sierra Club v. USFWS*). Further, the proposed lengthy process of compiling and conducting an economic analysis is contrary to Congress's intent to "improv[e] and expedit[e]" the listing process, H.R. REP. NO. 97-567, at 12 (1982); *see* S. REP. NO. 97-418, at 4 (1982), as this process will cause delays.[23] As the Services previously

[21] Endangered Species Act Amendments of 1982, Pub. L. 97-304, 96 Stat. 1411.

[22] *See, e.g., N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv*., 248 F.3d 1277, 1284–85 (10th Cir. 2001); *Ariz. Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1035 (D. Ariz. 2008); *Ala.-Tombigee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1266 (11th Cir. 2007).

[23] *See* Erich K. Eberhard et al., *Too Few, Too Late: U.S. Endangered Species Act Undermined by Inaction and Inadequate Funding*, 17(10): e0275322 (Oct. 2022) (reporting that most species are not receiving protection until they have reached dangerously low population sizes and the "wait-times between when a species is first petitioned for protection under the ESA and when it finally receives that protection have waxed and waned since 1992"), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0275322.

stated in the 2023 Proposed Listing and Critical Habitat Rule, the express prohibition of the consideration of economic impacts in the current regulations "is most consistent with the intent of Congress and provides an important guardrail for the scientific integrity of classification determinations."[24]

Finally, the Services have failed to provide a reasoned basis for the proposed removal of the prohibition on economic analyses. Indeed, as mentioned, the Services once again acknowledge (as they must) that the plain language of section 4(b)(1)(A) requires "that classification determinations must be made solely on the basis of the best scientific and commercial data available." 90 Fed. Reg. at 52,609. But then the Services do precisely the opposite by removing the prohibition on economic considerations. *Id.* And what is more, the Services offer no reason for doing so, aside from their unexplained and conclusory assertion that "reverting to the 2019 regulatory text best aligns with the [ESA]." *Id.* They also do not explain how they plan to consider economic impacts and quantify the costs and benefits of listing decisions, particularly given that the Services have been inadequately funded for decades.[25] The recent planned layoffs at FWS only exacerbate the existing lack of resources.[26]

For all of these reasons, the Services' proposal to remove the phrase "without reference to possible economic or other impacts of such determination" from the end of 50 C.F.R. § 424.11(b) is unlawful and must be withdrawn. *See State Farm*, 463 U.S. at 43.

b. The Services' proposed redefinition of "foreseeable future" in the definition of "threatened species," if finalized, would violate the ESA and the APA

The Services also propose to revert to the 2019 regulatory definition of "foreseeable future," within the meaning of the ESA's definition of "threatened species", in a manner that would limit the Services' ability to list threatened species in the future. The ESA defines "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). Current regulations define "foreseeable future" as extending "as far into the future as the Services can make *reasonably reliable predictions* about the threats to the species and the species' response to those threats." 50 C.F.R. § 424.11(d) (emphasis added). The Services propose to replace that definition with language indicating that "foreseeable future" extends "only so far into the future as the Services can reasonably determine that both the future threats and species' responses to those threats *are likely*." 90 Fed. Reg. at 52,610, 52,614 (emphasis added). As the Services themselves acknowledge in the preamble, how "foreseeable future" "is interpreted and applied dictates

[24] Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat, 88 Fed. Reg. at 40,764, 40,766 (June 22, 2023)

[25] *See* Eberhard, et al., *supra* note 23, at 4 (study data indicated that "inadequate funding has persisted for decades . . . FWS is being asked to do more with less resources."

[26] *See* Michael Doyle, *Fish and Wildlife Service staff down by at least 18%*, GREENWIRE (Dec. 17, 2025), https://www.eenews.net/articles/fish-and-wildlife-service-staff-down-by-at-least-18.

whether species are listed at all and whether they are listed as an endangered or a threatened species. *Id*. at 52,609.

The Services' proposed redefinition of "foreseeable future" is contrary to the plain language and purposes of the ESA as well as supporting case law. *See Loper Bright,* 603 U.S. at 400; *Nat'l Lab. Relations Bd.,* 380 U.S. at 292; *Prill*, 755 F.2d at 947. The Services also, again, do not provide a "rational connection between the facts found and the choice made" and rely on "factors which Congress has not intended it to consider." *State Farm,* 463 U.S. at 43.

First, the Services' proposal to narrow the definition of "threatened species," by limiting how "foreseeable future" is defined, is contrary to the ESA's plain language. In enacting the ESA, as discussed, Congress required the Services to make listing determinations based "solely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species," 16 U.S.C. § 1533(b)(1)(A), based on threats to the species, *id.* § 1533(a)(1). Following that analysis, if the relevant Service finds that a species is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range," *id.* § 1532(20), it must list the species as threatened.

The language of the ESA does not support ignoring future threats or responses to threats that are, in the Services' view, less than 50% likely to occur, as Congress used the term "*foreseeable* future," not "*likely* future." The proposed requirements that the Services determine that both the threats to the species *and* the species' responses to those threats are "likely" add new, extra-statutory criteria to listing determinations. 90 Fed. Reg. at 52,610, 52,614. The wording of the Proposed Rule would further layer the second "likely" determination on top of the first, resulting in two steps that would require the Services to engage in contrived quantification exercises to translate reasonable assessments into probabilities. This approach would improperly constrain the Services' considerations of future threats to imperiled species, contrary to the text of the ESA.

Second, the Services' proposal to redefine "foreseeable future" is contrary to the overriding conservation purpose and intent of the ESA, particularly the policy of "institutionalized caution." *See* 16 U.S.C. § 1531(b); *TVA v. Hill*, 437 U.S. at 194. As discussed above, the Services' proposal to add language requiring that future threats and the species' responses to those threats be "likely" would arguably require the Services to only consider threats that have a 50% or greater chance of occurring during a particular time period. This approach would conflict with the ESA's policy of "institutionalized caution" because it would discount threats that may be 45% likely but still extremely harmful to a species. And it would be devasting for species that are facing multiple threats that are collectively severe and/or reasonably likely to occur, but each of which standing alone may have a lower or less predictable chance of occurring. *Cf.* 48 Fed. Reg. 43,098, 43,102–103 (Sept. 21, 1983) (FWS guidelines for reclassification from threatened to endangered status based on magnitude and immediacy of threats). For example, although climate

change's impact on species and their habitats is certain to occur,[27] the precise impact that climate change might have on a particular area at a particular time may be difficult to quantify—thus, the Services may not deem it sufficiently likely to occur within a "foreseeable" timeframe under the 2019 definition.

In fact, the 2019 definition of "foreseeable future" has resulted in FWS denying multiple threatened species listings, including for the American wolverine, the Virgin River spinedace, the roundtail chub, and others.[28] Since extinction is irreversible, Congress's intent in enacting the ESA was for the Services to list threatened species "before the danger becomes imminent," *Defs. of Wildlife v. Babbitt*, 958 F. Supp. 670, 680 (D.D.C. 1997), based on the best available scientific data. In short, the Services' redefinition would limit the listing of threatened species, as the 2019 definition has already done, even where real threats exist, and is directly contrary to the conservation purpose of the ESA.

Third, courts have repeatedly recognized that the language of the ESA only requires that the Services consider the best and most reliable scientific and commercial data available and identify the limits of that data when making a listing determination. The Services are not required to base their decisions on "ironclad evidence." *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 681 (9th Cir. 2016).[29] Importantly, even in the case of evolving threats to a species, the Services still must consider *and act on* the best available science in evaluating those threats. *See*

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[27] *See* NOAA FISHERIES, *Climate Change Escalates Threats to Species in the Spotlight* (Aug. 2024), https://perma.cc/EAG4-72ZE (climate change impacts include warming oceans, the frequency and intensity of floods and droughts, rising sea levels, and ocean acidification, which impacts pose challenges for species and their habitats); *see also* U.S. FISH AND WILDLIFE SERV., *Climate Change Impacts* (linking climate change with observed changes in fish and wildlife populations and their habitats across the United States), https://perma.cc/5857-XCUA.

[28] *See* 85 Fed. Reg. 64,618 (October 13, 2020) (denying listing of the American wolverine); 86 Fed. Reg. 53,255 (Sept. 27, 2021) (denying listing of the Virgin River spinedace); and 87 Fed. Reg. 19,657 (Apr. 5, 2022) (denying listing of the roundtail chub).

[29] In *Pritzker*, NMFS had listed the Pacific bearded seal (*Erignathus barbatus nauticus*), using several climate models, as a threatened species. *Id.* at 674. The Ninth Circuit rejected plaintiffs' contention that climate models "cannot reliably predict the degree of global warming beyond 2050 or the effect of that warming on a subregion, such as the Artic." *Id*. at 679. The Court explained that while some "climate projections for 2050 through 2100 may be volatile," this does not mean that they have no value in the rulemaking process where the Services used a reasonable methodology for addressing that volatility. *Id.* at 680; *see also Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 558–59 (9th Cir. 2016) (in upholding FWS's final rule designating critical habitat for polar bears, the Ninth Circuit found that FWS had provided a rational explanation for using its mapping methodology and properly considered climate change given its citation to numerous published studies describing the effects of climate change on the loss of sea ice, which provides essential habitat for polar bears).

Ctr. for Biological Diversity v. Zinke, 900 F.3d 1053, 1072 (9th Cir. 2018).[30] "It is not enough for the [FWS] to simply invoke 'scientific uncertainty' to justify its action;" rather, the Services must explain why the uncertainty counsels in favor of not listing now due to scientific uncertainty—"otherwise, we might as well be deferring to a coin flip." *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011) (rejecting the Services' argument that there was too much uncertainty regarding the impact of whitebark pine loss on the grizzly bear).[31] Conducting yet another study may result in a slightly higher degree of certainty; but 100% certainty has never been the legal standard for listing. *See Alaska Oil & Gas Ass'n,* 840 F.3d at 681.[32] In short, the ESA's requirement that the Services base their listing decisions on the best available science allows for a consideration of all available data, but still permits the Services to act in the event of some uncertainty in the available data, as is often the case regarding biological impacts.

Finally, the Services' proposed redefinition of "foreseeable future," if finalized, would be arbitrary and capricious because the Services would rely on factors, such as the "likely" criterion, that Congress did not intend for them to consider and would ignore other relevant factors, such as the catastrophic impact to species facing multiple severe threats for which the likelihood of each cannot be precisely calculated. *See State Farm*, 463 U.S. at 43. The Services conclusorily claim that reversion to the 2019 "foreseeable future" definition aligns "with the best meaning of the Act and our best policy judgment about how to administer the Act." 90 Fed. Reg. at 52,609. But the Services offer no explanation as to how their proposed definition actually aligns with the "best meaning" of the ESA.

The Services' reliance on a 2009 memorandum opinion from the Department of the Interior, Office of the Solicitor (M-37021, January 16, 2009; "M-Opinion") does not assist them. 90 Fed. Reg. at 52,609–610. The Services offer no reasoned explanation as to how the M-Opinion supports their proposed redefinition, nor how the redefinition of "foreseeable future" comports with the best meaning of the ESA. As the Services stated in the proposal that would become the 2024 Listing and Critical Habitat Rule, "the M-Opinion describes a forecast or prediction into the foreseeable future as something that a reasonable person would rely on in making predictions about their own future." 88 Fed. Reg. at 40,766; *see* M-37021, at 8. The Services further

[30] In *Center for Biological Diversity*, the court held that FWS acted arbitrary and capriciously in failing to explain why the uncertainty of climate change impacts favors not listing the artic grayling when there was a scientific finding acknowledging warming of water temperatures and decreasing water flow because of global warming. 900 F.3d at 1073.

[31] The Ninth Circuit in *Greater Yellowstone Coalition*, further stated that "[r]ecognizing that policymaking in a complex society must account for uncertainty…does not imply that it is sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions." 665 F.3d at 1028 (citing *State Farm*, 463 U.S. at 52).

[32] *See also Bldg. Indus. Ass'n v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001) ("the 'best scientific . . . data *available*'" does not mean "the best scientific data *possible*") (quoting 16 U.S.C. § 1533(b)(1)(A)).

explained that "consistent with the best available information standard, we do not need to have absolute certainty about the information we use; rather, we need to have a reasonable degree of confidence in the prediction." 88 Fed. Reg. at 40,766.

The Services fail to explain the inconsistency in their position. *See FCC v. Fox*, 556 U.S. at 515–16. The M-Opinion aligns fully with the current regulatory definition of "foreseeable future" as extending "as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats." 50 C.F.R. § 424.11(d). And regardless, the proposed regulatory definition must comport with the statutory text, which for reasons explained above, it does not. Instead, the language of the ESA is clear that the Services must rely on the best available scientific data, and act to protect listed species even in the face of some uncertainty in the data; they may not arbitrarily constrain the listing analysis through extra-statutory considerations as the proposed foreseeable future definition would do.

For all of these reasons, the Services' proposal, if finalized, would violate the ESA and the APA and should be withdrawn.

c. The Services' proposed removal of consideration of "recovery" in the delisting analysis, if finalized, would violate the ESA and the APA.

The Services propose to readopt the 2019 regulatory language, which would eliminate the Services' ability to consider species recovery in determining whether to delist a species. Under the Services' proposal, when determining whether to delist species, the Services instead would apply the same criteria used to determine whether to list a species in the first instance. The Services propose to revise the regulations at 50 C.F.R 424.11(e) to provide three bases for delisting: "(1) the species is extinct; (2) the species does not meet the definition of an endangered or a threatened species [based on the listing factors in section 424.11(c)]; or (3) the listed entity does not meet the statutory definition of a species." 90 Fed. Reg. at 52,614.

In the current regulatory language, the second basis for delisting is if "[t]he species has recovered to the point at which it no longer meets the definition of an endangered species or a threatened species." 50 C.F.R. § 424.11(e)(2). Species recovery is the fundamental, overriding goal of the ESA, and permitting delisting based on a determination that the species is not endangered or threatened—without consideration of whether threats to the species have been eliminated or controlled, or whether the population size is stable and trending in a positive direction, *see* 16 U.S.C. § 1533(a)(1); 50 C.F.R. § 424.11(c)—could result in the premature delisting of species that are not yet likely to recover.

Removal of recovery considerations in the delisting process is contrary to the ESA's plain language, legislative history and purposes. *See Loper Bright,* 603 U.S. at 400; *Nat'l Lab. Relations Bd.,* 380 U.S. at 292; *Prill*, 755 F.2d at 947. The Services also do not provide a "rational connection between the facts found and the choice made" because they rely on "factors

which Congress has not intended it to consider." *State Farm,* 463 U.S. at 43 (quoting *Burlington Truck Lines,* 371 U.S. at 168).

First, the Services propose to insert in 50 C.F.R. § 424.11(e)(2) a requirement that the Services "consider the *same* factors and apply the *same* standards" in delisting as when listing or reclassifying a species. 90 Fed. Reg. at 52,614 (emphasis added). In addition, the Services propose to remove the existing requirement for the Services to consider "new information that has become available since the original listing decision." 50 C.F.R. § 424.11(e)(2)-(3); 90 Fed. Reg. at 42,614. This is contrary to the ESA's recovery purpose and confusing in application. The use of the word "same" and elimination of the consideration of "new information" can potentially allow the Services to limit the delisting analysis to those same, specific factors or threats that initially led the Services to list a particular species. 88 Fed. Reg. at 40,767–68.

But while some of those initial threats may subsequently have been ameliorated, the species still may face different and newer threats—all of which must be considered in the delisting analysis. For example, as the Services previously stated, "a particular threat or combination of threats, such as overfishing and inadequate harvest regulations, may have caused a species' initial decline and endangerment, but those threats may have subsequently been controlled, and other threats, such as habitation modification and disease, may have since arisen." *Id*. at 40,768. Thus, a delisting analysis must not just consider the same factors that led to the initial listing, but also any relevant factors or "new information" that affect the current or future biological status of the species and whether any of those factors imperil the continued viability and recovery of that species. *Id.*

Second, the Services' proposed elimination of the reference to recovery from the delisting factors, if the Proposed Listing and Critical Habitat Rule is finalized, would be contrary to the plain language of section 4, as confirmed by the ESA's legislative history. Section 4(f) of the ESA explicitly requires the Services to develop and implement recovery plans "for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless [they] find[] that such a plan will not promote the conservation of the species." 16 U.S.C. § 1533(f)(1). Such recovery plans must include, among other things, "to the maximum extent practicable . . . objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section*, that the species be removed from the list*." *Id.* § 1533(f)(1)(B)(ii) (emphasis added). Meeting the goals of an adopted recovery plan is one, but not the exclusive, pathway by which a species may reach the point of no longer requiring the protections of the ESA. *Friends of the Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012).

However, Congress' express requirement for the Services to develop recovery plans makes clear that a species' actual biological recovery remains an express, important requirement in delisting determinations. And the overriding purpose of the ESA is that its species conservation measures "bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary." 16 U.S.C. § 1532(3). Indeed, legislative history

confirms the ESA's plain requirement that species recovery is central to the delisting analysis. In particular, Congress amended the ESA to add specific requirements regarding recovery plans in 1988 to remedy the Services' failures in preparing adequate recovery plans for listed species. *See* S. REP. NO. 100-240, at 4, 9 (1987). Congress intended for the amendments to ensure that each recovery plan contains "objective, measurable criteria for removal of a species from the Act's lists and timeframes and cost estimates for intermediate steps toward that goal [to] . . . provide a means by which to judge the progress being made toward recovery." *Id.* at 9. Recovery has thus been a long-standing and critical factor in the Services' delisting decisions.

Finally, the Services' proposed removal of the consideration of recovery in the delisting process, if finalized, would be arbitrary and capricious because the Services do not offer any reasoned basis for their proposal. The term "recovery" has been included in the regulatory factors for delisting since 1980,[33] and was unchanged prior to 2019. 90 Fed. Reg. at 52,610. While the Services now claim that the inclusion of "recovery" in the regulatory factors led to allegedly improper interpretations that, in order to delist a species, specific species recovery plan goals had to be met, *id.*, the current regulatory language is clear that it does not necessarily require recovery plan goals to be met. Rather, the current language requires "the species *to be recovered* to the point at which it no longer meets the definition of an endangered species or a threatened species," i.e., to the point at which it is no longer biologically imperiled. 50 C.F.R. § 424.11(e)(2) (emphasis added).

In the proposal that would become the 2024 Listing and Critical Habitat Rule, the Services explained that "using the term 'recovered' in our regulations maintains a clear linkage between this primary goal and one of the circumstances in which the Services would delist a species." 88 Fed. Reg. at 40,767. The Services further explained that the reference to recovery does not alter the set of circumstances in which delisting is appropriate because "this section of the regulations still clearly indicates that the Secretary must consider the factors and standards of section 4 of the Act when evaluating species for delisting." *Id.* The Services do not provide a reasoned explanation for their change in position, and thus, if finalized, their proposal would violate the APA. *See FCC v. Fox*, 556 U.S. at 515–16.

In any event, once again, rather than providing a reasoned explanation for their proposed removal of recovery considerations in the delisting process, the Services simply state that the revisions reflect the "single, best meaning of the Act," without explaining how the revisions actually do so, or how the revised regulations could adequately protect imperiled species. 90 Fed. Reg. at 52,610. Failure to provide this reasoned explanation makes the proposed changes, if adopted in a final rule, arbitrary and capricious, because the Services fail to consider the legal and practical results of their proposal—the premature delisting of species that are not yet likely to recover. *See State Farm*, 463 U.S. at 43.

[33] Rules for Listing Endangered and Threatened Species, Designating Critical Habitat, and Maintaining the Lists, 45 Fed. Reg. 13,010, 13,023 (Feb. 27, 1980), codified at 50 C.F.R. § 424.11(d).

For all of the above reasons, the Services' proposal, if finalized, would violate the ESA and the APA and must be withdrawn.

2. Proposed Changes to the Regulations Governing Designation of Critical Habitat

The Services also propose to revert to the 2019 Listing and Critical Habitat Rule in several respects that would severely curtail their ability to designate critical habitat for listed species. These proposed changes are contrary to the express language of the ESA, years of settled case law, and the ESA's overarching conservation purpose. Moreover, the Services have not offered any additional justification for these changes, and if finalized, they would violate the APA.

a. The Services' proposal to once again unlawfully expand the circumstances in which they will find it "not prudent" to designate critical habitat, if finalized, would violate the ESA and the APA

The Services propose once again to reinstate language from the 2019 Listing and Critical Habitat Rule providing that critical habitat designation is "not prudent" when "threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations" or when "[t]he Secretary otherwise determines that designation of critical habitat would not be prudent." 90 Fed. Reg. at 52,615. That language is just as problematic now as it was when added to the regulations in 2019.

Section 4 of the ESA mandates that the Services designate critical habitat concurrently with the listing of a species "to the *maximum extent* prudent and determinable." 16 U.S.C. § 1533(a)(3)(A) (emphasis added). That language is clear on its face, leading courts to construe the "not prudent" exception narrowly.[34] Such a narrow interpretation is further supported by the provision's legislative history. Congress has repeatedly expressed a clear understanding that critical habitat should be designated in all but those "rare circumstances" where designation "would not be beneficial to the species." H.R. REP. NO. 95-1625, at 17 (1978); *see also* S. Rep. No. 106-126, at 10 (1999) (retaining "the Secretary's authority to determine that designation is not prudent" with the "express understanding that this authority is to be exercised only in rare situations"). But the proposed "not prudent" regulation unlawfully expands that narrow statutory authority to the point that designation will become the exception rather than the rule. *See Sierra Club v. USFWS*, 245 F.3d at 443 (rejecting FWS's expansive reading of "not prudent" exception

[34] *See, e.g., Sierra Club v. USFWS*, 245 F.3d at 443 (rejecting Service's expansive reading of "not prudent" exception because it "inverted [Congressional] intent, rendering critical habitat designation the exception and not the rule"); *Enos v. Marsh*, 769 F.2d 1363, 1370–71 (9th Cir. 1985) (recognizing that "legislative history does indicate that the Secretary may only fail to designate a critical habitat under rare circumstances"); *Nat. Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997) ("The fact that Congress intended the imprudence exception to be a narrow one is clear from the legislative history"); *Conservation Council for Haw. v. Babbitt*, 2 F. Supp. 2d 1280, 1283–84 (D. Haw. 1998) (noting that critical habitat should be designated "in all but rare cases").

because it "inverted [Congressional] intent, rendering critical habitat designation the exception and not the rule").

Limiting the Services' ability to designate critical habitat whenever the Services conclude that threats to the species cannot be obviated through section 7 consultations alone, or when the Services "otherwise determine[]" that designation is "not prudent," would create a gaping hole in the statute, allowing the Services to avoid designating critical habitat for virtually any species threatened by climate change or other global or regional phenomena. But the inability of federal agencies to address threats of a global or regional magnitude through the ESA's section 7 consultation process does not mean that designating critical habitat would not advance species conservation .[35] By the very definition of the term, critical habitat must either be "essential for the conservation of the species" or possess features that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A). And even if a species faces threats outside of a federal action agency's control, consultation may still have value as it ensures that federal actions do not result in the further adverse modification of areas that are essential to a listed species.

The proposed language also unlawfully and arbitrarily discounts the many other benefits that critical habitat provides outside of the consultation process. Identifying specific areas that are "essential" for the conservation of a listed species—even where consultation is unlikely — confers a significant informational benefit. For example, the Services, or other federal agencies acting pursuant to their affirmative obligations under section 7(a)(1) of the ESA, could use that information to target areas for land acquisition or habitat rehabilitation efforts to ensure that the species has continued access to those essential areas.[36] And critical habitat designations also serve important educational purposes both for the Services and the general public. Focusing exclusively on the role that critical habitat plays in the consultation process ignores the many benefits of critical habitat designations outside of section 7 consultations. As such, the proposed "not prudent" exemption conflicts with the ESA's clear instruction that critical habitat should be designated to the "maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A).

Moreover, the Services acknowledged the significant problems with the proposed "not prudent" exemption when they deleted the very same clause from 50 C.F.R. § 424.12 in 2024. 89 Fed. Reg. at 24,315. At that time, the Services weighed comments both for and against retaining the clause, but concluded that the provision "did, in fact, require that the Services presuppose the scope and outcomes of future section 7 consultations under the Act, and did suggest that the only conservation benefits of a critical habitat designation are through the section 7 process, a presumption not supported by the language of the [ESA] or court decisions." *Id.* While the Proposed Listing and Critical Habitat Rule acknowledges that the provision was removed from the regulations in 2024, the Services have failed to engage with their earlier reasoning for

[35] *See Nat. Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d at 1126 ("not prudent" exception is a "narrow statutory exception" to the general requirement to designate critical habitat).

[36] Conservation organizations, land trusts, and states also could use this information to take similar actions.

deleting this phrase, and if the Proposed Rule is finalized it thus would violate the APA. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016); *FCC v. Fox.*, 556 U.S. at 515.

In comments on the Proposal that would become the 2024 Listing and Critical Habitat Rule, many of our States called on the Services to return to the language of the 1980 critical habitat regulations.[37] The Services declined to do so at that time, leaving several parts of 50 C.F.R. § 424.12 in place from the 2019 Listing and Critical Habitat Rule. Our States maintain that reverting to the earlier language will more closely align the regulatory text with the statutory language and clear legislative history. The 1980 regulations described two situations where it was generally "not prudent" to designate critical habitat: first, "when the species is threatened by taking or other human activity, and the identification of critical habitat can be expected to increase the degree of such threat to the species,"[38] and second, "when such designation of critical habitat would not be beneficial to the species."[39] In other words, designation could only be considered "not prudent" if it would result in harm to species conservation efforts. That approach provides an alternative to the regulatory see-sawing of the past seven years and is more consistent with the ESA's plain language and overarching conservation purpose.

As referenced above, the Services' proposal to reinsert language at 50 C.F.R. § 424.12(a)(1)(v) that broadly states that the Secretary may make a "not prudent" determination if "the Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available" likewise is inconsistent with the ESA and APA. 90 Fed. Reg. at 52,615. The Services deleted this clause in 2024 because it "gave the appearance that [they] might overstep their authority under the Act by issuing 'not prudent' determinations for any number of unspecified reasons," but largely undermined their own position at the time by including similar language in section 424.12(a)(1). 89 Fed. Reg. at 24,317.

As many of our States noted in comments on the proposed 2019 and 2024 Listing and Critical Habitat Rules, these broad assertions of Secretarial discretion also are at odds with the statute's clear instruction that critical habitat should be designated to the "*maximum* extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A) (emphasis added). Our States thus both oppose the reinstatement of section 424.12(a)(1)(v) and urge the Services to remove the prefatory language added to section 424.12(a)(1) in 2024 that had a similar effect.

b. The Services' proposal to add several unlawful requirements for designating unoccupied critical habitat, if finalized, would violate the ESA and the APA

The Proposed Listing and Critical Habitat Rule would also revert to regulations, first adopted in 2019, that the Services claimed would "clarify" when unoccupied areas are "essential for the conservation of the species" and thus warrant designation as critical habitat. 83 Fed. Reg. at

[37] *See* State Comments 2023 at 18.

[38] 45 Fed. Reg. 13,010, 13,023 (codified at 50 C.F.R. § 424.12(a)(1) (1980)).

[39] *Id*. (codified at 50 C.F.R. § 424.12(a)(2) (1980)).

35,198. But, as in 2019, the proposal goes much further than simply clarifying the statutory definition of critical habitat. Instead, it would add new substantive standards that unlawfully torpedo the Services' clear statutory authority to designate unoccupied critical habitat. See 16 U.S.C. § 1532(5).

First, the proposal specifies that unoccupied areas will only be considered "essential" if occupied areas are "inadequate to ensure the conservation of the species." 90 Fed. Reg. at 52,615 (proposed 50 C.F.R. § 424.12(b)(2)). That would effectively require the Services to exhaust designations of eligible occupied areas before they will even consider designating unoccupied critical habitat. But the statute itself requires that the Services consider both occupied and unoccupied areas when designating critical habitat and determine whether both such areas are essential to the species' conservation (i.e., recovery).[40] As the Services previously acknowledged, there is no basis in the legislative history for this rigid requirement to first exhaust occupied areas.[41]

Second, the proposed regulations unlawfully require "a reasonable certainty" that the area "will contribute to the conservation of the species." 90 Fed. Reg. at 52,615 (proposed 50 C.F.R. § 424.12(b)(2)). Further, to the extent that this language requires the Services to consider factors beyond the "best scientific data available" it likewise conflicts with this requirement in the statute. *See* 16 U.S.C. § 1533(b)(2). Indeed, the proposed language suggests that the Services will weigh factors that Congress clearly did not intend it to consider at the designation stage. 89 Fed. Reg. at 24,238 ("[t]he 'reasonable certainty' standard appeared to set a more stringent standard relative to the statutory standard and thus could potentially result in the Services excluding data from consideration because they were deemed not to meet some ambiguously heightened level of certainty").

Third, the proposed language would add a requirement that an unoccupied area must "contain[] one or more of those physical or biological features essential to the conservation of the species." 90 Fed. Reg. at 52,615 (proposed 50 C.F.R. § 424.12(b)(2)). This requirement cannot be squared with the plain language of the ESA. The statute requires *occupied* areas to contain "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections," but only requires that unoccupied areas be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A). By proposing to

[40] 16 U.S.C. § 1532(5)(A) (defining "critical habitat" to include both occupied and unoccupied areas); *see generally id.* §§ 1533(a)(3)(A); 1533(b)(2) (discussing "critical habitat" without distinguishing between occupied and unoccupied areas).

[41] 81 Fed. Reg. at 7,426–27 (emphasizing that "there is no suggestion in the legislative history that the Services were expected to exhaust occupied habitat before considering whether any unoccupied areas may be essential" and "no specific language in the Act that requires the Services to first prove that the inclusion of all occupied areas in a designation are insufficient to conserve the species before considering unoccupied areas"); *accord* 89 Fed. Reg. at 24,321-22 (rejecting the "rigid" exhaustion requirement as neither "the best or a necessary" approach) .

add an extratextual requirement for designating unoccupied critical habitat, the Services have unlawfully muddled the clear statutory distinction between occupied and unoccupied critical habitat and curtailed their ability to designate unoccupied areas.

The Services now claim, inexplicably, that the "proposed change would align the regulations with the best meaning of the [ESA]," citing *Loper Bright,* 603 U.S. 369. 90 Fed. Reg. at 52,612. But *Loper Bright* does not grant agencies discretion to conjure the best meaning of a statute out of thin air. Rather, it reminds courts that it is their constitutional duty to interpret the law even in the face of statutory ambiguity. The proposed regulatory changes clearly violate basic canons of statutory construction, most notably that Congress acts intentionally when it omits from one section of a statute terms that it applies in another. *See e.g.*, *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005); *Dean v. United States*, 556 U.S. 568, 573 (2009). Here, Congress intentionally omitted the "physical or biological features" requirement that it included for occupied areas from the requirements for designating unoccupied critical habitat. And just last year, the Services deleted this language because it conflated the definitions of these two clear statutory terms. 89 Fed. Reg. at 24,326. The Services do not even attempt to grapple with the text of the statute here. It is the height of conclusory reasoning to suggest that the Services' contrived definition provides the "best meaning."

Nor is the proposed reversion to the 2019 language required by the Court's decision in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 586 U.S. 9 (2018) (*Weyerhaeuser*), as the Services now suggest. *See* 90 Fed. Reg. at 52,612. There, the Court looked to the text of the statute to determine that "an area is eligible for designation as critical habitat," whether occupied or unoccupied, "only if it is habitat for the species," e.g. is an area where that species might be expected to live. *Weyerhaeuser*, 586 U.S. at 19–21 & n.2. But the Court did not find that the physical and biological features the ESA requires to be present in occupied areas are also required to be present in unoccupied areas in order for the latter to qualify as critical habitat. And, as the Services acknowledged in 2024 when removing this extratextual requirement from the regulations, determining whether an area is *habitat* for a given species is a fact-specific inquiry that must be based on the best available science. 89 Fed. Reg. at 24,326–27.

The proposed limits on designating unoccupied critical habitat would short circuit an important tool for advancing species conservation.[42] While other sections of the ESA protect species from harm and authorize discretionary land acquisition to advance conservation, only the critical habitat provisions require the Services to determine exactly what areas are *essential* to conservation. That this designation must occur concurrent with listing—i.e., at the start of the conservation process—makes it even more important that the Services not artificially limit the designation process.

[42] *See e.g.*, Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Reviving Critical Habitat Under the Endangered Species Act*, 58 BUFF. L. REV. 1095, 1105 (2010) ("It will be necessary to protect . . . former habitat as well as that which it currently occupies," in order to achieve recovery).

Our States also note that any concerns over the regulatory impact of designating unoccupied critical habitat often reflect a lack of understanding of the consultation process. It is only when a federal agency is involved in a project, providing permits or funding, that private lands may be affected by a critical habitat designation. Even then, such consultation is completed informally in almost all cases, and, when formal consultation is required, a jeopardy finding rarely follows.[43] Moreover, as the Services acknowledged in 2024, attempts to study the effects of critical habitat designations on property values have yielded "equivocal" results. 89 Fed. Reg. at 24,320.

For all of these reasons and more, the Services should withdraw their proposed changes to 50 C.F.R. § 424.12(b)(2).

C. Proposed Habitat Exclusion Rule

FWS proposes to reinstate the 2020 Habitat Exclusion Rule, even though FWS previously determined the 2020 rule conflicted with its statutory duties under the ESA, and that keeping any part of it "would result in competing and conflicting legal requirements." 86 Fed. Reg. at 59,347. The Proposed Habitat Exclusion Rule is contrary to the plain language of the ESA and its overriding conservation purpose. If finalized as proposed, the rule also would violate the APA because FWS did not provide a reasoned justification for reversing its 2022 decision to rescind the rule in its entirety as contrary to the ESA.

1. The Proposed Economic Impact Analysis Process in Section 17.90(a) is Contrary to Section 4(b)(2), Section 7, and the ESA's Conservation Purpose, and, if Finalized, Would Violate the APA

Section 4(b)(2) of the ESA 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); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 938 (9th Cir. 2006). 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 particular areas from critical habitat, as a second step in the process. 16 U.S.C. § 1533(b)(2); *Weyerhaeuser*, 586 U.S. at 24.

In addition, all critical habitat designations must meet the statutory definition of critical habitat, and further the fundamental purpose of critical habitat and the ESA's overarching conservation purpose. 16 U.S.C. §§ 1531(b), (c), 1532(3), 1536(a)(1). As discussed in Part IV.B above, the statutory definition of critical habitat in section 1532(5)(A) specifically requires that critical habitat be sufficient to provide for the "conservation" (i.e., recovery) of listed species. *Id*.

[43] Jacob Malcolm & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act*, 112 PROC. NAT. ACAD. SCIS. 15844, 15845 (2015) (finding that of 88,920 consultations conducted by the U.S. Fish and Wildlife Service from January 2008 to April 2015, only 6,829 were formal).

§ 1532(5)(A). Courts have interpreted the ESA's definition of "critical habitat" broadly, consistent with the ESA's plain text and purpose, to provide for listed species' recovery. As the Fifth Circuit has explained, "[t]he 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 v. USFWS*, 245 F.3d at 441–42 (citing 16 U.S.C. § 1532(5)(A)).[44]

The Proposed Habitat Exclusion Rule's process for broadly assessing the economic impacts of a proposed critical habitat designation conflicts with the express language of the ESA for several reasons. First, the Proposed Rule unlawfully conflates the initial, mandatory 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.

90 Fed. Reg. at 52,598–99 (emphasis added). In short, the Proposed Habitat Exclusion Rule compresses the two-step process outlined in the ESA into a single step that places an undue emphasis on the exclusion analysis.

FWS's proposed conflation of the statutory two-step process into a single step process conflicts with the ESA's language stating that the exclusion analysis is secondary to the economic impact analysis and is always discretionary. 16 U.S.C. § 1533(b)(2). Case law confirms as much. The 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." *Weyerhaeuser*, 586 U.S. at 25 (emphasis added); *accord Bldg. Industry Ass'n of the Bay Area v. U.S. Dep't of Com.*, 792 F.3d 1027, 1033 (9th Cir. 2015) ("we 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 NMFS is required "to assess whether the economic benefits of excluding an area from

[44] *See also Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (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").

designation outweigh the conservation benefits of including the area" in the first step of the analysis. *Id*. at 1032–33. Rather, the economic cost-benefit analysis of critical habitat exclusion is limited to situations in which the Service has first considered the best available science and economic and national security impacts of designating critical habitat in general, and then exercises its discretion to undertake an analysis of whether to exclude any particular area from that designation. *Id*. at 1033. By proposing to integrate the exclusion analysis into the first step of the critical habitat designation process, FWS disregards the ESA's plain text and effectively places a heavy thumb on the scale of exclusion.

Second, the Proposed Habitat Exclusion Rule sets forth an unlawfully broad list of "economic impacts" and "other relevant impacts" that FWS must consider in the economic impact analysis. These include "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 "impacts to . . . Federal lands." 90 Fed. Reg. at 52,599 (proposed 50 C.F.R. § 17.90(a)). The proposed requirement for FWS to consider "opportunity costs" of designating an area as critical habitat, including the economic benefits of "avoidance of administrative and transactional costs," or "permitting requirements" if an area (such as federal lands) are excluded from critical habitat, are routine regulatory costs that will exist for most areas of proposed critical habitat. 90 Fed. Reg. at 52,596. And as FWS acknowledged in the 2022 Rescission, the "transactional costs of consultation with Federal agencies tend to be relatively minor cost in most situations." 86 Fed. Reg. at 59,350.

The proposed approach to economic impact analyses is likely to result in a significant reduction in the number and extent of critical habitat designations, as FWS would have broad discretion to deem more areas as too "costly" to include in a designation. In fact, under FWS's proposed approach, all critical habitat, except the remaining habitat necessary to prevent *extinction* of listed species, could potentially be excluded from designation, directly contrary to the conservation goals of the ESA. *See* 90 Fed. Reg. at 52,599 (proposed 50 C.F.R. § 17.90(e)). That result not only will reduce the number, type, and extent of critical habitat designations, but also will necessarily reduce the number, type, and scope of section 7 consultations that would otherwise occur as a result of those avoided designations. This is directly contrary to FWS and federal action agencies' duties under section 7, and the fundamental purposes of critical habitat designation and the ESA. 16 U.S.C. §§ 1531(b), (c)(1), 1532(3), 1532(5), 1536(a)(1), (a)(2).

Third, FWS also proposes to reverse its "2016 policy position that [it] generally do[es] not exclude Federal lands from designations of critical habitat." 90 Fed. Reg. at 52,595 (citing 81 Fed. Reg. at 7,226 (Feb. 11, 2016)).[45] FWS claims that "there is nothing in the [ESA] that states

[45] The 2016 Policy is a joint policy between FWS and NMFS that describes how both Services implement their discretion to exclude areas from critical habitat designations under section 4(b)(2) of the ESA (hereinafter, the 2016 Policy). 81 Fed. Reg. at 7226. Among other things, the 2016 Policy directs the

that lands could not be excluded from designation of critical habitat simply because that land is managed by the Federal Government." 90 Fed Reg. at 52,595. FWS contends that the Proposed Rule will avoid and reduce administrative and transactional costs for Federal agencies and permittees that are associated with the consultation process. *Id.* at 52,595–96.

However, the 2016 Policy stated that the economic and other benefits of excluding *non*-Federal lands from critical habitat "do not generally arise with respect to Federal lands, because of the independent obligations of Federal agencies under section 7 of the [ESA]" to avoid jeopardizing listed species on such lands, 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." 81 Fed. Reg. at 7231; *see also id*. at 7238, 7248. The 2016 Policy further provides that "Federal lands should be prioritized as sources of support in the recovery of listed species," and that, FWS will focus designation of critical habitat on Federal lands "to avoid the real or perceived regulatory burdens on non-Federal lands." 81 Fed. Reg. at 7231–32.

The 2016 approach is consistent with Federal agency obligations that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of th[e] [ESA]." 16 U.S.C. § 1531(c)(1).

The claimed costs of consultation, and avoidance or minimization of mitigation measures imposed as result of consultation, as reasons not to designate critical habitat could result in fewer critical habitat designations on federal land, fundamentally undermining the value of critical habitat for species survival and recovery. Many endangered and threatened species, especially those in the western United States (for example, northern spotted owls and marbled murrelets in Washington), rely almost exclusively on federal lands to support these species. The impact of this proposed change would be particularly significant for these species because critical habitat consultations are only triggered when there is a federal nexus—i.e., if an action occurs on federal land or is permitted or funded by a federal agency. Codifying this new approach that favors excluding federal lands from critical habitat designations thus would significantly limit species recovery, in violation of the ESA.

Finally, FWS's broad list of economic impacts and exclusion of federal lands from critical habitat designation is arbitrary and capricious and, if finalized, would violate the APA because FWS does not offer any reasoned basis for doing so. It also does not provide a reasoned justification for reversing the 2022 Rescission of its broad approach to assessing economic impacts, nor does it provide a reasoned explanation for repudiating its previous approach to determining whether federal lands should be excluded from a critical habitat designation. FWS stated in the 2022 Rescission that the 2016 Policy regarding federal lands "better equips the Service with the flexibility necessary to account for the wide variability of circumstances in

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Services to focus designation of critical habitat on Federal lands and requires that, when making exclusion determinations on the basis of habitat conservation plans or agreements, the Services must rely on the entire record. *Id*. at 7232, 7229, 7247.

which the Secretary makes exclusion decisions" and therefore, found it "unwise to constrain the Secretary's discretion in the regulations." 86 Fed. Reg. at 59,350. FWS has not even attempted to justify its course reversal on this issue.

For all of these reasons, FWS's proposed reversion to the 2020 regulatory language and repudiation of the 2016 Policy, if finalized, would be unlawful and arbitrary and capricious and must be withdrawn.

2. The Mandatory Critical Habitat Exclusion Analysis, if Finalized, Unlawfully Eliminates FWS's Statutory Discretion to Determine When the Benefits of Exclusion Outweigh the Benefits of Inclusion in Violation of the ESA and APA

The Proposed Habitat Exclusion Rule also conflicts with section 4(b)(2)'s plain language by making a critical habitat exclusion analysis mandatory rather than discretionary in any situation 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." 90 Fed. Reg. at 52,599 (proposed 50 C.F.R. § 17.90(c)(2)(i) (emphasis added)). As it did in 2020, FWS again proposes that in such circumstances, it "*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 52,599 (emphasis added). This proposed change, if adopted, violates the ESA and APA for several reasons.

First, the plain language of the ESA and case law confirm that an exclusion analysis is always discretionary, not mandatory. The proposed language directly contradicts section 4(b)(2) of the ESA, 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 likewise agree that FWS's decision to conduct an exclusion analysis is discretionary. For example, in *Bear Valley Mutual 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. 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 economic impact, the entire exclusionary process is discretionary." *Id*. at 1033.[46]

[46] 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*, 586 U.S. at 23–26; *cf. Bear Valley Mut. Water Co.,* 790 F.3d at 990; *Bldg. Indus. Ass'n*,

Second, in the 2022 Rescission, FWS noted that the "credible information" standard in section 17.90(c)(2) deviated from both the statutory standard and FWS's longstanding approach and practice, and that this provision "reduces the Secretary's discretion not to conduct exclusion analyses in individual circumstances, even in situations in which it is clear to the Service … that the benefits of exclusion are not going to outweigh the benefits of inclusion." 86 Fed. Reg. at 59,348-49. FWS further stated that the requirement to conduct an exclusion analysis when a proponent of such exclusion presented "credible information" unlawfully restricted FWS's statutory discretion to determine whether to conduct an exclusion analysis. *Id*. at 59,349. Finally, FWS acknowledged that the "shall exclude" language interfered with the ESA's conservation goals by making a binding rule that "ties the hands of current and future Secretaries" regardless of the "case-specific facts or the conservation outcomes." *Id*. at 59,350. In short, FWS itself previously acknowledged the major flaws in its proposal here.

Third, FWS has failed to justify its reversal of position in introducing this "credible information" standard, and thus if such standard is finalized, FWS would be in violation of the APA. As noted above, in 2022, FWS acknowledged that this standard was a reversal of its "longstanding approach and practice" in conducting exclusion analyses. 86 Fed. Reg. at 59,348–49. But it does not even attempt to explain why it is once again reversing its longstanding practice.

The "credible information" threshold is also ambiguous and subjective because 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. 90 Fed. Reg. at 52,595. Without any meaningful regulatory definition, the Proposed Habitat Exclusion Rule's "credible information" standard would appear to mean nothing more than information that FWS *believes*, with or without reasonable justification, might be credible or reliable.

Finally, FWS does not provide a reasoned justification for its change from its 2016 Policy that explains that a decision to exclude an area from critical habitat designation is *always* discretionary. 81 Fed. Reg. at 7,247; *see also id*. at 7,228–29. The Proposed Habitat Exclusion Rule now makes an exclusion analysis mandatory and requires exclusions in certain situations. Mandating exclusion under the circumstances set forth in the Proposed Habitat Exclusion Rule is an unexplained and unjustified departure from the 2016 Policy and the 2022 Rescission.

For all of these reasons, FWS's proposed reversion to the 2020 regulatory language and reversal of the 2016 Policy, if finalized, would be unlawful and arbitrary and capricious. It therefore must be withdrawn.

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792 F.3d at 1034–35. But the question 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.

3. The Proposed Habitat Exclusion Rule's Undue Deference to Outside Non-Biological "Experts," if Finalized, Would Violate the ESA's Plain Language and Purpose and the APA

FWS also proposes to readopt the 2020 requirement that it "*shall weigh* the benefits of including or excluding particular areas in the designation of critical habitat, according to" certain specified principles. 90 Fed. Reg. at 52,599 (emphasis added). These principles include requiring FWS to defer to outside "experts in," or those with "firsthand knowledge of," areas that "*may be* outside of the scope of the [FWS's] expertise," unless FWS has specific evidence rebutting that information. *Id*. at 52,599 (proposed 50 C.F.R. § 17.90(d)(1)(i)–(iv)) (emphasis added). The Proposed Habitat Exclusion Rule identifies several areas 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*. In such instances, FWS "would give weight to benefits consistent with expert or firsthand information, unless [FWS] has knowledge or material evidence that rebuts that information." *Id.* at 52,595. This proposed deference is alarming and violates 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); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d at 938.

FWS states that this deference would mostly occur with regard to purported outside expertise or "firsthand knowledge" regarding "non-biological impacts." 90 Fed. Reg. at 52,595. However, the Proposed Rule also requires FWS to consider and "assign weight" to outside expertise regarding *biological* impacts in an exclusion analysis. *Id.* The 2020 Habitat Exclusion Rule provided that FWS should defer to outside experts or those with firsthand knowledge of areas "that *are* outside the scope of [FWS's] expertise." 85 Fed. Reg. at 82,388 (emphasis added). But the Proposed Rule goes even further, by requiring FWS to defer to those experts for areas "that *may be* outside the scope of FWS's expertise." 90 Fed. Reg. at 52,599 (emphasis added). The proposal effectively delegates FWS's statutory duty, authority, and discretion to undertake the economic and critical habitat exclusion analyses to third parties who may not have the requisite biological expertise and who are not statutorily authorized to perform these duties. 16 U.S.C. § 1533(b)(2). Indeed, FWS is the expert biological agency charged with making critical habitat determinations and weighing both biological considerations and economic impacts. *See Karuk Tribe of Calif. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (*Karuk Tribe*).[47] Astonishingly, therefore, if finalized, the Proposed Rule would allow FWS to defer to outside experts even on topics where FWS *itself* is the expert.

FWS's proposal, if finalized, would also violate the APA because it does not justify or explain its dramatic change in approach from the 2016 Policy and the 2022 Rescission to assign weight to

[47] *Ctr. for Biological Diversity v. U.S. Env't Prot. Agency*, 847 F.3d 1075, 1084 (9th Cir. 2017) (the Services are the expert biological agencies charged with determining impacts to species and habitat under the ESA).

non-biological information provided by third parties and to consider information or expertise from outside sources regarding biological impacts. 90 Fed. Reg. at 52,595, 52,599. In its 2022 Rescission, FWS stated that assigning weight to impacts identified by third parties did not advance the ESA's conservation goals, and that it not only constrained FWS's "authority and responsibility as the agency with the expert judgment … but it could be at odds with the [ESA's] mandate to base designations on the best scientific data available." 86 Fed. Reg. at 59,349. FWS further stated that "[a]utomatically assigning weights based on information from parties . . . that may have direct economic or other interests in the outcome of the exclusion analysis, regardless of whether those parties have expert or firsthand information, is in tension with Congress's decision to place that authority with the Secretary." *Id*. Finally, FWS noted that the requirement that the Secretary must assign weights to non-biological impacts based on information from those entities, unless FWS has rebutting information, "constrains the Secretary's discretion to use their expert judgment and mandate to base designations on the best scientific data available." *Id.*

While the Proposed Habitat Exclusion Rule attempts to distinguish between areas within and outside of FWS's expertise, it provides no reasoned explanation of why FWS is not itself best suited to evaluate economic or other non-biological *and* biological information, 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).

Moreover, the Proposed Habitat Exclusion Rule's deferential approach to evaluating outside "expertise" contains significant ambiguities and raises multiple unanswered questions regarding its implementation. For example, the "credible information" threshold is inherently amorphous and sets an extremely low bar to meet for triggering such a high level of deference to third-party information. On its face, the threshold 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.[48] 90 Fed. Reg. at 52,599. For example, under this standard, FWS could ignore biological information supporting critical habitat designation, including information submitted by expert state agencies, but more heavily weigh information supporting exclusion submitted by a project proponent with no such expertise. Such a rule, if adopted as proposed, is arbitrary and capricious.

[48] The Preamble does explain that the "information provided by submitters or proponents could address either the benefits of exclusion, or the benefits or inclusion," but the sentence immediately preceding focuses on information that "supports a benefit of exclusion." 90 Fed. Reg. at 52,595. And the text of proposed section 17.90(c)(2) states that FWS will conduct an exclusion analysis whenever "the proponent of *excluding* a particular area" has presented credible information. *Id*. at 52,599 (emphasis added).

For all of these reasons, FWS's proposed reversion to the 2020 Habitat Exclusion Rule and reversal of the 2016 Policy, if finalized, would be unlawful and arbitrary and capricious. It thus must be withdrawn.

4. The Exclusion of Areas Covered by Conservation Plans from Critical Habitat Is Contrary to the ESA and, if Finalized, Would Violate the APA

Finally, FWS proposes to codify an approach and substantive criteria for evaluating critical habitat exclusions of lands subject to a habitat conservation plan or other conservation agreement or partnership that either are or are not authorized by an incidental take permit under section 10 of the ESA, similar to the criteria that were previously set forth in the 2016 Policy. 90 Fed. Reg. at 52,599 (proposed 50 C.F.R. § 17.90(d)(3), (4)). Under the proposal, FWS may exclude areas subject to a conservation plan or agreement based on such factors, *inter alia*, as whether the plan or agreement "specifically addresses the habitat of the species" and whether the plan or agreement is being properly implemented. *Id.*

In doing so, the Proposed Habitat Exclusion Rule conflates the regulatory standard for "take" with the relevant standard for section 7 consultation relating to critical habitat: whether action may "destroy or adversely modify" designated critical habitat. *Compare* 16 U.S.C. §§ 1536(a)(2) and (b)(4) *with id.* §§ 1538(a)(1)(B), 1539(a)(1)(B); *see also Karuk Tribe*, 681 F.3d at 1028 ("[w]hether 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").[49] Equating these two distinct standards ignores the ESA's plain language and the many independent conservation benefits that accrue from critical habitat designation, as discussed in Part IV.B.1.

The Proposed Rule also would grant authority to FWS to exclude lands from critical habitat that are subject to a conservation plan or agreement on the basis that the plan covers the same species and habitat. This proposal is inconsistent with the case law. For example, in *Natural Resources Defense Council v. U.S. Department of the Interior*, 113 F.3d at 1126–27, the Ninth Circuit rejected FWS's argument that it 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 rule adopted pursuant to section 4(d) of the ESA. The Ninth Circuit 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-

[49] The Proposed Habitat Exclusion Rule also 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).

federal land-use activities." *Id*. Accordingly, while such plans and agreements are important for species conservation, they are not a substitute for critical habitat designation.

Moreover, FWS has failed to justify this proposed change. 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]." 90 Fed. Reg. at 52,599 (emphasis added). The phrase "or information provided by proponents of an exclusion" is neither discussed nor justified. This proposed language provides an opportunity for proponents of an exclusion—but not proponents of an inclusion—to provide relevant information to inform critical habitat designations. But 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 proposed approach unjustifiably and impermissibly places a thumb on the scale in favor of critical habitat exclusions, and FWS does not, and cannot, provide any reasoned basis for that change.

Further, 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 (cleaned up). 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. 90 Fed. Reg. at 52,596.

Consequently, the proposed changes, if finalized, regarding areas covered by conservation plans or agreements would be arbitrary and capricious under the APA.

For all these reasons, FWS's proposed readoption of the 2020 Habitat Exclusion Rule and reversal of its 2016 Policy is unlawful and must be withdrawn.

D. Proposed Section 4(d) Rule

The Proposed Section 4(d) Rule would remove the Blanket Section 4(d) Rule, which automatically extends section 9 take protections to species newly listed as threatened. *See* 90 Fed. Reg. at 52,589. Once again, FWS proposes to abandon its practice of providing default protections to all newly listed threatened species without providing an adequate justification for doing so, and if the proposal is finalized, would violate the APA's requirement that an agency engage in "reasoned decisionmaking." *Michigan*, 576 U.S. at 750. Instead, FWS states that it intends to issue species-specific rules to protect threatened species only as it sees fit, and proposes to preserve its discretion to delay promulgation of those protections indefinitely. 90 Fed. Reg. at 52,589.

FWS further proposes to amend 50 C.F.R. § 17.31 and § 17.71, which govern protections for threatened plants and wildlife, to add new subsections 50 CFR § 17.31(d) and § 17.71(d). The new text would require FWS to make a "necessary and advisable determination" for each species-specific rule, including a consideration of economic impacts in every case, in contravention of the text and purposes of the ESA. 90 Fed. Reg. at 52,589. The Proposed Section 4(d) Rule is unlawful and must be withdrawn.

1. FWS's Proposal to Rescind the Blanket Section 4(d) Rule, if Finalized, Would Be Arbitrary and Capricious Because FWS Has Failed to Provide a Reasoned Explanation for its Decision

Section 4(d) of the ESA grants FWS discretion to regulate threatened species to provide for their conservation, including extending all section 9 prohibitions to threatened species. *See* 16 U.S.C. § 1533(d) ("the Secretary shall issue such regulations *as he deems necessary and advisable* to provide for the conservation of such species") (emphasis added); *id.* ("[t]he Secretary *may* by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the case of plants") (emphasis added).

For almost the entirety of the ESA's history, FWS regulations have extended the full suite of section 9's prohibitions to all threatened fish, wildlife and plant species by default, 50 C.F.R. § 17.31(a) (the Blanket Section 4(d) Rule), though FWS has always retained the authority to promulgate species-specific section 4(d) rules, 50 C.F.R. § 17.31(c).[50] In 2019, however, FWS promulgated a rule that eliminated the Blanket Section 4(d) Rule. 84 Fed. Reg. 44,753. This 2019 rescission itself was rescinded in 2024, when FWS reinstated the Blanket Section 4(d) Rule, recognizing that extension of section 9 protections to threatened species was well within FWS's authority, and that the Blanket Section 4(d) Rule promoted the ESA's core purpose by ensuring that "there is never a lapse in threatened species protections." *See* 89 Fed. Reg. at 23,919, 23,921.

FWS now proposes to once again rescind the Blanket Section 4(d) Rule, this time basing its proposal on the assertion that repeal represents the "single, best meaning" of the statute, as required by *Loper Bright*. 90 Fed. Reg. at 52,589 (citing *Loper Bright*, 603 U.S. at 400). But *Loper Bright* expressly recognized that the "best reading" of certain statutes may authorize agencies to exercise a degree of discretion if that is contemplated by the statutory text. *Loper Bright*, 603 U.S. at 395. Here, Section 4(d) authorizes the Secretary to promulgate such protective regulations "as he deems necessary and advisable to provide for the conservation of" threatened species and provides that the Secretary "may" extend section 9 protections to

[50] 50 C.F.R. § 17.31 applies to threatened wildlife. *See also* 50 C.F.R. § 17.71(a) (the Blanket Section 4(d) Rule applied to threatened plant species); *id.* § 17.71(c) (authorizing FWS to promulgate species-specific section 4(d) rules for threatened plant species).

threatened species, and thus expressly grants the Secretary discretion to promulgate such rules. 16 U.S.C. § 1533(d).

Where, as here, "the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is . . . ensuring the agency has engaged in reasoned decisionmaking." *Id.* (cleaned up). The only question, then, is whether FWS has engaged in "reasoned decisionmaking" in its Proposed Section 4(d) Rule. It did not.

"[R]easoned decisionmaking" requires that "the process by which [an agency] reaches [a] result must be logical and rational" and that the action "rest[] on a consideration of the relevant factors." *Michigan*, 576 U.S. at 750 (cleaned up). FWS supplements its flawed *Loper Bright* argument with several unsupported and incoherent policy arguments, none of which provides a rational "examin[ation of] the relevant data" or factors, or an "articulat[ion of] a satisfactory explanation." *State Farm*, 463 U.S. at 43.

First, FWS points to the purported benefits of promulgating species-specific rules but fails to acknowledge that FWS already has the ability to promulgate species-specific rules for every threatened species for which it chooses to do so under the existing rule. 90 Fed. Reg. at 52,589. The proposed rollback of the longstanding Blanket Section 4(d) Rule merely ensures that newly listed threatened species are entitled to *zero* section 9 protections unless and until the under-resourced FWS undertakes the resource-intensive process of tailoring a species-specific rule for each such species.

Second, FWS claims, again without support, that the proposed approach would reduce burdens on FWS and regulated entities and would allow FWS "to better protect threatened species." 90 Fed. Reg. at 52,589.[51] This statement defies logic: tailoring species-specific rules necessarily demands far more agency time and resources than does reliance on the Blanket Section 4(d) Rule. Further, FWS fails to acknowledge the backlog of unprotected species, processing times that are already too slow, staff shortages, and recent attempts to fire hundreds of FWS employees, including those that implement the ESA, making it even less likely that FWS would be able to issue species-specific rules within any reasonable time frame.[52] And such delays expose FWS to APA litigation for unreasonably delaying the promulgation of species-specific rules. *See* 5 U.S.C. § 706(1).

Without the Blanket Section 4(d) Rule in place, newly listed threatened species likely will receive minimal section 9 protections. And those protections that ultimately *are* granted could be long-delayed, given that species-specific rules may be promulgated "at any time" after the initial

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[51] Indeed, FWS also has indicated its intent eventually to promulgate species-specific rules for all *currently listed* threatened species as well, further adding to an already immense resource burden that would be created by the Proposed Rule. 90 Fed. Reg. at 52,588.

[52] *See e.g.* Eberhard, *supra* note 23; Doyle, *supra* note 26.

listing determination. 90 Fed. Reg. at 52,589. The Proposed Section 4(d) Rule thus indisputably leaves threatened species more vulnerable. This directly contradicts the overarching purpose of the ESA "to halt and reverse the trend toward species extinction, whatever the cost," *TVA v. Hill*, 437 U.S. at 184, as well as the statutory purpose of section 4(d) rules in particular "to provide for the conservation of" threatened species, 16 U.S.C. § 1533(d).

Finally, FWS argues that the Proposed Section 4(d) Rule aligns FWS with NMFS's longstanding practice of establishing species-specific rules. 90 Fed. Reg. at 52,589. But NMFS does not, in fact, issue species-specific rules for every threatened species. As of May 2016, 39% of animal species listed as threatened under NMFS's jurisdiction did not have a species-specific rule.[53] Further, FWS fails to acknowledge that FWS has jurisdiction over 2,388 species,[54] compared to only 165 for NMFS,[55] and that over 500 species are awaiting status reviews and consideration for listing from FWS, compared to only 62 for NMFS.[56]

Because FWS failed to provide a satisfactory explanation for the proposal, the Proposed Section 4(d) Rule, if finalized, would be "arbitrary and capricious for want of reasoned decisionmaking," *Fox v. Clinton*, 684 F.3d 67, 80 (D.C. Cir. 2012), and should be withdrawn.

2. The Text and Purpose of the ESA Prohibit Consideration of the Economic Impacts of Species-Specific Section 4(d) Rules

FWS's proposal to consider economic impacts in all "necessary and advisable" species-specific rules also contravenes the text and purpose of section 4(d). The Proposed Section 4(d) Rule would add 50 C.F.R. § 17.31(d) and § 17.71(d), to provide that "whenever [FWS] propose[s] a species-specific 4(d) rule, [FWS] will ensure that each rule include a necessary and advisable determination (including consideration of conservation *and economic* impacts) and will seek public comment on that determination." 90 Fed. Reg. at 52,589 (emphasis added). FWS proposes this rule change in response to *Kansas Natural Resources Coalition v. U.S. Fish & Wildlife Service*, 780 F. Supp. 3d 650 (W.D. Tex. 2025), in which a district court concluded that a "necessary and advisable determination" under section 4(d) requires consideration of "economic costs." *Id.* at 660–61. But in fact, consideration of economic impacts contravenes the language and purposes of the ESA.

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[53] Ya-Wei Li, *Section 4(d) Rules: The Peril and the Promise*, Defenders of Wildlife ESA Policy White Paper Series, at 5 (2017).

[54] U.S. FISH AND WILDLIFE SERVICE, *Listed Species Summary (Boxscore)*, https://perma.cc/LK6G-3YMS (last visited Dec. 8, 2025).

[55] NOAA FISHERIES, *Species Directory*, https://www.fisheries.noaa.gov/species-directory (last visited Dec. 8, 2025).

[56] *See* U.S. FISH AND WILDLIFE SERVICE, *National Listing Workplan*, https://www.fws.gov/project/national-listing-workplan; NOAA FISHERIES, *Species Directory*, supra note 55.

As discussed, section 4(d) directs that regulations protecting threatened species must be "necessary and advisable *to provide for the conservation of such species*." 16 U.S.C. § 1553(d) (emphasis added). The ESA defines "conservation" as:

> [T]o use and the 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. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management . . .

Id. § 1532(3) (emphasis added). The broad definition of conservation leaves no room for the consideration of economic factors. *Id*.[57]

The district court in *Kansas Natural Resources* sidestepped the significance of this definition by severing the term "necessary" from the term "advisable," holding that only the term "*necessary* aims at the goal of providing for the conservation of the threatened species . . . [b]ut *advisable* does something different." 780 F. Supp. 3d at 661. The court did not clarify precisely what "advisable" signifies: in the court's view, "the capaciousness of ['necessary and advisable']" was self-evident and necessarily contemplates economic costs. *Id.* The text of section 4(d) and overall purposes of the ESA dictate a different result. *Both* necessary *and* advisable speak to "provid[ing] for the conservation of such species." 16 U.S.C. § 1533(d).

Moreover, the cases that the *Kansas Natural Resources* court relied on for the proposition that "similar phrases require at least some attention to cost" did not address the ESA. *Kansas Nat. Res.*, 780 F. Supp. 3d at 661. For example, the Fifth Circuit opinion cited by the *Kansas Natural Resources* court concluded that the statutory directive that measures be "necessary and appropriate for the conservation and management" of fisheries under the Magnuson-Stevens Act "requires that its benefits reasonably outweigh its costs." *Mexican Gulf Fishing Co. v. U.S. Dep't of Com*., 60 F.4th 956, 965 (5th Cir. 2023). Crucially, however, in contrast to the ESA, the Magnuson-Stevens Act has a dual purpose: to conserve *and* utilize fishery resources. The statute is intended to, *inter alia*, "conserve and manage . . . fishery resources," "promote domestic commercial and recreational fishing under sound conservation and management principles," and to establish stewardship plans that "*take into account the* social and *economic needs* of the States." 16 U.S.C. § 1801(b) (emphasis added). Simply put, the consideration of economic factors is baked into the language and purpose of the Magnuson-Stevens Act.[58]

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[57] Indeed, had Congress intended FWS to consider economic impacts or costs when promulgating species-specific section 4(d) rules, it would have done so clearly, as it did in section 4(b)(2) and section 4(f)(1)(B)(ii). *See* 16 U.S.C. §§ 1533(b)(2), 1533(f)(1)(B)(iii).

[58] Furthermore, though a statutory purpose of both the Magnuson-Stevenson Act and the ESA is to "conserve," that same term has two different meanings in the two statutes. The statutory definition of

The ESA, on the other hand, is not intended to optimize yields and does not require any balancing of economic production with species conservation. Quite the opposite. The North Star of the ESA is, as already discussed, "halt[ing] and revers[ing] the trend toward species extinction, *whatever the cost*." *TVA v. Hill*, 437 U.S. at 184 (emphasis added).[59]

Similarly, the *Kansas Natural Resources* court's reliance on *Michigan v. Environmental Protection Agency*, 576 U.S. 743, does not assist FWS. There, the Supreme Court held that the Environmental Protection Agency (EPA) had to consider costs when determining whether regulating hazardous air pollutants from power plants was "appropriate and necessary." *Id*. at 752. The Clean Air Act treats power plants differently than other emission sources, for which the statute has established criteria that EPA must consider when determining whether to regulate hazardous air pollutants from those sources. As to power plants, the "capaciousness" of the phrase "appropriate and necessary" led the Court to conclude that EPA must consider "all the relevant factors," including costs. *Id.* at 751–52. Notably, the Court recognized that "[t]here are undoubtedly settings in which the phrase 'appropriate and necessary' does *not* encompass cost"—this would include, for example, the "necessary and advisable" language in section 4(d). *Id.* at 752 (emphasis added).

Therefore, the proposed requirement that FWS consider economic impacts when conducting "necessary and advisable" determinations under ESA section 4(d), if finalized, would violate both the ESA and the APA and must be withdrawn.

3. Any Final Section 4(d) Rule Must Include a Mandatory Deadline for Promulgating Species-Specific Rules

Should the agency proceed with this unlawful proposal, any final rule must include a mandatory deadline to promulgate all necessary protections in a species-specific rule. The text of section 4(d) provides that "*[w]henever* any species is listed as a threatened species[,] . . . the Secretary *shall* issue such regulations as he deems necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d) (emphasis added). "Whenever" means "at whatever time," and the term "shall" creates a mandatory duty.[60] Therefore, the text directs the agency to issue species-specific rules concurrently with listing.

"conserve" in the ESA is focused exclusively on species survival and recovery, which distinguishes it from the definition of "conservation and management" in the Magnuson-Stevenson Act, which focuses on rebuilding fishery resources for human utilization and avoiding "irreversible or long-term adverse effects" on such resources. *Compare* 16 U.S.C. § 1532(3), *with* 16 U.S.C. § 1802(5).

[59] *See also* 16 U.S.C. § 1531(b) ("The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species"); *id.* at § 1531(c)(1) ("[FWS] shall seek to conserve endangered species and threatened species and shall utilize [its] authorities in furtherance of the purposes of this chapter").

[60] *Whenever*, MERRIAM-WEBSTER DICTIONARY, https://perma.cc/N8BF-GV6H; *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

FWS states that it "intend[s] to finalize species-specific rules concurrent with the final listing or reclassification determination," but simultaneously expressly claims "discretion to revise or promulgate species-specific rules at any time after the final listing or reclassification determination." 90 Fed. Reg. at 52,589. Such an approach is inconsistent with the text of section 4(d) and creates regulatory uncertainty for potentially affected parties trying to anticipate protections that may be adopted at any point, or not at all. FWS should revise the proposal to state that it will promulgate species-specific rules concurrent with final listing or reclassification determinations, but in no event later than 180 days following any such determination. Without a mandatory timeframe, FWS could promulgate species-specific rules "at any time" long after the relevant final listing or reclassification determination, 90 Fed. Reg. at 52,589, departing from both the text of section 4(d) and the ESA's directive that FWS use all available resources and authority to conserve threatened species. *See* 16 U.S.C. §§ 1531(b), (c)(1), 1533(d), 1536(a)(1).[61]

E. Proposed Interagency Cooperation Rule

The Services propose to readopt the definitions of "effects of the action" and "environmental baseline" from the 2019 Interagency Cooperation Rule for purposes of interagency consultation under section 7(a)(2). The Services also propose to readopt and expand section 402.17, also adopted in 2019 but rescinded in 2024, which addresses when "effects of the action" may be considered "reasonably certain to occur."

As the States explained in their comments on the Proposed 2018 and 2023 Interagency Cooperation Rules,[62] these proposed revisions unlawfully limit the circumstances requiring consultation in the first instance, as well as the type and scope of consultations that do occur. The definitions limit the number, type and scope of effects of the proposed action required to be analyzed and reasonable and prudent measures required to mitigate such effects. The reduction in number, type and scope of section 7 consultations in turn will limit the number of instances in which "jeopardy" and "adverse modification" findings are made and reasonable and prudent alternatives are required to be developed to avoid such jeopardy and adverse modification findings. As such, the Proposed Rules fail to "insure" that federal actions will not jeopardize listed species or destroy or adversely modify critical habitat, or that reasonable and prudent mitigation measures and alternatives will be required for such actions, as required by section 7. 16 U.S.C. § 1536(a)(2), (b)(4).

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[61] *See also* 16 U.S.C. § 1533(b)(3)(A)–(B) (timeframes for FWS action on ESA listing petitions).

[62] *See* Comments of the Attorneys General of Massachusetts, California, Maryland, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia, Sept. 24, 2018, Docket No. FWS-HQ-ES-2018-0009: Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. 35,178 (July 25, 2018), at 25–28; Comments of the Attorneys General of California, Maryland, Massachusetts, Connecticut, Illinois, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia, August 21, 2023, Dkt. No. FWS–HQ–ES–2021–0104: Revision of Regulations for Interagency Cooperation, 88 Fed. Reg. 40,753 (June 22, 2023), at 23–32.

The Proposed Interagency Cooperation Rule is contrary to the plain language and purpose of section 7, the conservation purposes undergirding the ESA, and controlling case law. In addition, the Services have failed to articulate a reasoned basis for the proposed changes, and, as such, the proposal is arbitrary and capricious.

1. The Services' Proposed Reversion to the 2019 Definition of "Effects of the Action" and Readoption and Expansion of Section 402.17 Violates the ESA and if Finalized, Would Be Contrary to the APA

The Services propose to revert to the same definition of "effects of the action" that they adopted in 2019, and to rescind the minor language tweaks to the definition adopted in the 2024 Interagency Cooperation Rule. The 2019 definition contains a two-part test limiting the types of effects (which the Proposed Rule refers to as "consequences") that may be considered as "caused by the proposed [federal agency] action" to those that (1) "would not occur but for the proposed action" *and* (2) are "reasonably certain to occur." 90 Fed. Reg. at 52,606. This 2019 two-part test for "effects of the action" was retained and not amended by the 2024 Interagency Cooperation Rule. The Services now propose also to readopt and expand former section 402.17, which also was initially adopted in 2019 but was rescinded in toto in 2024. Proposed Section 402.17 provides guidance as to what types of activities "caused by the proposed action" may be deemed "reasonably certain to occur," and what types of "consequences" are deemed to be "caused by the proposed action." *Id*. at 52,607. As it did in 2019, section 402.17 places further significant limits on effects that must be analyzed during both informal and formal section 7 consultations.

Specifically, under proposed section 402.17(a), an *activity* that is caused by the proposed action, but that is not "part of" the proposed action, and/or any cumulative activities, may not be considered "reasonably certain to occur" (and thus need not be analyzed as an "effect of the action"), unless "based on clear and substantial information, using the best scientific and commercial data available." *Id*. Further, in making the determination whether such an activity is "reasonably certain to occur," the action agency and Services must consider a number of "non-exclusive" factors or criteria. *Id*. at 52,603. These include: (1) "[p]ast experiences" with similar actions, (2) "[e]xisting plans for the activity"; (3) "[a]ny remaining economic, administrative, and legal requirements necessary for the activity to go forward;" and a new proposed factor, (4) "[t]he amount of State, tribal, territorial, or local administrative discretion remaining to be exercised." *Id*. at 52,607.

Under proposed section 402.17(b), an *effect* cannot be considered an "effect of the action" unless it also is "based on clear and substantial information, using the best scientific and commercial data available." *Id*. In determining whether "a consequence to the species or critical habitat is not caused by the proposed action," the action agency and the Services must consider, among other "non-exclusive" factors whether the consequence is (1) "remote in time from the action under consultation"; (2) "geographically remote from the immediate area involved in the action"; or (3) "only reached through a lengthy causal chain." *Id*. at 52,604, 52,607. The Proposed Rule also would add two new and additional factors to consider: (4) "[t]he agency has no ability to prevent

the consequence due to its limited statutory authority"; or (5) "the consequence would occur regardless of whether the proposed action goes forward." *Id.*

The proposed revised definition of "effects of the action" and section 402.17 apply the two-part "but for" and "reasonably certain to occur" test to *all* effects of the proposed action, including direct, indirect, cumulative, and interrelated or interdependent effects, whereas under the longstanding, pre-2019 definition of "effects of the action," the "reasonable certainty" standard applied only to indirect and cumulative effects of the proposed action. *See* 83 Fed. Reg. 35,178, 35,183–84 (July 25, 2018) (discussing former definition of "effects of the action"). The Services claim that these regulatory changes are consistent with their existing practice and are necessary "to prevent confusion and provide more clarity in the regulatory text." 90 Fed. Reg. at 52,603; *see also id*. at 52,604 (proposed section 402.17 provides "helpful guidance consistent with . . . agency practice").

Contrary to these contentions, these aspects of the Proposed Rule contravene section 7(a)(2) and its status as "[t]he heart of the ESA," *W. Watersheds Project*, 632 F.3d at 495. The existing two-part test for "effects of the action," unlawfully adopted in 2019, in conjunction with the proposed "reasonably certain to occur" criteria in section 402.17, strike directly at this heart of section 7. Section 7(a)(2) requires federal agencies to "insure" that their actions are not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). Taken together, the proposed definition of "effects of the action" (as well as the definition of "environmental baseline," discussed below) and the proposed readoption of section 402.17 will significantly limit the number, type and extent of effects of a proposed federal agency action that either will trigger the section 7 consultation requirement in the first instance, or that must be considered during the consultation process once triggered.

This reduction in the number and scope of federal agency actions undergoing consultation in turn will limit the number and kind of instances in which federal agency actions will be found to jeopardize the continued existence of a listed species or destroy or adversely modify designated critical habitat and thereby require the development of reasonable and prudent alternatives for such actions. 16 U.S.C. § 1536(b)(3)(A). The proposed changes also will limit the number, type, and extent of reasonable and prudent measures required for incidental take statements accompanying biological opinions under section 1536(b)(4). These proposed regulatory changes thus are contrary to section 7, the conservation purpose of the ESA, and controlling case law, and, if finalized, are arbitrary and capricious under the APA.

a. The proposed reversion to the 2019 definition of "effects of the action" and the readoption of section 402.17 violate the ESA

The definition of "effects of the action" and readoption of the reasonable certainty criteria and factors in section 402.17 violate the ESA and are directly contrary to applicable case law, for three reasons.

First, the two-part "but for" and "reasonably certain to occur" causation test contravenes the statutory trigger for section 7 consultation. Section 7(b), as interpreted by the case law and other ESA regulations, requires federal agencies to consult with the Services if all or any part of a proposed action "'may affect' any listed species or critical habitat." *Karuk Tribe*, 681 F.3d at 1027 (en banc); *see also W. Watersheds Project*, 632 F.3d at 495 (citing 16 U.S.C. § 1536(a)(2)–(c)); 50 C.F.R. § 402.14(a). This "may affect" trigger for consultation is a "relatively low threshold[,]" allowing an agency to "avoid the consultation requirement only if it determines that its action will have 'no effect' on a listed species or critical habitat." *Karuk Tribe*, 681 F.3d at 1027; *see also Growth Energy v. Env't Prot. Agency*, 5 F.4th 1, 30 (D.C. Cir. 2012) ("'may affect' purposefully sets a low bar"). Thus, "[a]ny possible effect, whether beneficial, benign, adverse, *or of an undetermined character*, triggers the [section 7] requirement." *Karuk Tribe*, 681 F.3d at 1027 (*quoting* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)) (emphasis changed); *accord Growth Energy*, 5 F.4th at 30; *W. Watersheds Project*, 632 F.3d at 496).

For proposed federal actions that meet this "may affect" threshold, if the federal agency or the Services find that the proposed action is "likely" to adversely affect listed species or critical habitat, then formal section 7 consultation with the Services is required. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(a) & (b)(1); *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 741 (9th Cir. 2020). The section 7 "may affect" threshold is necessarily low so that federal agencies meet their statutory obligation to "insure" that their actions are not "likely" to jeopardize listed species or destroy or adversely modify designated critical habitat. *Karuk Tribe*, 681 F.3d at 1027 (citing 51 Fed. Reg at 19,949); *see* 16 U.S.C. § 1536(a)(2); *see also Nat'l Assn. of Home Builders v. Def. of Wildlife*, 551 U.S. 644, 667 (2007) (*Home Builders*) ("[t]o 'insure' something means '[t]o make certain, to secure, to guarantee") (cleaned up).

The two-part "but for" and "reasonably certain to occur" test sets a much higher bar that is not supported by the plain meaning of section 7 of the ESA. As the preamble to the 2019 Interagency Cooperation Rule stated, the "reasonably certain to occur" test is "an explicit foreseeability test," and actually is intended to set an even "higher threshold than 'reasonably foreseeable.'" 84 Fed. Reg. 44,976, 44,991–92 (Aug. 27, 2019). This is manifestly contrary to section 7.[63] Indeed, the D.C. Circuit has twice rejected a federal action agency's determinations, based on the unlawful two-part causation test, that its actions would have "no effect" on listed species and critical habitat, and that consequently no section 7 consultation was required.[64] Further, in a 2025

[63] The "but for" and "reasonably certain to occur" requirements also flout the ESA's overriding conservation purpose, which likewise calls for a low threshold for adverse effects in order to be maximally protective of species and habitat. 16 U.S.C. §§ 1531(b), (c)(1), 1536(a)(1).

[64] *See Growth Energy*, 5 F.4th at 30–32 (invalidating "no effect" determination for renewable fuel regulation because EPA's finding regarding alleged lack of reasonable causation was not the same as a "no effect" determination, and EPA instead needed to determine whether rule was "likely to affect" listed species or critical habitat as required by the statute); *Am. Fuel & Petrochem. Mfrs. v. Env't Prot. Agency*,

decision, the D.C. Circuit noted "the apparent tension between the definition of 'effect' in the regulations" and "a 'may affect' determination," implying that it viewed the regulatory effects definition as in conflict with the "may affect" threshold for section 7 consultation. *Ctr. for Biological Diversity v. U.S. Env't Prot. Agency*, 141 F.4th 153, 177 (D.C. Cir. 2025).

Contrary to the broad "may affect" and "likely to adversely affect" requirements of section 7, the proposed definition of "effects of the action" arbitrarily limits the scope of the section 7 analysis to effects for which the federal agency action is deemed a "but for" cause, and only to those effects that are deemed "reasonably certain to occur." The "reasonably certain to occur" determination in turn must be based on "clear and substantial information," applying a variety of vaguely worded, open-ended, highly discretionary, and purportedly "non-exclusive" factors set forth in section 402.17. 90 Fed. Reg. at 52,603–04, 52,607. The numerous "reasonable certainty" factors and limitations in section 402.17 would allow both federal action agencies and the Services to arbitrarily exclude certain effects—even those that are admittedly directly, indirectly, or cumulatively caused by the proposed action—from the section 7 "may affect" and "likely to adversely affect" analyses, based on myriad non-biological rationales. *Id.* at 52,607.

The new proposed section 402.17 factors add insult to this injury, allowing for exclusion of direct, indirect, and cumulative effects of a proposed federal agency action based on highly speculative considerations, such as the "amount of . . . discretion remaining to be exercised" by non-federal agencies, or whether the consequence allegedly would occur "regardless of" the proposed federal action. *Id.* These non-biological factors also allow federal agencies and the Services to narrowly define the scope of the proposed action and its effects and to conduct a piecemeal, limited evaluation of the action's adverse effects on listed species and critical habitat—ignoring many of the action's true impacts. This will enable federal action agencies and the Services either to avoid consultations altogether, or limit the scope of such consultations, contrary to the ESA and governing case law.

Second, for agency actions that otherwise meet the "may affect" and "likely to adversely affect" thresholds and thus require formal section 7 consultation, the two-part causation test and reasonable certainty factors unlawfully allow the Services to limit the scope of the federal agency action analyzed during that consultation. This is contrary to the ESA and longstanding case law requiring the Services to comprehensively evaluate *all* effects of the *entire* proposed agency

937 F.3d 559, 597–98 (D.C. Cir. 2019) (invalidating EPA's "no effect" determination for a separate renewable fuel regulation, which concluded that harm to species "cannot with reasonable certainty be attributed to" the proposed regulation; Court held that this finding "is not the same as a finding that the [Proposed] Rule 'will not affect' or 'is not likely to adversely affect' listed species or critical habitat").

action on listed species and critical habitat during that consultation process, including short-term, long-term, temporary, permanent, site-specific, regional, and cumulative effects.[65]

Well-established case law makes it clear that "the scope of the agency action is crucial because the ESA requires the biological opinion to analyze the effect of the *entire* agency action." *Conner*, 848 F.3d at 1453 (emphasis in original); *see also Wild Fish Conservancy*, 628 F.3d at 521–22 (citing *Conner* with approval on this point). Moreover, "[t]he delineation of the scope of an action can have a determinative effect on the ability of a biological opinion fully to describe the impact of the action" on the species and habitat. *Wild Fish Conservancy*, 628 F.3d at 522. The scope of the evaluation in a biological opinion directly affects the determination as to whether the action is likely to cause jeopardy or adverse modification of critical habitat, whether "reasonable and prudent alternatives" to the action must be implemented, and the number, type, and extent of "reasonable and prudent measures" that will be required to mitigate the adverse effects of the action. 16 U.S.C. § 1536(b)(3)(A), (b)(4).

The two-part causation test and reasonable certainty factors conflict with section 7 and case law because they unlawfully limit the number, type and extent of effects that will be analyzed as part of the proposed federal agency action. *Id.* §§ 1536(a)(2), (b)(3)(A). Instead, an effect purportedly would not be "caused by the proposed action," and therefore need not be considered in the section 7 analysis, if it would occur "but for the proposed action" and/or is not "reasonably certain to occur." 90 Fed. Reg. at 52,606. This limitation, in turn, unlawfully restricts the type and extent of reasonable and prudent alternatives and mitigation measures that must be included as part of the proposed action to avoid jeopardy and adverse modification and reduce the project's adverse effects on listed species and critical habitat. 16 U.S.C. §§ §§ 1531(b), (c)(1), 1536(a)(1), (a)(2), (b)(3)(A), (b)(4).

For example, the section 402.17 "reasonable certainty" factors, particularly the new proposed criteria, give the Services substantial and unlawful discretion to ignore agency actions' contributions to climate change and other effects that are reasonably foreseeable or even probable, but the precise extent of which are not entirely predictable or certain. Moreover, the reasonable certainty factors allow the Services to ignore reasonably foreseeable effects of an agency action on species and habitat based on biologically irrelevant, speculative considerations like whether the agency "has no ability to prevent the consequence," the consequence would occur anyway, or some other non-federal agency would exercise its future discretion in a manner

[65] 16 U.S.C. § 1536(b)(3)(A); *see, e.g.*, *Appalachian Voices v. U.S. Dep't of the Interior*, 25 F.4th 259, 271–76 (4th Cir. 2022); *Turtle Island Restoration Network v. U.S. Dep't of Com.*, 878 F.3d 725, 737–39 (9th Cir. 2017); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521–24 (9th Cir. 2010); *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1270–71 (11th Cir. 2009); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928–930, 934–35 (9th Cir. 2008) (*NWF v. NMFS)*; *Pac. Coast Fed'n of Fishermen's Ass'n v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1090–95 (9th Cir. 2005); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034–38 (9th Cir. 2001); *Conner v. Burford*, 848 F.2d 1441, 1452–54, 1457–58 (9th Cir. 1988).

that might somehow change that effect. 90 Fed. Reg. at 52,604, 52,607. Thus, like the biological opinion invalidated in *NWF v. NMFS*, 524 F.3d at 933, the regulatory language amounts "to little more than an analytical sl[e]ight of hand" that will enable federal action agencies and the Services to "manipulat[e] the variables to achieve a 'no jeopardy' finding."

Third, the "reasonably certain to occur" standard runs counter to the ESA's requirement that the Services must use the "best available science" in conducting consultations. *See* 16 U.S.C. §§ 1536(a)(2), (c)(1). Courts have held that the Services cannot shirk their duty to comprehensively analyze the effects of a proposed agency action simply because the available information does not necessarily point to a definite conclusion or outcome. *Conner*, 848 F.2d at 1454 ("incomplete information . . . does not excuse the failure to comply with the statutory requirement of a comprehensive biological opinion using the best information available") (citing 16 U.S.C. § 1536(a)(2)); *Wild Fish Conservancy*, 628 F.3d at 525 (same). Thus, the Services must make decisions based on the best scientific information available at the time the decision is made rather than defer analysis or decisions simply because either the information or outcome is not "reasonably certain." *See Conner*, 848 F.2d at 1453–54.

For all of these reasons, the States respectfully request that the Services rescind the two-part causation test and section 402.17, and restore the definition of "effects of the action" to the version that, prior to 2019, had been in effect since 1986. *See* 51 Fed. Reg. at 19,958.

b. The Services have failed to explain and justify the proposed regulatory changes

In addition, the Services have failed to adequately explain or justify their proposed changes regarding the determination of effects of the action, and thus if such changes are adopted as a final rule, they would violate the APA. First, the Services state, inaccurately, that the changes are "intended to provide additional clarity," and do "not change the various standards and requirements of the statutory or regulatory framework." 90 Fed. Reg. at 52,603. This assertion is incorrect. The Services do not provide any examples of how the pre-2019 regulatory language, which was in effect for nearly 35 years, caused confusion or needed to be clarified. Nor do they explain how the proposed regulatory changes would resolve the issue. In fact, the proposed changes are likely to lead to increased confusion, inconsistency, and uncertainty as to the effects that can and cannot be considered during consultation. Moreover, rather than codifying current practice, the proposed changes would severely limit the effects of federal action considered in the consultation process, in direct conflict with the plain language and purposes of section 7 and the ESA as a whole, as discussed above.

Second, contrary to the Services' claim, prior to 2019, the two-part causation test and reasonable certainty factors were not part of the Services' section 7 practice. 90 Fed. Reg. at 52,603–04. Prior to 2019, the "but for" language was used only as a shorthand reference for actions "interrelated" with the proposed action, which formerly were required to be evaluated within the

full scope of "effects of the action" under section 7.[66] Also, prior to 2019, the "reasonable certainty" standard only applied to the *indirect and cumulative* effects of the proposed federal agency action, not the direct effects of the proposed action and other activities caused by the action, as is the case under the post-2019 definition of "effects of the action."[67] As they did in 2019 and again in 2024, the Services continue to provide little to no justification for this significant change in agency practice.

Third, the Services' current rationale for readopting the "reasonably certain to occur" standard and criteria for effects of the action is inconsistent with its prior statements regarding the level of proof required to establish that a consequence is "reasonably certain to occur." In 2019, the Services stated that the "reasonably certain to occur" test is an "explicit foreseeability test" that is intended to set an even "higher threshold than 'reasonably foreseeable.'" 84 Fed. Reg. at 44,991–92. In 2023 and 2024, however, the Services conceded that "[i]mposing a 'reasonable certainty' standard" is both unnecessary and unwarranted "in light of the best available data standard of the [ESA]," which "has not previously been interpreted to require a specific level of certainty." 88 Fed. Reg. 40,764, 40,769–70 (June 22, 2023).[68]

Contrary to these prior statements, the Services now claim that the "reasonably certain to occur" standard and criteria are wholly consistent with the ESA, including the "best available science" requirement in section 7(a)(2). 90 Fed. Reg. at 52,603. The Services even state that the reasonably certain standard "does not limit what information and data the Services will consider" or require any particular quantum of proof. *Id.* Rather, they allege that this standard simply is intended to "illustrate that the determination of a consequence or activity . . . must be rooted in the best scientific and commercial information available, and should not be based on speculation or conjecture." *Id.* But the Services cannot simply reach the opposite conclusion on this issue

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[66] *See* former 50 C.F.R. § 402.02, 51 Fed. Reg at 19,958 (defining "interrelated actions" as "those that are part of a larger action and depend upon the larger action for their justification"); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1047 (9th Cir. 2015) and *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1113 (9th Cir. 2012); *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987) (all referring to the "but for" test for "interrelatedness").

[67] *See* former 50 C.F.R. § 402.02, 51 Fed. Reg at 19,958 (former definitions of "effects of the action" and "cumulative effects," limiting consideration of indirect and cumulative effects, but not direct effects, to those that are "reasonably certain to occur"). In addition, in 2015, the Services applied the "reasonably certain" standard to incidental take statements required by ESA section 7(b)(4), such that only take that is "reasonably certain to occur" needs be accounted and mitigated for in such statements. *See* 80 Fed. Reg. 26,832, 26,836–37, 26,844 (May 11, 2015) (adding 50 C.F.R. § 402.14(g)(7)).

[68] *See also id.* at 40,770 (reasonably certain standard "could potentially result in the Services excluding from consideration the best available data merely because it was deemed not to be sufficiently certain"; section 7 "does not require that the information relied upon by the Services be perfect or free from uncertainty"); 89 Fed. Reg. 24,268, 24,281 (Apr. 5, 2024) ("[r]ather than focusing on the 'best available' data, the 'clear and substantial information' requirement would appear to circumscribe that data to only that which meets those heightened requirements"); and *id.* ("[t]he best available data will not always be free of uncertainty and often may be qualitative in nature").

without explanation. *See Nat'l Cable & Telecomms*., 545 U.S. at 981 (any "[u]nexplained inconsistency" is "a reason for holding an [agency's] interpretation to be an arbitrary and capricious change" under the APA); *FCC v. Fox*, 556 U.S. at 515-16 (when an agency policy "rests upon factual findings that contradict those which underlay its prior policy," agency must "provide a more detailed justification" for the change).

Fourth, the Services' rationale for adopting the new reasonable certainty criterion in section 402.17(b)(4) (that "[t]he agency has no ability to prevent the consequence due to its limited statutory authority") is contrary to law. The Services cite two NEPA cases as authority for this provision that do not assist. 90 Fed. Reg. at 52,604 (citing *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 221 L.Ed.2d 820, 841 (2025)) and *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004). These cases hold that under NEPA, a federal agency does not need to examine indirect environmental effects of a proposed federal action if it has no statutory authority to prevent these effects from occurring. *Seven County Infrastructure Coal.*, 221 L.Ed.2d at 841; *Pub. Citizen*, 541 U.S. at 757–58. But no case has expanded the rationale of these cases to the ESA context, and the Services fail to explain why it would be lawful or logical to do so.[69]

The proposed definition of "effects of the action" and proposed section 402.17 are therefore contrary to the ESA and, if finalized, the APA. The Services should withdraw their proposals and revert to the pre-2019 definition of "effects of the action."

2. The Services' Proposed Reversion to the 2019 Definition of the "Environmental Baseline" Violates the ESA and If Finalized, Would Violate the APA

The Services also propose largely to revert to the 2019 version of the definition of "environmental baseline," eliminating some minor changes made to this definition in 2024 and adding further changes in wording to clarify that the baseline is determined as of the time of consultation. 90 Fed. Reg. at 52,602, 52,606. Most significantly, the Services propose to add the word "ongoing" back into the third sentence in the definition, such that this sentence will now read as follows: "[t]he consequences to listed species or designated critical habitat from ongoing agency activities *or* existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline." *Id.* at 52,606 (emphasis added). The Services explain that they are reverting to the 2019 version of the third sentence in the "environmental baseline" definition because "those components of Federal activities or Federal facilities in

[69] Nor does *Home Builders*, 551 U.S. at 667–71, support proposed section 402.17(b)(4). *Home Builders* holds that a federal agency does not have a duty to comply with section 7 in the first instance where a controlling and mandatory federal statute renders such compliance impossible. *See id.* at 669; *see also San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 639–40 (9th Cir. 2014); *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 780, 784 (9th Cir. 2014) (en banc). But section 402.17(b)(4) is far broader, excluding analysis of any *effects* of a discretionary federal agency action that is otherwise subject to section 7, in all circumstances where the agency purportedly has no statutory authority to prevent such effects.

which there is no discretionary [Federal] involvement or control . . . are not subject to the requirement to consult," and therefore the effects of these activities or facilities "are not a consequence of a proposed discretionary Federal action." *Id*. at 52,602 (citing *Home Builders*, 551 U.S. at 667–71).

The Services' proposal unlawfully subsumes into the environmental baseline ongoing federal agency actions or facilities, as well as components of agency actions over which a federal agency allegedly has no discretionary involvement or control. This approach artificially and unlawfully inflates the environmental baseline and minimizes the full suite of effects of proposed agency actions on listed species and critical habitat. Under this approach, for example, ongoing operation of federal dams and other federal facilities may unlawfully and improperly be deemed part of the "environmental baseline" and thus not analyzed as part of the effects of a proposed federal agency action in both informal and formal section 7 consultations. This segmented approach to analyzing federal agency actions is contrary to section 7, the purposes of the ESA, and multiple court decisions.

a. The 2019 "environmental baseline" definition is contrary to the ESA

Section 7 applies to all federal "agency actions" over which there is "discretionary Federal involvement or control." *Home Builders*, 551 U.S. at 666–67 (*citing* 50 C.F.R. § 402.03); 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.02 (broad definition of "action"). Courts have repeatedly held that "agency action" is a broad concept that includes ongoing federal agency actions, provided the agency retains *some* discretionary involvement or control over those actions.[70] Indeed, the Supreme Court has held that "it is clear Congress foresaw that § 7 would, on occasion, *require agencies to alter ongoing projects* in order to fulfill the goals of the [ESA]." *TVA v. Hill*, 437 U.S. at 186 (emphasis added). The distinction between the environmental baseline and the effects of the proposed agency action is important because "whether an action is included in the baseline determines whether its impacts are considered at all in the agency's basic jeopardy [and adverse modification] analysis." *NWF v. NMFS*, 524 F.3d at 930 n.9.

Multiple courts have held that when a federal agency action meets the section 7 consultation "may affect" trigger, the Services cannot minimize the effects of that action by subsuming an ongoing federal agency action, or allegedly non-discretionary components of an agency action, into the environmental baseline. For example, in *NWF v. NMFS*, 524 F.3d at 928–33, NMFS incorporated the past and present impacts of ongoing operation of a federal dam into the

[70] *See, e.g*., *Cottonwood Env't Law Ctr. v. U.S. Forest Serv*., 789 F.3d 1075, 1084–88 (9th Cir. 2015); *Karuk Tribe*, 681 F.3d at 1020–21, 1024–25; *Wild Fish Conservancy*, 628 F.3d at 521–25; *Forest Guardians v. Johanns*, 450 F.3d 455, 462–63 (9th Cir. 2006); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv*., 340 F.3d 969, 974–77 (9th Cir. 2003); *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1125–26 (9th Cir. 1998); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1053–55 (9th Cir. 1994); *Conner*, 848 F.2d at 1453.

environmental baseline on the ground that these ongoing operations were "non-discretionary." NMFS proposed only to analyze certain proposed discretionary, *future* changes in dam operation as an "effect of the action." *Id*. at 926. The court rejected this approach and invalidated the biological opinion, holding that the ESA does not permit agencies to "ignore potential jeopardy risks by labeling parts of an action non-discretionary," and thereby "sweep so-called 'nondiscretionary' operations into the environmental baseline, thereby excluding them from the requisite ESA jeopardy analysis." *Id.* at 928–29.

In *Wild Fish Conservancy*, 628 F.3d at 522–29, the Ninth Circuit held that FWS was required to analyze the effects of ongoing operation of a fish hatchery on the endangered bull trout, and had not adequately justified its decision to analyze the ongoing action for only a five-year period. The Court invalidated the biological opinion because "[t]he artificial division of a continuing operation into short terms" undermined the "ability to determine accurately the species' likelihood of survival and recovery" (*id*. at 522) and "mask[ed] the long-term impact of Hatchery operations" (*id*. at 523). *See id*. at 521–25. The Court reasoned that, under such an approach, "a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide into oblivion is one of the very ills the ESA seeks to prevent." *Id*. at 523 (*quoting NWF v. NMFS*, 524 F.3d at 930). Multiple other courts have followed the same line of reasoning.[71]

In sum, the Services' approach to the environmental baseline unlawfully permits piecemealing of proposed federal agency actions and impermissibly allows federal action agencies and the Services to exclude components or aspects of federal activities and facilities from the effects analysis during consultation, contrary to the requirements of section 7 and the conservation purposes of the ESA. *See* 16 U.S.C. §§ 1531(b), (c)(1), 1536(a)(1), (a)(2).

[71] *See, e.g*., *Appalachian Voices*, 25 F.4th at 279 (4th Cir. 2022) ("for obvious reasons, simply reciting the activities and impacts that constitutes the baseline . . . and then separately addressing only the impacts of the particular agency action in isolation is not sufficient") (cleaned up); *Cooling Water Intake Structure Coal. v. U.S. Env't Prot. Agency*, 905 F.3d 49, 81 (2d Cir. 2018) (noting that "[w]here the future operation of a regulated facility depends upon the discretion of the acting agency, the continued operation of that facility is not a 'past' or 'present' impact of a previous federal action" that is included in the environmental baseline) (citing *NWF v. NMFS*, 524 F.3d at 930–31)); *Am. Rivers v. Fed. Energy Reg. Comm'n*, 895 F.3d 32, 46–47 (D.C. Cir. 2018) (holding FWS acted arbitrarily by placing past and present impacts of a hydropower project within the environmental baseline "without considering the degradation to the environment caused by the . . . Project's operation and its continuing impacts" (citing *NWF v. NMFS*, 524 F.3d at 930)); *Turtle Island*, 878 F.3d at 737–39 (9th Cir. 2017) (NMFS biological opinion "improperly minimized the risk of bycatch to the loggerhead [turtle]'s survival by only comparing the effects of the fishery against the baseline conditions that have already contributed to the turtles' decline") (cleaned up); *San Luis v. Jewell*, 747 F.3d at 639–40 (9th Cir. 2014) (federal action agency and the Services may not "segregate discretionary from non-discretionary actions when it considers the environmental baseline" and *Home Builders* does not dictate a different result).

b. The Services' rationale for reverting to the 2019 "environmental baseline" definition, if such definition is finalized, does not comply with the APA

The Services' rationale for reverting to the 2019 "environmental baseline" definition, if adopted as proposed, also does not pass muster under the APA because *Home Builders*, 551 U.S. at 667–71, on which the Services rely, does not support their position. In *Home Builders*, the Supreme Court held that the EPA's decision to transfer permitting authority to a state under section 402(b) of the Clean Water Act (CWA), 33 U.S.C. § 1342(b), was not subject to section 7 consultation because the EPA had no ability under any of the nine specific criteria in CWA section 402(b) to consider protections for listed species or habitat. *See Home Builders*, 551 U.S. at 669, 671–72.[72]

But whether an agency retains sufficient discretionary authority under its authorizing statute to protect listed species and habitat when undertaking a proposed action is a very different question than whether a federal agency action—over which it *otherwise* has discretionary involvement and control—may be segmented into discretionary and non-discretionary components or aspects. As discussed above, numerous decisions—all of which post-date *Home Builders*—have explicitly rejected as contrary to section 7 the Services' attempts to segment federal agency actions into discretionary and non-discretionary components or aspects and to place some components of the action into the environmental baseline. *See infra* note 7371 and accompanying text.

For all of these reasons, the Services' proposal is arbitrary and capricious and, if finalized, would violate the APA. It should therefore be withdrawn.

V. THE PROPOSED RULES MUST BE ANALYZED UNDER NEPA

The Services have a duty under NEPA to analyze the significant effects of the Proposed Rules, and to circulate that analysis for public review and comment. But instead of performing the required analysis, the Services merely invite public comment on whether NEPA applies. *See* 90 Fed. Reg. at 52,591 (Proposed Section 4(d) Rule), 52,598 (Proposed Habitat Exclusion Rule), 53,605–06 (Proposed Interagency Cooperation Rule), 52,614 (Proposed Listing and Critical Habitat Rule). For one Proposed Rule—the Interagency Cooperation Rule—the Services prepared a draft environmental assessment (Draft EA) but failed to provide adequate notice of the draft document, and failed to analyze the full scope of the Proposed Rule. As discussed below, the Proposed Rules constitute a major federal action significantly affecting the quality of the human environment, and they are not subject to a categorical exclusion under NEPA. As such, the Services were required to request comments on the appropriate scope of environmental review and then prepare, and notice for public comment, an EIS analyzing the Proposed Rules'

[72] Significant, and often overlooked, is the fact that the U.S. Supreme Court was not construing section 7 itself, which is not limited to "discretionary" federal agency actions, *see* 16 U.S.C. § 1536(a)(2). Rather, the Court was applying the Services' regulation limiting application of section 7 consultation to discretionary agency actions, *see* 50 C.F.R. § 402.03. *Home Builders*, 551 U.S. at 665–69.

potential impacts before, or in tandem with, their publication. The Proposed Rules thus violate NEPA and must be withdrawn. At the very least, the Services must suspend rulemaking for the Proposed Rules, request NEPA scoping comments, and prepare an EIS.

A. The Services Are Required to Prepare an EIS on the Proposed Rules

NEPA requires federal agencies to take a "hard look" at the environmental consequences of proposed major federal actions that may significantly affect the quality of the human environment. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see* 42 U.S.C. § 4332(2)(C). If the proposed action would have a "reasonably foreseeable significant effect on the quality of the human environment," then the federal agency "shall issue" an EIS. 42 U.S.C. § 4336(b)(1). Even if a proposed action will not have a "reasonably foreseeable significant effect," or the significance of the effect is unknown, the agency still is required to prepare an EA under NEPA, unless it finds that the proposed action qualifies for a categorical exclusion. *Id.* § 4336(b)(2).

The Services plainly have violated their NEPA obligations here. As an initial matter, it is the Services' obligation to perform the required assessment of whether an EIS is required, and they cannot shirk that duty or delegate it to the public by requesting that stakeholders commenting on the Proposed Rules explain why the Rules do, or do not, require preparation of an EIS. In any event, there can be no doubt that the Proposed Rules constitute a major federal action requiring the preparation of an EIS. The Department of Interior's own NEPA regulations state that when an agency conducts notice and comment rulemaking, "an environmental assessment or draft environmental impact statement will normally accompany the proposed rule" unless the agency determines that a categorical exclusion applies.[73] And as multiple courts have confirmed, a "major federal action" includes new or revised agency rules and regulations.[74]

The Proposed Rules indisputably qualify as a "major federal action[] significantly affecting the quality of the human environment," thereby requiring NEPA review, because they will have significant negative impacts on conservation of imperiled species and the habitats upon which these species depend, as described in Sections IV.B through IV.E, *supra*. 42 U.S.C. § 4332(2)(C). If adopted, the Proposed Rules are likely to cause numerous and profound harms to imperiled species and their habitat. For example, the Proposed Rules would limit the designation of critical habitat; result in fewer listings of—and significantly less protection for—

[73] Dep't of the Interior, Handbook of National Environmental Policy Act Implementing Procedures, 516 DM 1 (Jun. 26, 2025), section 1.3(d).

[74] *See Solar Energy Indus. Ass'n v. Fed. Energy Regul. Comm'n*, 80 F.4th 956, 992–97 (9th Cir. 2023) (regulation changing eligibility standards for preferential treatment under federal statute required NEPA review); *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1012–18 (9th Cir. 2009) (agency repeal of roadless rule and replacement with new regulations required NEPA review); *Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 37–38 (D.D.C. 2007) (vacating federal rule for failure to conduct NEPA review).

threatened species; increase the likelihood that species will be delisted; and limit the number and scope of section 7 consultations, among other adverse impacts on imperiled species and their habitats. Thus, the Services must prepare an EIS for the Proposed Rules.

What is more, the Services should already have done so. As the Supreme Court has explained, an EIS "is the outward sign that environmental values and consequences have been considered during the planning stage of agency actions. If environmental concerns are not interwoven into the fabric of agency planning, the 'action-forcing' characteristics of [NEPA] would be lost." *Andrus v. Sierra Club*, 442 U.S. 347, 350–51 (1979). Thus, federal agencies already must have evaluated the environmental consequences of an action when they propose to undertake a qualifying major federal action, *Kleppe v. Sierra Club*, 427 U.S. 390, 406 & n.15 (1976), and certainly must do so "*prior* to commitment to any actions which might affect the quality of the human environment," *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphasis in original). "If *any* 'significant' environmental impacts might result from the proposed agency action then an EIS must be prepared *before* the action is taken." *Id.* (emphasis in original).[75]

Here, the Services should have followed NEPA's requirements to prepare a draft EIS for the Proposed Rules well before—or at the latest, at the same time as—publishing the Proposed Rules on November 21, 2025, in order to weave a thorough understanding of environmental consequences into the planning process. By failing to publish an EIS before the close of the comment period, the Services have unlawfully foreclosed the opportunity for the public to understand and provide important feedback on the Proposed Rules' environmental impacts. Because the Services published the Proposed Rules in violation of NEPA, they must be withdrawn. At the very least, to comply with NEPA the Services must suspend rulemaking on the Proposed Rules, request comments on the appropriate scope of environmental review under NEPA, and prepare and circulate a comprehensive draft EIS for comment to afford the public a meaningful opportunity to participate in the Services' development of any final rules.

B. The Proposed Rules Are Not Eligible for a Categorical Exclusion From NEPA

The Services invite comment on whether the Proposed Rules "fall within one of the categorical exclusions for actions that have no reasonably foreseeable effects on the human environment." 90 Fed. Reg. at 52,591 (Proposed Section 4(d) Rule), 52,598 (Proposed Habitat Exclusion Rule), 53,606 (Proposed Interagency Coordination Rule), 52,614 (Proposed Listing and Critical Habitat Rule). The Services thereby fail even to analyze the threshold question of whether they are

[75] *See also Aberdeen & Rockfish R. Co. v. Students Challenging Regul. Agency Procs.*, 422 U.S. 289, 320 (1975) ("[T]he time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a proposal for federal action.").

required to perform a NEPA analysis in the first instance, leaving the public to guess at which categorical exclusions the Services could subsequently attempt to invoke.[76]

Agencies may invoke a categorical exclusion only for "a category of actions that a Federal agency has determined normally does not significantly affect the quality of the human environment." 42 U.S.C. § 4336e(1). If a categorical exclusion applies to a proposed agency action, the agency is not required to prepare an environmental document under NEPA. *Id.* § 4336(a)(2).

No such circumstances are present here. The Services have established categorical exclusions for policies and regulations of *an administrative or procedural nature*, none of which apply to the substantive, significant changes to myriad ESA implementing regulations reflected in the Proposed Rules.[77] Indeed, the Ninth Circuit rejected a similar attempt to evade NEPA requirements in the context of National Forest planning, finding that replacement of substantive protections with a less-protective regulatory regime—as the Services are currently attempting to do with the Proposed Rules—qualifies as a major federal action that is not exempt from NEPA review. *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1013–18 (9th Cir. 2009).[78]

Nor do these rules fall within the categorical exclusion for rules or regulations "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); *see also* NOAA Manual, App'x A, at G7.[79] To start, as already discussed, it does not require conjecture to conclude that the Proposed Rules would limit the designation of critical habitat; result in fewer listings of—and significantly less protection for—threatened species; increase the likelihood that species will be delisted; and limit the number and scope of section 7 consultations, among other adverse impacts on imperiled species and their habitat. In fact, the Services have made it clear that one of the aims of these Proposed Rules is to remove

[76] As discussed below in Section V.C, the Draft EA for the Proposed Interagency Cooperation Rule indicates that the Services "maintain that one or more categorical exclusions apply" to that Rule, but the document does not specify which categorical exclusion or exclusions the Services may invoke. FWS and NMFS, Draft Environmental Assessment for Revisions to the Endangered Species Act Section 7 Implementing Regulations (Oct. 21, 2025) at v.

[77] *See* 43 C.F.R. § 46.210 (Department of Interior categorical exclusions); Nat'l Oceanic and Atmospheric Admin. (NOAA), Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities: Companion Manual for NOAA Administrative Order 216-6A, (Jun. 30, 2025) (NOAA Manual), App'x A (NOAA categorial exclusions).

[78] *See also Solar Energy Indus. Ass'n v. Fed. Energy Regulatory Comm'n*, 80 F.4th 956, 992 (9th Cir. 2023) (holding that FERC regulation making it more difficult for facilities to qualify for preferential treatment under federal statute did not qualify for the categorical exclusion for procedural regulations).

[79] NOAA has proposed revisions to its categorical exclusions, but these proposed revisions do not affect exclusion G7. *See* 90 Fed. Reg. 28,717 (Jul. 1, 2025); NOAA Proposed Categorical Exclusion Revisions, Jun. 30, 2025, https://www.noaa.gov/sites/default/files/2025-06/NOAAProposedCERedline063025.pdf.

"burden[s] on the identification, development, or use of domestic energy resources,"[80] in contravention of the ESA's purpose "to halt and reverse the trend toward species extinction, whatever the cost" and Congress's intention to ensure that endangered species "be afforded the highest of priorities." *TVA v. Hill*, 437 U.S. at 174, 184.

Moreover, by its terms, the cited categorical exclusion only applies if the proposed agency action will be subject to NEPA review *at a later date.* Here, actions taken under the Proposed Rules may only be subject to NEPA review in cases where a person requires a federal permit or license, or a federal agency directly undertakes or funds an activity; the vast majority of non-federal actions would be excluded from later NEPA review. Environmental review therefore must be conducted *now*, to fully understand and evaluate the full scope of effects of the Services' proposed actions and assess potential alternative actions at the outset, rather than wait for a case-by-case NEPA review of application of the Proposed Rules which may never occur, and in any event would prevent a fair assessment of the totality the potential impacts of the Proposed Rules.

Even if the Proposed Rules otherwise qualified for a categorical exclusion (they do not), they would nonetheless present extraordinary circumstances requiring NEPA review. 43 C.F.R. § 46.215. If an action meets the standard for an extraordinary circumstance, "further analysis and environmental documents must be prepared for the action." *Id*. § 46.205(c)(1); *see also* NOAA Manual at 9. The Services define extraordinary circumstances to include actions that, among other things, may significantly impact species listed, or proposed to be listed, under the ESA, or their critical habitat; have uncertain or potentially significant environmental effects or have unique or unknown environmental risks; or potentially violate a federal law imposed for protection of the environment. *See* 43 C.F.R. § 46.215 (c), (g); NOAA Manual at 9. While only one of these factors need apply to the Proposed Rules to remove them from eligibility for a categorical exclusion, here, several of them plainly do. The Proposed Rules would have significant negative impacts on, among other things, newly listed threatened species and on all listed species' critical habitat. Additionally, the Proposed Rules violate the ESA itself in numerous ways, as detailed above. Therefore, no categorical exclusion may be applied to the Proposed Rules, and NEPA analysis is required.

NEPA includes a separate statutory exclusion for a proposed agency action that is "a nondiscretionary action with respect to which such agency does not have authority to take environmental factors into consideration in determining whether to take the proposed action." 42 U.S.C. § 4336(a)(4). That is plainly not the case here. The Services recently attempted to invoke this exclusion in a proposed rule to rescind the regulatory definition of "harm" in the definition of "take" under the ESA, arguing that this proposed rule was "compelled by the best reading of the statutory text," invoking the Supreme Court's decision in *Loper Bright*, 603 U.S. 369

[80] 90 Fed. Reg. at 52,588 (Proposed Section 4(d) Rule); 90 Fed. Reg. at 52,593 (Proposed Habitat Exclusion Rule); 90 Fed. Reg. at 52,600–01 (Proposed Interagency Cooperation Rule); 90 Fed. Reg. at 52,608 (Proposed Listing and Critical Habitat Rule).

(2024).[81] As explained in Section IV.A, *supra*, and in comments filed by fifteen of the undersigned States on the proposed harm rescission rule,[82] *Loper Bright* does not "compel" agencies to revise these or any other regulations. *See Solar Energy Indus. Ass'n v. Fed. Energy Regul. Comm'n*, 80 F.4th 956, 992 (9th Cir. 2023) ("[W]hen an agency adopts broad, transformative, and substantive changes to its regulations, it cannot sidestep NEPA's requirements by claiming that it was motivated by its desire to better conform to the statute."). The Proposed Rules are not required by any order, opinion, or court judgment, and the Services have authority here to take environmental factors into consideration. The Proposed Rules therefore are clearly discretionary agency actions subject to NEPA.

C. The Draft Environmental Assessment Prepared for the Proposed Interagency Cooperation Rule is Legally Inadequate

While the Services failed to prepare any NEPA documents for the Proposed Listing and Critical Habitat Rule, the Proposed Habitat Exclusion Rule, or the Proposed Section 4(d) Rule, the Services did prepare a cursory Draft EA for the Proposed Interagency Cooperation Rule. In the first paragraph of its executive summary, the Draft EA states that "[t]he Services prepared this EA in an abundance of caution only, as we maintain that one or more categorical exclusions apply," without specifying any particular exclusion. Draft EA at v. The Services' half-hearted approach is evident throughout the Draft EA. First, the Services failed to provide adequate notice of the Draft EA by neglecting to mention the existence of the Draft EA in their NEPA discussion of the Proposed Interagency Cooperation Rule. Second, the Services must prepare an EIS, not an EA, because the Interagency Cooperation Rule will have "reasonably foreseeable significant effect[s] on the quality of the human environment." 42 U.S.C. § 4336 (b)(1). Third, even if the Services were permitted to prepare an EA, the Draft EA fails to meet the minimum requirements for an adequate EA under NEPA.

As a preliminary matter, nowhere in the Proposed Interagency Cooperation Rule do the Services mention that they prepared any NEPA documents for that rule. Instead, like all three of the other Proposed Rules, the Proposed Interagency Cooperation Rule simply contains a brief statement inviting public comment on whether the Proposed Rule would have a significant impact on the environment or qualify for a categorical exclusion. *See* 90 Fed. Reg. at 52,605–06. However, the docket for the Proposed Rule on Regulations.gov includes a document entitled "RIN_1018-BI75_0648-BN79_20251021_Draft EA 402 regs." The Services' failure to mention the Draft EA in the Notice of Proposed Rulemaking deprives the public of a meaningful opportunity to review,

[81] *See* Rescinding the Definition of "Harm" Under the Endangered Species Act, 90 Fed. Reg. 16,102, 16,104 (Apr. 17, 2025).

[82] Comments of the Attorneys General of the Commonwealth of Massachusetts and the States of Arizona, California, Colorado, Connecticut, Illinois, Maine, Maryland, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington, filed in Docket No. FWS–HQ–ES–2025–0034-001: Rescinding the Definition of "Harm" Under the Endangered Species Act (May 19, 2025), at 27–28.

analyze, and comment on the Draft EA. This is particularly true in light of the extremely short, 30-day comment period for these four Proposed Rules, which is the public's only opportunity to comment on the Draft EA.[83]

For the reasons discussed in Section V.A, *supra*, the Services must prepare an EIS for the Proposed Interagency Cooperation Rule (as well as for the three other Proposed Rules), not an EA, because the Rule is a major federal action that will significantly affect the quality of the human environment. An EA is only appropriate if the action "does not have a reasonably foreseeable significant effect on the quality of the human environment, or if the significance of such effect is unknown." 42 U.S.C. § 4336(b)(2). As discussed in Sections IV.E and V.A, *supra*, the Proposed Interagency Cooperation Rule is likely to cause numerous and significant impacts to imperiled species and habitat, and thus meets the threshold for when an EIS is required.

Even if the Services were permitted to prepare only an EA, the Draft EA is woefully inadequate because it fails to analyze the full scope of the changes in the Proposed Interagency Cooperation Rule. The vast majority of the document is devoted to discussion of the anticipated impacts of rescinding the regulations that authorize offsetting measures as part of reasonable and prudent measures in incidental take statements. The Draft EA also mentions the readoption of 50 C.F.R. § 402.17, and summarily acknowledges that some of the provisions in section 402.17 may "reduce the scope of some ESA section 7 consultations," which "may result in increased adverse effects to threatened and endangered species and associated habitats." Draft EA at 33. However, the Draft EA does not include any analysis of the other significant regulatory changes in the Proposed Interagency Cooperation Rule—the unlawful definitions of "effects of the action," "reasonably certain to occur," and "environmental baseline." Those definitional changes are not even mentioned in the section of the Draft EA purporting to describe the effects of the Proposed Interagency Cooperation Rule on the environment.

As discussed in Sections IV.E and V.A, *supra*, those changes, if adopted, will have significant impacts on endangered and threatened species and their habitat. These impacts include, but are not limited to, a reasonably foreseeable reduction in the number of instances when federal agencies will be required to consult with the Services, as well as the number, type, and extent of effects of federal agency actions and associated reasonable and prudent measures to mitigate such effects, as well as the number, type, and extent of jeopardy and adverse modification findings and associated reasonable and prudent alternatives, that will be considered during interagency consultations. An EA is legally inadequate if it fails to "identif[y] the relevant areas of environmental concern." *Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983). The Services have not taken the requisite "hard look" at the Proposed Interagency Cooperation Rule because they have only looked at a portion of the Proposed Rule.

[83] *See* Draft EA at ix ("Public input provided during the comment period [for the Proposed Interagency Cooperation Rule] will be considered in the development of the final EA.").

For all the above reasons, the Proposed Rules violate NEPA and must be withdrawn. At the very least, the Services must suspend rulemaking and follow all NEPA requirements, including noticing and seeking public comment on the proper scope of environmental review, and preparing and circulating a draft EIS for each Proposed Rule for public comment.

VI. CONCLUSION

For all of the foregoing reasons, the undersigned States urge the Services to immediately withdraw the patently unlawful Proposed Rules as in clear violation of the ESA, NEPA, and the APA.

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