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12 UNITED STATES DISTRICT COURT  
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

14 CENTER FOR BIOLOGICAL DIVERSITY,  
15 DEFENDERS OF WILDLIFE, SIERRA CLUB,  
16 NATURAL RESOURCES DEFENSE  
17 COUNCIL, NATIONAL PARKS  
18 CONSERVATION ASSOCIATION,  
19 WILDEARTH GUARDIANS, and THE  
20 HUMANE SOCIETY OF THE UNITED  
21 STATES,

Plaintiffs,

v.

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

Defendants.

Case No. 19-cv-05206-JST

Related Case: No. 19-cv-06013-JST

FIRST AMENDED COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF

(Administrative Procedure Act, National  
Environmental Policy Act, Endangered  
Species Act)

INTRODUCTION

1  
2 1. Congress passed the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*,  
3 in 1973 to affirm our nation’s commitment to the conservation of threatened and endangered  
4 species and their habitat – the forests, grassland, prairies, rivers, and seas these species need to  
5 survive. Congress specifically gave “conservation” a sweeping definition – the use of all  
6 methods and procedures necessary to recover threatened and endangered species so that they no  
7 longer need the Act’s protections. 16 U.S.C. § 1532(3). The ESA works, in part, by placing the  
8 survival and recovery of imperiled animals, fish, and plants at the forefront of every federal  
9 action and decision.

10 2. For over 40 years, the Department of the Interior and the Department of  
11 Commerce, acting through the U.S. Fish and Wildlife Service (“FWS”) and the National Marine  
12 Fisheries Service (“NMFS”) (collectively “the Services”), have administered the ESA through  
13 duly promulgated joint regulations.

14 3. This action challenges three regulatory revision packages promulgated by FWS  
15 and NMFS, amending the regulations that implement ESA Sections 4 and 7, 16 U.S.C. §§ 1533,  
16 1536. *See* 84 Fed. Reg. 44,753 (Aug. 27, 2019) (ESA Section 4(d) regulation); 84 Fed. Reg.  
17 44,976 (Aug. 27, 2019) (ESA Section 7 regulations); 84 Fed. Reg. 45,020 (Aug. 27, 2019) (ESA  
18 Section 4 regulations).

19 4. Federal defendants issued the challenged regulatory revisions in three parts: one  
20 repealing the longstanding FWS regulation implementing ESA Section 4(d) that automatically  
21 extended certain protections to threatened animals and plants upon listing (50 C.F.R. §§ 17.31,  
22 17.71); one amending other parts of ESA Section 4 regulations jointly promulgated by FWS and  
23 NMFS that govern listing, delisting, and designation of critical habitat (generally codified under  
24 50 C.F.R. § 424); and one revising FWS and NMFS regulations governing ESA Section 7

1 consultations (generally codified under 50 C.F.R. § 402). In these regulatory revisions, the  
2 Services claim they have acted to increase clarity and encourage transparency; to the contrary,  
3 the regulatory revisions weaken and violate the requirements of the ESA.

4 5. Taken together, this package of regulatory changes undermines the fundamental  
5 purpose of the ESA “to provide a means whereby the ecosystems upon which endangered  
6 species and threatened species depend may be conserved, [and] to provide a program for the  
7 conservation of such endangered species and threatened species....” 16 U.S. C. § 1531(b). The  
8 revised regulations violate the plain language and overarching purpose of the ESA; they also lack  
9 any reasoned basis and are arbitrary and capricious under the Administrative Procedure Act  
10 (“APA”), 5 U.S.C. § 551 *et seq.*

11 6. Additionally, the Services failed to consider and disclose the significant  
12 environmental impacts from these regulations in violation of the National Environmental Policy  
13 Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.* The final regulatory revisions are major federal  
14 actions, none qualify for categorical exclusions from NEPA compliance, and each will affect the  
15 human environment by undermining the ESA’s purpose and protections.

16 7. The Services also failed to consult under ESA Section 7 on the revised ESA  
17 regulations, regulations that clearly may affect ESA-listed species and critical habitat. This type  
18 of consultation provides a vital check on the biological impacts and risks that stem from  
19 regulatory actions.

20 8. For these violations of law, plaintiffs seek an order (1) declaring the revised ESA  
21 regulations invalid, (2) vacating the revised ESA regulations, (3) enjoining reliance on the  
22 revised ESA regulations, and (4) reinstating the prior ESA regulations.

JURISDICTION AND VENUE

9. This action is brought pursuant to the APA, 5 U.S.C. §§ 701-706, and the ESA, 16 U.S.C. § 1540(g)(1). This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 16 U.S.C. § 1540(g)(1). To the extent required by the ESA, 16 U.S.C. § 1540(g), plaintiffs provided 60 days’ notice of intent to sue on August 20, 2019 to federal defendants. A copy of the notice is appended as Exhibit A.

10. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3), as a number of the plaintiffs reside in this district, plaintiffs have members and offices in California, and many of the consequences of the defendants’ violations of the law giving rise to the claims occurred or will occur in this district.

INTRADISTRICT ASSIGNMENT

11. This case is properly assigned to the San Francisco Division or the Oakland Division under Civil L.R. 3-2(c) because many of the plaintiffs and their members are located in counties within those districts.

PARTIES

12. The plaintiffs in this action are:

A. Center for Biological Diversity, a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center is incorporated in California and headquartered in Tucson, Arizona, with field offices throughout the United States and Mexico, including in Oakland, California. The Center has more than 1.6 million members and on-line activists. The Center and its members are concerned with the conservation of imperiled species, including ones that will be affected by the regulations at issue in this suit, and with the effective implementation of the ESA. The Center submitted extensive comments on the proposed ESA regulatory revisions, as well as

1 worked as part of a coalition that delivered over 800,000 public comments to the Services  
2 opposing these regulations.

3 B. Defenders of Wildlife, a nonprofit membership organization dedicated to the  
4 protection of all native animals and plants in their natural communities, including our country's  
5 most imperiled wildlife and habitat. Headquartered in Washington, D.C., Defenders has seven  
6 regional offices, with its California Regional Office located in Sacramento, California.  
7 Defenders has more than 1.8 million members and on-line activists across the nation. Defenders  
8 submitted extensive comments on the proposed ESA regulatory revisions, as well as participated  
9 in the coalition that delivered over 800,000 public comments to the Services opposing these  
10 regulations.

11 C. Sierra Club, one of the oldest environmental organizations in the United States.  
12 Sierra Club is incorporated in the State of California as a Nonprofit Public Benefit Corporation  
13 with headquarters in Oakland, California. The organization has over 779,000 members  
14 nationwide, and local chapters across the country. Sierra Club is dedicated to protecting and  
15 preserving the natural and human environment, and its purpose is to explore, enjoy, and protect  
16 the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems  
17 and resources; and to educate and enlist humanity to protect and restore the quality of the natural  
18 and human environments. Its mission includes engaging its members and the public to protect  
19 public lands, wildlife habitat, and wildlife, and it has been a longtime, active public advocate for  
20 imperiled wildlife. When FWS and NMFS proposed the challenged revisions to the ESA's  
21 regulations, the Sierra Club submitted comments not only on behalf of itself, but also as part of a  
22 coalition that delivered over 800,000 public comments to the Services opposed these regulatory  
23 changes.

1 D. Natural Resources Defense Council (“NRDC”), an international non-profit  
2 membership organization whose mission is to ensure the rights of all people to the air, the water,  
3 and the wild. To that end, NRDC works on behalf of its over 384,000 members to protect and  
4 conserve species threatened with extinction. NRDC has offices in San Francisco, CA; New  
5 York, NY; Washington, DC; Santa Monica, CA; Chicago, IL; Bozeman, MT; and Beijing,  
6 China. NRDC submitted extensive comments opposing the challenged ESA regulatory  
7 amendments and participated in the coalition that delivered over 800,000 public comments to the  
8 Services opposed to these regulations.

9 E. National Parks Conservation Association (“NPCA”), founded in 1919, as a  
10 leading voice for America’s national parks; NPCA works to protect and preserve parks for  
11 present and future generations. NPCA is headquartered in Washington, D.C., and has 27  
12 regional and field offices throughout the country, including the Pacific Regional Field Office in  
13 Oakland, California. NPCA has over 1.3 million members and supporters. There are over 600  
14 threatened and endangered species that call a national park unit home. NPCA provided detailed  
15 comments on the proposed regulatory revisions and is interested in maintaining the strong legal  
16 protections provided by the ESA for threatened and endangered species who live in park  
17 ecosystems.

18 F. WildEarth Guardians, a non-profit environmental organization dedicated to  
19 protecting and restoring the wildlife, wild places, wild rivers, and health of the American West.  
20 Guardians is incorporated in New Mexico and headquartered in Santa Fe, New Mexico with  
21 additional offices in Denver, CO, Missoula, MT, Portland, OR, and Tucson, AZ. Guardians has  
22 approximately 231,000 members and supporters nationwide. Guardians and its members are  
23 concerned about protecting threatened and endangered species from extinction and extensively  
24

1 rely upon the ESA to ensure imperiled species receive the protections they need to survive and  
2 recover. Guardians submitted comments on the proposed ESA regulatory revisions and was part  
3 of the coalition that delivered over 800,000 comments to the Service opposing these regulations.

4 G. The Humane Society of The United States, (“HSUS”), founded in 1954, the  
5 nation’s largest animal protection organization. HSUS is a non-profit organization  
6 headquartered in Washington D.C., with regional offices in California and throughout the United  
7 States. On behalf of its millions of members and constituents in Northern California and  
8 nationwide, HSUS works to promote the humane treatment of all animals and the protection and  
9 recovery of threatened and endangered species and their habitats. HSUS regularly advocates for  
10 threatened and endangered species through the ESA regulatory process, including by petitioning  
11 federal agencies to list and designate critical habitat for species and commenting on proposed  
12 regulatory actions. As part of a coalition of animal protection and conservation organizations,  
13 HSUS and its affiliates submitted comments opposing the regulatory changes challenged in this  
14 lawsuit.

15 13. Plaintiffs and their members use threatened and endangered species and their  
16 critical habitat located in California and other states nationwide for recreational, scientific, and  
17 aesthetic purposes. Plaintiffs have members who reside near, visit, or otherwise use and enjoy  
18 threatened and endangered species and their critical habitat in a variety of ways, including  
19 wildlife viewing and education and aesthetic and spiritual enjoyment. The plaintiffs and their  
20 members derive scientific, recreational, aesthetic, and conservation benefits of and enjoyment  
21 from threatened and endangered species and their critical habitat. The past, present, and future  
22 enjoyment of these benefits by plaintiffs and their members has been, is being, and will continue  
23  
24

1 to be irreparably harmed by the Services' disregard of their statutory duties and by the unlawful  
2 injuries imposed on imperiled species and their critical habitat by their actions.

3 14. In addition to harming the concrete interests of plaintiffs' members, the regulatory  
4 changes adopted by the Services also harm the operations and missions of one or more of the  
5 plaintiff organizations themselves. For example, the regulatory changes greatly frustrate and  
6 impede the Center's core mission to obtain critically important legal and practical protections for  
7 species at grave risk of extinction. As an essential part of its core mission to protect the nation's  
8 and world's dwindling biodiversity, the Center routinely submits formal petitions for the listing  
9 of imperiled species as endangered or threatened and, once such species are listed, the Center  
10 invokes the vital safeguards afforded by the Act to ensure that species obtain the on-ground-  
11 protections they need to avoid extinction and recover. The Services' far-reaching regulatory  
12 changes seriously frustrate and impede these efforts on behalf of at-risk species, including by  
13 erecting barriers to new listings and critical habitat designations, substantially delaying the  
14 listing process, and greatly weakening the statutory protections for species that are listed.

15 15. The regulatory changes adopted by the Services also necessitate a diversion of  
16 plaintiffs' resources in an effort to counteract the grave injury inflicted on their essential species-  
17 protection efforts. For example, by unlawfully requiring that economic analyses be prepared  
18 before any species may be listed, the regulations require the Center and other plaintiffs to spend  
19 resources addressing economic considerations that under the prior regulatory regime and the  
20 statute itself have no role in the Service's listing process. The insertion of economic factors into  
21 the listing process for the first time is, unavoidably, exacerbating the Services' delays in  
22 responding to listing petitions, impeding the ability of the Center and others to fulfill their core  
23 missions and requiring the expenditure of further resources as plaintiffs expend time and effort  
24



1 (on notice letters and other communications with the Services) attempting to ensure that its  
2 petitions are addressed in a timely manner.

3 16. The aesthetic, conservation, organizational, recreational, and scientific interests of  
4 these groups and their members in threatened and endangered species and their critical habitat  
5 have been, are being, and, unless the relief prayed for is granted, will continue to be directly and  
6 adversely affected by the failure of defendants to comply with the law.

7 17. The defendants in this action are:

8 A. David Bernhardt, U.S. Secretary of the Interior, in his professional capacity. Mr.  
9 Bernhardt has responsibility for implementing and fulfilling the duties of the United States  
10 Department of the Interior, including the administration of the ESA with regard to threatened and  
11 endangered terrestrial and freshwater plant and animal species. Mr. Bernhardt signed the final  
12 revised ESA regulations at issue;

13 B. U.S. Fish and Wildlife Service, an agency of the U.S. Department of the Interior,  
14 charged with administering the ESA with respect to threatened and endangered terrestrial and  
15 freshwater plant and animal species;

16 C. Wilbur Ross, U.S. Secretary of Commerce, in his professional capacity. Mr. Ross  
17 has responsibility for implementing and fulfilling the duties of the United States Department of  
18 Commerce, including the administration of the ESA with regard to threatened and endangered  
19 marine species and anadromous fish species. Mr. Ross signed the final revised ESA regulations  
20 at issue; and

21 D. National Marine Fisheries Service, an agency of the U.S. Department of  
22 Commerce, responsible for administering the ESA with regard to threatened and endangered  
23 marine species and anadromous fish species.

BACKGROUND

I. THE ENDANGERED SPECIES ACT MAKES CONSERVATION, PROTECTION, AND RECOVERY OF IMPERILED SPECIES AND THEIR HABITAT A NATIONAL PRIORITY.

18. Congress passed the ESA in 1973 in response to the extinction crisis to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species....” 16 U.S.C. § 1531(b). Congress defined “conservation” under the ESA as “the use of all methods and procedures which are necessary to bring any endangered species to the point at which the measures provided pursuant to this act are no longer necessary,” that is, when the species have recovered and no longer need the protection of the ESA. 16 U.S.C. § 1532(3).

19. In broad strokes, the ESA seeks to protect and recover imperiled species and populations by listing them as threatened or endangered based on enumerated statutory factors, 16 U.S.C. § 1533(a)(1)(A)-(E), using the “best scientific and commercial data available. 16 U.S.C. § 1533(b).

20. The term “endangered species is defined as “any species which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A threatened species is “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).

21. At the same time as a species is listed as threatened or endangered, the Services must designate and protect critical habitat for the species, subject to certain exceptions. 16 U.S.C. § 1533(a)(3), (b)(2). The ESA directs FWS and NMFS to issue additional protective regulations for threatened species if deemed necessary and advisable. 16 U.S.C. § 1533(d). The listing and designation of critical habitat provisions are contained in Section 4 of the ESA – the

1 section Congress labeled the “cornerstone of effective implementation” of the Act. S. Rep. No.  
2 97-418, at 10 (1982).

3 22. Congress expressly recognized the independent value of protecting critical habitat  
4 when it enacted the ESA:

5 Man can threaten the existence of species of plants and animals in  
6 any of a number of ways. ... The most significant of those has  
7 proven also to be the most difficult to control: the destruction of  
8 critical habitat. ...

9 There are certain areas which are critical which can and should be  
10 set aside. It is the intent of this legislation to see that our ability to  
11 do so, at least within this country, is maintained.

12 H.R. Rep. No. 412, 93d Cong., 1st Sess. 5 (1973).

13 23. In 1976, Congress reiterated the distinct importance of critical habitat and the  
14 prohibition on adverse modification:

15 It is the Committee’s view that classifying a species as endangered  
16 or threatened is only the first step in insuring its survival. Of equal  
17 or more importance is the determination of the habitat necessary  
18 for that species’ continued existence. Once a habitat is so  
19 designated, the Act requires that proposed federal actions not  
20 adversely affect the habitat. If the protection of endangered and  
21 threatened species depends in large measure on the preservation of  
22 the species’ habitat, then the ultimate effectiveness of the  
23 Endangered Species Act will depend on the designation of critical  
24 habitat.

25 H.R. Rep. No. 887, 94th Cong., 2d Sess. 3 (1976).

26 24. Under ESA Section 7, Congress charged each and every federal agency with the  
affirmative duty to further conservation of imperiled species; the ESA explicitly elevates species  
protection over the primary missions of federal agencies. 16 U.S.C. § 1536(a).

27 25. In addition to an overarching affirmative duty, the ESA requires every federal  
28 agency to obtain review and clearance for activities that may affect listed species or their habitat.  
29 If an activity authorized, funded, or carried out by a federal agency may affect a listed species or

1 its designated critical habitat, that activity cannot go forward until consultation (a biological  
2 review of the proposal by FWS or NMFS) ensures that it will not “jeopardize” the species or  
3 result in the “destruction or adverse modification” of designated critical habitat. 16 U.S.C. §  
4 1536(a)(2); 50 C.F.R. § 402.14(a).

5 26. Agency actions subject to consultation include actions taken by the Services  
6 themselves. *See* FWS and NMFS, Endangered Species Act Consultation Handbook 1-5 to 1-6,  
7 App. E (1998) (describing Intra-Service Section 7 Consultation requirements), *available at*  
8 <http://www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm>. When the Services’ own  
9 actions “may affect” a listed species or critical habitat, they must consult with the Endangered  
10 Species office of FWS or the NMFS Office of Protected Resources.

11 27. The listing of a species as endangered under the ESA triggers prohibitions under  
12 Section 9 of the Act, 16 U.S.C. § 1538, including the prohibition on the “take,” of species, which  
13 is defined to include “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect,  
14 or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(18); *see also* 50 C.F.R. § 17.3  
15 (harm “means an act which actually kills or injures wildlife. Such act may include significant  
16 habitat modification or degradation where it actually kills or injures wildlife by significantly  
17 impairing essential behavioral patterns, including breeding, feeding or sheltering.”).

18 28. The prohibitions in ESA Section 9 also extend beyond intentional take of  
19 endangered species to “incidental take,” or take that is not a direct goal of the proposed action.  
20 During Section 7 consultation, if FWS or NMFS concludes that take will not jeopardize the  
21 species, then the agency may issue a written statement that specifies the impacts of the incidental  
22 taking on the species, mitigation measures, reporting requirements, and any other terms and  
23

1 conditions with which the action agency must comply (“Incidental Take Statement”). 16 U.S.C.  
2 § 1536(b)(4)(C).

3 29. Similarly, ESA Section 10 regulates incidental take by private entities. FWS or  
4 NMFS may permit “any taking otherwise prohibited by Section 9(a)(1)(B) if such taking is  
5 incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16  
6 U.S.C. 1539(a)(1)(B). If FWS or NMFS finds that the taking will not reduce the likelihood of  
7 the survival and recovery of the species, the agency may issue an Incidental Take Permit. 16  
8 U.S.C. § 1539(a)(2)(B)(iv).

9 30. Today, the ESA protects more than 1,600 plant and animal species and millions of  
10 acres have been designated as critical habitat to allow for species’ survival and recovery. Since  
11 its enactment, the ESA has prevented the extinction of 99 percent of the species under its  
12 protections.

13 **II. OVER FORTY YEARS AGO, FWS PROMULGATED THE BLANKET 4(D) RULE**  
14 **TO ENSURE COMPLETE PROTECTION FOR ALL THREATENED SPECIES.**

15 31. Section 4(d) of the ESA requires the Services to promulgate regulations necessary  
16 and advisable to conserve species listed as threatened, including regulations prohibiting the take  
17 of threatened species. 16 U.S.C. § 1533(d).

18 32. In 1975, only two years after Congress enacted the ESA, FWS exercised its  
19 authority and responsibility under Section 4(d) to extend the prohibition on “take” in Section 9 of  
20 the ESA to all threatened species. 50 C.F.R. § 17.31(a) (2018); Reclassification of the American  
21 Alligator and Other Amendments, 40 Fed. Reg. 44,111, 44,425 (Sept. 26, 1975). This rule  
22 created the default situation that a threatened species would receive all of the “anti-take”  
23 protections provided to endangered species, unless FWS promulgated a species-specific rule that  
24 changed those protections.

1           33.     Colloquially referred to as the “Blanket 4(d) Rule,” *id.*, the D.C. Circuit upheld it  
2 against *ultra vires* and contrary to the plain language of the statute challenges. *Sweet Home*  
3 *Chapter of Cmty. for a Great Or. v. Babbitt*, 1 F.3d 1, 5-8 (D.C. Cir. 1993), *rev’d on other*  
4 *grounds*, 515 U.S. 687 (1995).

5           34.     FWS found that presumptively providing threatened species with protection,  
6 rather than reserving it solely for endangered species facing imminent extinction, allowed the  
7 agency to work towards halting the slide of threatened species to endangered status. In addition  
8 to flexibility, this approach allowed the agency to protect threatened species while working on a  
9 species-specific rulemaking. FWS noted that the presumption of complete protection, along with  
10 the ability to tailor protections if need be with a specific 4(d) rule, constituted “the cornerstone of  
11 the system for regulating threatened wildlife.” 40 Fed. Reg. at 44,414.

12           35.     On September 16, 1977, FWS clarified the Blanket 4(d) Rule and explicitly  
13 prohibited the possession of illegally taken threatened species, as well as their commercial  
14 transportation and sale in foreign or interstate commerce. Protection for Threatened Species of  
15 Wildlife, 42 Fed. Reg. 46,561-62 (September 16, 1977); *see also* 42 Fed. Reg. 46,539  
16 (September 16, 1977) (exercising emergency rulemaking authority to make the prohibition on  
17 the possession, transportation, and sale of illegally taken threatened species immediately  
18 effective). Maintaining the presumption of protection, this clarifying amendment to the Blanket  
19 4(d) Rule continued to presumptively apply the strict prohibitions applicable to endangered  
20 species to threatened species.

21           36.     Since 1975, FWS has listed over 300 species as threatened and applied the  
22 Blanket 4(d) Rule to them. Of that number, less than a quarter later received species-specific  
23 Section 4(d) rules.

1 III. FOR OVER THIRTY YEARS, THE SERVICES' JOINT REGULATIONS HAVE  
2 IMPLEMENTED ESA SECTIONS 4 AND 7.

3 37. FWS and NMFS are the federal agencies charged by Congress with implementing  
4 the ESA, and most of their ESA regulations have been in effect since 1986 or earlier. The  
5 Services adopted joint regulations implementing ESA Sections 4 and 7 approximately 30 years  
6 ago. *See* 45 Fed. Reg. 13,010 (Feb. 27, 1980) (Section 4); 48 Fed. Reg. 38,900 (Oct. 1, 1984  
7 (Section 4); 51 Fed. Reg. 19,926 (June 3, 1986) (Section 7). The ESA Regulations have not been  
8 substantially amended since that time, with only minor amendments adopted in 2015 and 2016.  
9 *See* 80 Fed. Reg. 26,832 (May 11, 2015) (Section 7); 81 Fed. Reg. 7,214 (Feb. 11, 2016)  
10 (Section 7); 81 Fed. Reg. 7,439 (Feb. 11, 2016) (Section 4).

11 IV. THE CHALLENGED REGULATIONS REVERSE PROTECTIONS FOR  
12 THREATENED AND ENDANGERED SPECIES AND THEIR CRITICAL HABITAT.

13 A. The 2018 Proposed Rules

14 38. On July 25, 2018, FWS and NMFS issued three proposed regulatory packages  
15 revising the ESA regulations. All three proposed regulatory changes sought to carry out  
16 Executive Order 13777, which directs federal agencies to eliminate allegedly “unnecessary  
17 regulatory burdens.” *Enforcing the Regulatory Reform Agenda*, 82 Fed. Reg. 12,285 (Mar. 1,  
18 2017). First, FWS proposed to repeal the Blanket 4(d) Rule by revising regulations found in 50  
19 C.F.R. §§ 17.31, 17.71. 83 Fed. Reg. 35,174-78 (July 25, 2018). While conceding that the  
20 Blanket 4(d) rule represented a reasonable interpretation of the ESA, FWS attempted to justify  
21 the proposed repeal of the Blanket 4(d) Rule by asserting that it wished to align itself with the  
22 procedures used by NMFS and that it had developed experience on species-specific 4(d) rules  
23 over the years. 83 Fed. Reg. at 35,175.

24 39. The second package of proposed regulatory revisions focused on the rules  
25 promulgated by FWS and NMFS implementing the listing, delisting, and designation of critical

1 habitat provisions of ESA Section 4, specifically 50 C.F.R. § 424.11 (Factors for Listing,  
2 Delisting, or Reclassifying Species) and 50 C.F.R. § 424.12 (Criteria for Designating Critical  
3 Habitat). 83 Fed. Reg. 35,193-201 (July 25, 2018).

4 40. The third set of proposed regulatory changes involved the FWS and NMFS  
5 regulations implementing ESA Section 7. 83 Fed. Reg. 35,178-93 (July 25, 2018). These  
6 revisions proposed changes to the regulatory definitions (50 C.F.R. § 402.02), regulations on  
7 formal consultation (50 C.F.R. § 402.14), regulations on reinitiation of formal consultation (50  
8 C.F.R. § 402.16), and those for other provisions (50 C.F.R. § 402.17).

9 41. In both packages proposing changes to the rules implementing ESA Sections 4  
10 and 7, FWS and NMFS also asked for input on broad, unfocused swaths of the regulations,  
11 seeking comments on “any provisions in part 424 of the regulations, including but not limited to  
12 revising or adopted as regulations existing practices or policies, or interpreting terms or phrases  
13 from the Act.” 83 Fed. Reg. at 35,194. “[T]he final rule may include revisions to any provisions  
14 in part 424 that are a logical outgrowth of this proposed rule.” *Id.*; *see also* 83 Fed. Reg. at  
15 35,179 (same for revisions in part 402).

16 42. The federal agencies indicated that they were not likely to undertake an  
17 environmental assessment or environmental impact statement under NEPA when promulgating  
18 the proposed revisions. The agencies asserted that the rules would likely fall under a  
19 “categorical exclusion” exempting them from NEPA review. 83 Fed. Reg. at 35,176, 35,191,  
20 35,200. Specifically, FWS and NMFS stated that the proposed rules were likely categorically  
21 exempt as “policy, directive, regulation, or guideline that is administrative, legal, technical, or  
22 procedural in nature” that “would not individually or cumulatively have a significant effect on  
23 the human environment.” *Id.*



1 43. FWS and NMFS accepted comments on all three packages of proposed ESA  
2 revised regulations through September 24, 2018. The proposed revisions sparked great concern  
3 and controversy, with over 800,000 comments being submitted to the agencies opposed to the  
4 proposed revisions.

5 B. The Final 2019 FWS Repeal of the Blanket 4(d) Rule

6 44. On August 12, 2019, FWS issued final rules amending 50 C.F.R. §§ 17.31 and  
7 17.71 to eliminate the Blanket 4(d) Rule that prohibits take of threatened animals and plants.  
8 Final Rule, Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 84  
9 Fed. Reg. 44,753 (Aug. 27, 2019).

10 45. FWS's new rule removes the presumption that threatened species will receive  
11 protection from take, which has far-reaching impacts. Any species listed or reclassified as  
12 threatened in the future "would have protective regulations only if the Service promulgates a  
13 species-specific rule," 84 Fed. Reg. at 44,753, and yet the new rule imposes no obligation on  
14 FWS to adopt any such species-specific rules.

15 46. FWS gave scant reasons for eliminating the Blanket 4(d) Rule. First, FWS noted  
16 that the Department of Commerce (acting through NMFS) did not have a similar rule for species  
17 under its jurisdiction. 84 Fed. Reg. at 44,754. Second, FWS alleged that it had acquired  
18 "considerable experience in developing species-specific rules over the years." *Id.* The agency  
19 went on to allege that such species-specific 4(d) rules provide benefits such as "removing  
20 redundant permitting requirements, facilitating implementation of beneficial conservation  
21 actions, and making better use of [the agency's] limited personnel and fiscal resources by  
22 focusing prohibitions on the stressors contributing to the threatened status of the species." *Id.*

23 47. FWS claimed that reversal of the Blanket 4(d) Rule will allow FWS to "tailor  
24 protections to the needs of the threatened species." 84 Fed. Reg. at 44,757. In support of the

1 revision, FWS noted two species-specific 4(d) rules which were adopted while the Blanket 4(d)  
2 Rule was still in effect, citing the coastal California gnatcatcher's and Kentucky arrow darter's  
3 species-specific 4(d) rules as examples of when species-specific 4(d) rules allowed FWS to  
4 "capitalize" on specific regulations to meet the "conservation needs of the species." 84 Fed.  
5 Reg. at 44,754.

6 48. Commenters on the rule, including plaintiffs, noted that FWS has issued species-  
7 specific 4(d) rules for only a fraction of the species listed in the last ten years; NMFS manages  
8 far fewer species than FWS and has still failed to provide species-specific 4(d) rules for all its  
9 threatened species; and the Blanket 4(d) Rule in no way prohibited FWS from issuing species-  
10 specific 4(d) rules, as its own examples highlighted.

11 49. In response to comments critical of FWS's intent to eliminate the Blanket 4(d)  
12 Rule, FWS "restate[d] our intention to finalize species-specific 4(d) rules concurrently with final  
13 listing or reclassification determinations. 84 Fed. Reg. at 44,755. However, FWS refused to  
14 create a binding regulatory requirement to ensure concurrent promulgation of listing and species-  
15 specific 4(d) decisions. FWS also asserted its interpretation that the statute itself does not require  
16 species-specific 4(d) rules to be promulgated at the time of listing. 84 Fed. Reg. at 44, 753  
17 ("[W]e have discretion to revise or promulgate species-specific rules at any time after the final  
18 listing or reclassification determination.").

19 50. FWS's elimination of the Blanket 4(d) Rule became effective on September 26,  
20 2019. 84 Fed. Reg. at 44,753.

21 C. The Final Section 4 Listing and Critical Habitat Regulatory Revisions

22 51. On August 12, 2019, FWS and NMFS issued final changes to the joint regulations  
23 that implement ESA Section 4 listing and critical habitat requirements. Final Rule, Revision of  
24

1 the Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020 (Aug.  
2 27, 2019). Major changes and revisions are described below.

3 *1. Adding economic considerations to listing decisions*

4 52. The ESA requires that listing decisions to protect endangered and threatened  
5 species be made “solely on the basis of the best scientific and commercial data available.” 16  
6 U.S.C. § 1533(b)(1)(A). Congress added the word “solely” in the 1982 amendments to the Act  
7 to underscore that non-biological considerations should play no role in listing decisions. Pub. L.  
8 No. 97-304, 96 Stat. 1411; *see also* H.R. Rep. No. 97-567, at 19 (1982) (noting that the term  
9 “solely” was added to emphasize that listing determinations were to be made “solely upon  
10 biological criteria and to prevent non-biological considerations from affecting such decisions”).

11 53. The Services’ final regulation deletes from 50 C.F.R. § 424.11(b), the Services’  
12 regulation establishing listing factors, the phrase “without reference to possible economic or  
13 other impacts.” 84 Fed. Reg. at 45,024. In adopting this change, the Services made clear that, in  
14 the course of making listing decisions they intend to “compil[e] economic information” and  
15 “present[] that information to the public” irrespective of Congress’s intent that listing decisions  
16 be made based solely on non-economic considerations. *Id.*

17 *2. Revising the definition of foreseeable future*

18 54. The Services finalized a new definition of the term “foreseeable future,” which  
19 increased the level of certainty required to protect species, contravening Congress’s intent to  
20 “give the benefit of the doubt to the species.” H.R. Rep. No. 96-697, at 12 (1979) (Conf. Rep.),  
21 reprinted in 1979 U.S.C.C.A.N. 2572, 2576. Listing decisions must be made “solely on the basis  
22 of the best scientific and commercial data available,” and injecting notions of “likelihood” into  
23 those decisions is contrary to the ESA. While the Services purported to follow the guidance set  
24

1 forth in a 2009 opinion from the Department of the Interior’s Solicitor (M-37021, Jan. 16, 2009),  
2 the revised definition deviates significantly from current practice and the 2009 opinion.

3 55. The 2009 Opinion’s definition of “the foreseeable future” was animated by a  
4 desire to avoid “reliance on assumption, speculation, or preconception.” 2009 Opinion at 8. To  
5 ensure imperiled species receive the benefit of the doubt in listing decisions, as Congress  
6 intended, the 2009 Opinion requires only that predictions be reliable, rejecting a definition that  
7 would limit “the foreseeable future” to only “predictions that can be made with certainty.” *Id.* at  
8 9.

9 56. The final changes to Section 424.11 do not adopt the 2009 Opinion’s definition,  
10 instead adding the requirements that “both the future threats and the species’ responses to those  
11 threats are likely.” 84 Fed. Reg. 45,052. Demanding that both threats and responses to threats  
12 be “likely” — which the Services clarified means “more likely than not” — goes beyond  
13 ensuring against decisions based on assumption, speculation, or preconception. The  
14 consequence of imposing this increased certainty requirement is that species facing extinction  
15 from the impacts of climate change or other future events involving prediction and uncertainty  
16 will improperly be deprived of protection until after it is too late to prevent their extinction,  
17 violating the ESA’s command to use the best available science.

18 3. *Undermining recovery criteria*

19 57. For nearly four decades, the ESA’s listing regulations restricted the delisting of a  
20 species to only situations where the best scientific and commercial data available “substantiate”  
21 that the species is no longer threatened nor endangered. 45 Fed. Reg. 13,010, 13,023 (Feb. 27,  
22 1980) (promulgating original version of 50 C.F.R. § 424.11(d)). The previous regulations  
23 specified that the Services either must know the locations and fate of all individuals of the  
24 species or must allow “a sufficient period of time” before delisting to “indicate clearly” the

1 species is actually extinct. 50 C.F.R. § 424.11(d)(1). The Services insisted on this high bar to  
2 ensure that any decision to delist due to extinction is based on “conclusive evidence appropriate  
3 for the species in question.” 49 Fed. Reg. 38,900, 38,903 (Oct. 1, 1984); *see* also FWS,  
4 Proposed Rule, Endangered Status for Franklin’s Bumble Bee, 84 Fed. Reg. 40,006, 40,008  
5 (Aug. 13, 2019) (“Recent approaches to evaluating extinction likelihood place increased  
6 emphasis on the extensiveness and adequacy of survey effort, and caution against declaring a  
7 species as extinct in the face of uncertainty.”) (citation omitted).

8 58. The Services’ revisions drop the requirement that data “substantiate” any delisting  
9 decision. 84 Fed. Reg. at 45,036. The revisions also permit the Services, in making delisting  
10 decisions, to disregard formal recovery and/or delisting criteria established in species recovery  
11 plans for the very purpose of gauging species’ progress towards recovery. 84 Fed. Reg. at  
12 45,052.

13 4. *Expanding critical habitat exemptions*

14 59. The ESA allows the Services to forego designating critical habitat for a species if  
15 such designation is “not prudent” because it could result in actual harm to the species. The final  
16 regulations expand the circumstances under which the Services may find designation “not  
17 prudent” to include situations where: the threatened destruction, modification, or curtailment of  
18 a species’ habitat or range is not a threat to the species; threats to habitat “stem solely from  
19 causes that cannot be addressed through management actions resulting from” Section 7  
20 consultations; or, areas within the jurisdiction of the United States provide no more than a  
21 “negligible” conservation value for a species occurring primarily outside the jurisdiction of the  
22 United States. 84 Fed. Reg. at 45,053.

23 60. The ESA defines unoccupied critical habitat to include “specific areas outside the  
24 geographical area occupied by the species at the time it is listed” that “are essential for the

1 conservation of the species.” 16 U.S.C. § 1532(5)(A)(ii). Instead of focusing on whether  
2 unoccupied areas are essential for conservation based on the best available scientific data, the  
3 final regulations limit the designation of unoccupied critical habitat only to those situations  
4 where it can be determined with “reasonable certainty” both that the area will contribute to the  
5 conservation of the species and that the area contains at least one “physical or biological feature”  
6 essential to the conservation of the species. 84 Fed. Reg. at 45,053. The final rule imposes an  
7 elevated certainty requirement on the determination of what areas are “essential,” rather than  
8 requiring decisions to be made based on the best available science.

9 61. The final regulation also impermissibly and unreasonably limits the designation of  
10 unoccupied areas as critical habitat to situations where the designation of only occupied areas  
11 would be inadequate to ensure the conservation of the species. 84 Fed. Reg. at 45,053. The  
12 Service itself previously identified such a limitation as “unnecessary and unintentionally  
13 limiting.” FWS/NMFS, Proposed Regulatory Amendments re Critical Habitat, 79 Fed. Reg.  
14 27,073 (May 12, 2014).

15 62. The final regulation also revises the definition of “physical and biological  
16 features” at 50 C.F.R. § 424.02 to define such features as “essential” only when they “occur in  
17 specific areas.” 84 Fed. Reg. at 45,052. This introduces a new limitation, not based in the  
18 statute, that restricts the designation of critical habitat. This change affects the designation of  
19 occupied critical habitat and, under the final rules, unoccupied critical habitat as well.

20 63. The Services’ revisions to ESA Section 4 regulations became effective September  
21 26, 2019. 84 Fed. Reg. at 45,020.

22 D. The Final Section 7 Consultation Regulatory Changes

23 64. To ensure that any action by a Federal agency authorized, funded, or carried out  
24 by such agency is not likely to jeopardize the continued existence of any endangered or

1 threatened species, ESA Section 7 requires FWS and NMFS as the consulting agencies to: (1)  
2 use the best available science; (2) conduct an independent scientific review as a check on  
3 agencies that might seek to take actions at the expense of protecting threatened and endangered  
4 species; and (3) if jeopardy or destruction/adverse modification of critical habitat is found,  
5 develop alternatives and mitigation that the action agencies must take to protect species and their  
6 habitat.

7 65. The ESA makes the best science currently available the determinant of whether an  
8 action must undergo consultation or is likely to cause jeopardy or degrade critical habitat, and the  
9 ESA requires that uncertainty be resolved in favor of protection.

10 66. ESA regulations distinguish between two types of consultation: formal and  
11 informal. During both types of consultations, the action agencies and the Services have a  
12 statutory duty to use the best available scientific information. 16 U.S.C. § 1536(a)(2); 50 C.F.R.  
13 402.14(g)(8).

14 67. Formal consultations culminate with the Services' issuance of a biological  
15 opinion, in which the Services determine whether an action is likely to either jeopardize the  
16 survival and recovery of a listed species or destroy or adversely modify a species' designated  
17 critical habitat. 16 U.S.C. § 1536(b); 50 C.F.R. 402.02 (definition of "formal consultation"). In  
18 order to make this determination, the Service must review all relevant information and provide a  
19 detailed evaluation of the action's effects, including the cumulative effects of other activities in  
20 the area, on the listed species and critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §  
21 402.14(g)-(h).

1           68.     As part of the formal consultation process, the Services must also formulate  
2 discretionary conservation recommendations to reduce or minimize the action’s impacts on listed  
3 species or critical habitat. 50 C.F.R. § 402.14(g)(6).

4           69.     If the Services determine that the action is likely to jeopardize the species or  
5 adversely modify its critical habitat, the biological opinion must specify reasonable and prudent  
6 alternatives that will avoid such jeopardy or adverse modification. 16 U.S.C. § 1536(b); 50  
7 C.F.R. § 402.14(h)(3). If the jeopardy or adverse modification cannot be avoided, however, the  
8 agency action may not proceed.

9           70.     Informal consultations are those consultations in which the action agency  
10 determines that an action “may affect,” but is “not likely to adversely affect” (“NLAA”) the  
11 listed species or its critical habitat and the pertinent Service concurs in writing in that  
12 determination.

13           71.     Informal consultation is often a give-and-take process through which the Services  
14 can obtain sufficient information about, or modifications to, the action to concur in the action  
15 agency’s NLAA determination. During informal consultation, the Services may, and often do,  
16 suggest modification to the action that will avoid the “the likelihood of adverse effects to listed  
17 species or critical habitat.” 50 C.F.R. § 402.13(b).

18           72.     The informal consultation process does not conclude until the pertinent Service  
19 issues its written concurrence, and only then may the consultation be resolved without  
20 preparation of a biological opinion. If the Service does not concur, or if the action agency has  
21 determined that the action is “likely to adversely affect” the listed species, the agencies must  
22 conduct a formal consultation. *Id.* §§ 402.02, 402.14(a).



1           73.     On August 12, 2019, FWS and NMFS issued final changes to the regulations that  
2 implement ESA Section 7. Final Rule, Endangered and Threatened Wildlife and Plants;  
3 Revision of Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019).  
4 Major changes and revisions are described below.

5                   1.     *Unchecked reliance on mitigation promises*

6           74.     Section 7(a)(2) of the ESA expressly requires the Services to “insure” that agency  
7 actions are not likely to cause jeopardy or result in the destruction or adverse modification of  
8 critical habitat. 16 U.S.C. § 1536(a)(2). During formal consultation, the Services have an  
9 obligation under their own regulations to “use the best available scientific and commercial data  
10 available and give appropriate consideration to beneficial actions taken by the Federal agency” in  
11 formulating its biological opinion of the impacts of an agency action, any reasonable and prudent  
12 alternatives, and reasonable and prudent measures to minimize the impacts of incidental take  
13 (mitigation measures). 50 C.F.R. § 402.14(g)(8), 402.02. Courts have held for almost thirty  
14 years that the Services cannot rely on an agency’s proposal to undertake mitigation measures that  
15 are uncertain to occur or succeed to reach a “no-jeopardy” conclusion. The Ninth Circuit has  
16 held that a no-jeopardy conclusion based on mitigation measures must include “specific and  
17 binding plans” with a “clear definite commitment of resources for future improvements.” *Nat’l*  
18 *Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 935-36 (9th Cir. 2008).

19           75.     The Services finalized a new provision that amends 50 C.F.R. § 402.14(g)(8) to  
20 mean that for purposes of rendering a no-jeopardy opinion or finding that the proposed action  
21 does not destroy or adversely modify critical habitat, the consulting agency may rely on the  
22 action agency’s assertion that it will mitigate any incidental take without requiring any additional  
23 demonstration of specific binding plans. 84 Fed. Reg. at 45,017. The Services justify their  
24 proposal by asserting that “judicial decisions have created confusion” about the level of certainty

1 required for mitigation measures. 84 Fed. Reg. at 45,002. But the decisions the Services cite  
2 (and many more) have, consistent with Congress’s intent, been uniform in holding that  
3 mitigation measures cannot be relied on to avoid a jeopardy determination unless those measures  
4 are sufficiently concrete, specific, and certain to occur.

5           2.       *Definition of destruction or adverse modification of critical habitat*

6           76.       The Services’ new definition of “destruction or adverse modification” of critical  
7 habitat requires the scale of the impacts to be relative to the value of critical habitat “as a whole.”  
8 84 Fed. Reg. at 45,016. Yet the purpose of establishing critical habitat is for the government to  
9 delineate territory that is not only necessary for the species’ survival but also essential for the  
10 species’ recovery. The critical habitat designation already represents the area essential to the  
11 survival and recovery of species, adding “as a whole” conflicts with the ESA’s plain language  
12 and focus on recovery.

13           77.       The “as a whole” language means that the prohibition on “destruction or adverse  
14 modification” of critical habitat will not be triggered unless the critical habitat would be reduced  
15 below the minimum deemed necessary for survival or recovery of the species, which amounts to  
16 jeopardizing the species. This impermissibly prevents the prohibition on “destruction or adverse  
17 modification” from having independent effect from the prohibition on jeopardizing the species.

18           78.       This is a special concern for highly migratory or wide-ranging species that, by  
19 definition, require large amounts of designated critical habitat. The “as a whole” language also  
20 disregards circumstances where the Service has designated critical habitat necessary for certain  
21 functions, such as dispersal habitat or nesting/roosting/foraging habitat for threatened northern  
22 spotted owls in the Pacific Northwest. While the proposed rule included a recognition that some  
23 areas of critical habitat may be disproportionately biologically important or relevant to the  
24

1 species, the final language does not capture those nuances or require an analysis that would  
2 ensure the Services' conclusions are based on such biologically determinative distinctions.

3           3.       *Reinitiation of consultation on land management plans*

4           79.       The Services' final regulations exempt programmatic land management plans  
5 from the requirement to reinitiate consultation upon listing of the new species or designation of  
6 new or additional critical habitat, with several exemptions. 84 Fed. Reg. at 45,017-18

7           80.       Later consultations on site-specific actions cannot fill the void. Consultation on  
8 programmatic actions provides a full picture of all relevant impacts in order to determine  
9 whether the combination of activities in the plan will avoid jeopardy and adverse modification of  
10 critical habitat. These determinations are appropriately made at the programmatic level, where  
11 the agency is best able to consider the aggregate impacts of all the proposed activities, together  
12 with other activities taking place in the same area. Deferring this analysis to project-specific  
13 consultations risks masking or missing these collective impacts.

14           4.       *Definition of environmental baseline*

15           81.       The Services finalized a new definition of the "environmental baseline" that  
16 creates a distinction between entirely new and ongoing agency actions. 84 Fed. Reg. at 45,016  
17 ("The consequences to listed species or designated critical habitat from ongoing agency actions  
18 or existing agency facilities that are not within the agency's discretion to modify are part of the  
19 environmental baseline.").

20           82.       Segregating from a proposed action those aspects and effects that are ongoing is  
21 inconsistent with the definition of "action" as anything a Federal agency authorizes, funds, or  
22 carries out. 50 C.F.R. § 402.02. For example, where the past and present effects of an on-going  
23 federal action hasten or continue a species' decline to extinction, carrying that action forward  
24 necessarily means carrying forward those harmful effects. In other words, a decision to continue

1 an ongoing action (even if modified to be slightly less harmful than it was previously) is as much  
2 a decision to carry forward the harmful effects as it is a decision to continue the action in a  
3 slightly less detrimental fashion.

4 83. Consultation on a proposed modification and continuation of an ongoing action  
5 must ensure that the entire ongoing action does not appreciably reduce the likelihood of survival  
6 and recovery and/or destroy or adversely modify critical habitat. The final definition invites that  
7 improper comparison between the past and present impacts of an ongoing federal action and the  
8 effects of the action.

9 5. *New definitions for activities reasonably certain to occur and*  
10 *consequences of proposed action*

11 84. The Services added a new section, § 402.17 Other Provisions, that defines  
12 “activities that are reasonably certain to occur” in subsection (a) and “consequences caused by  
13 the proposed action” in subsection (b). 84 Fed. Reg. at 45,018.

14 85. Subsection (b) states that “[t]o be considered an effect of a proposed action, a  
15 consequence must be caused by the proposed action (i.e., the consequence would not occur but  
16 for the proposed action and is reasonably certain to occur).” *Id.* Including a requirement that the  
17 consequence be “reasonably certain to occur” creates a new standard for showing a consequence  
18 is caused by the proposed action. The ESA requires that any doubt should be read in favor of  
19 protecting the species and that the proposed action bear the burden of risk and uncertainty.

20 86. Subsection (b) also lists three mandatory considerations for determining that a  
21 consequence is not caused by the proposed action, and is therefore not an effect of the action,  
22 including that the consequence is “remote in time,” “geographically remote,” and “reached  
23 through a lengthy causal chain” such that they are not “reasonably certain to occur.” *Id.*  
24 Temporal or geographic remoteness do not necessarily bear on whether an impact is reasonably

1 certain to occur. These criteria would allow the agency to avoid consideration of a particular  
2 effect in, among other things, a biological assessment, determination of the lead and cooperating  
3 agencies, and reinitiation of formal consultation. This requirement would require the agency to  
4 ignore during Section 7(a)(2) consultation the consequences of a proposed action simply because  
5 those consequences do not meet the arbitrary and vague new causation standard.

6 87. The Services' definition of consequences caused by the proposed action also  
7 includes a newly minted "but for" causation test – requiring that a consequence will not be  
8 considered unless it would not occur unless exclusively caused by the proposed activity. This  
9 new definition would allow the Services to speculate that certain impacts — for example, the  
10 growth inducing effects of a new highway — would occur regardless of the proposed activity  
11 and on that basis avoid consideration of those impacts in the ESA Section 7(a)(2) consultation  
12 process.

13 88. Section 7(a)(2) requires Federal agencies to consult with the Services to insure  
14 that *any action* authorized, funded, or carried out by such agency is not likely to jeopardize  
15 species or adversely modify critical habitat. Artificially limiting and attempting to draw bright  
16 lines around some elements of a proposed action to cabin—or exclude consequences entirely  
17 from—the consultation process would result in far greater risk to species listed as endangered  
18 and threatened and violates the best available science requirement of the ESA.

19 89. The Services' revisions to the ESA Section 7 regulations originally had an  
20 effective date of September 26, 2019, but the Services delayed the effective date until October  
21 28, 2019 to provide additional time "to adequately educate and train staff of the Services and all  
22 of the affected Federal agencies." 84 Fed. Reg. 50,333 (Sept. 25, 2019).

1 E. The Services Failed To Comply with NEPA and ESA Consultation Requirements.

2 90. The Services did not analyze the impacts of the revised regulations under NEPA.  
3 For the elimination of the Blanket 4(d) Rule, FWS invoked two categorical exclusions under 43  
4 C.F.R. § 46.210(i) — that the revisions were of a legal, technical, or procedural nature and that  
5 any potential impacts were too broad, speculative, and conjectural for meaningful analysis. The  
6 Service also found that no extraordinary circumstances were present. 84 Fed. Reg. at 44,759.

7 91. For the revisions to the ESA Section 4 regulations, the Services concluded that the  
8 regulations were categorically excluded from NEPA review and that no extraordinary  
9 circumstances were present. 84 Fed. Reg. at 45,051-52.

10 92. For the revision to the ESA Section 7 regulations governing consultation, the  
11 Services also concluded that the regulations were categorically excluded from NEPA review and  
12 that no extraordinary circumstances were present. 84 Fed. Reg. at 45,015.

13 93. Nor did the Services consult on the effects of any of the revised regulations under  
14 ESA Section 7 or use the best scientific and technical information available in developing and  
15 promulgating the revised regulations.

16 CLAIMS FOR RELIEF

17 FIRST CLAIM FOR RELIEF

18 Violation of the National Environmental Policy Act  
19 and the Administrative Procedure Act:

20 Failure to Prepare an Adequate Environmental Impact Statement

21 94. NEPA is our “basic national charter for protection of the environment.” 40  
22 C.F.R. § 1500.1. Among other things, NEPA requires all agencies of the federal government to  
23 prepare a “detailed statement” that discusses the environmental effects of, and reasonable  
24 alternatives to, all “major Federal actions significantly affecting the quality of the human  
25 environment.” 42 U.S.C. § 4332(2)(C). This statement is commonly known as an

1 Environmental Impact Statement (“EIS”). A “major federal action” upon which an EIS may be  
2 required includes “new or revised agency rules [and] regulations.” 40 C.F.R. § 1508.18(a). The  
3 environmental effects that must be considered in an EIS include “indirect effects, which are  
4 caused by the action and are later in time or farther removed in distance, but are still reasonably  
5 foreseeable,” as well as direct effects. 40 C.F.R. § 1508.8. An EIS must also consider the  
6 cumulative impacts of the proposed action, that is, the environmental impacts that result “from  
7 the incremental impact of the action when added to other past, present, and reasonably  
8 foreseeable future actions.” 40 C.F.R. § 1508.7; *see also* § 1508.27(b)(7). The purpose of an  
9 EIS is to inform the decision-makers and the public of the significant environmental impacts of  
10 the proposed action, means to mitigate those impacts, and reasonable alternatives that will have  
11 lesser environmental effects.

12 95. NEPA requires federal agencies, including FWS and NMFS, to “study, develop,  
13 and describe appropriate alternatives to recommended courses of action in any proposal which  
14 involves unresolved conflicts concerning alternative uses of available resources.” 40 U.S.C. §  
15 4332(E). This requires an agency to “[r]igorously explore and objectively evaluate all  
16 reasonable alternatives,” 40 C.F.R. § 1502.14(a), as well as describe the “underlying purpose and  
17 need to which the Agency is responding in proposing the alternatives, including the proposed  
18 action.” 40 C.F.R. § 1502.13. The consideration of alternatives is described as the “heart” of the  
19 NEPA analysis. 40 C.F.R. § 1502.14.

20 96. NEPA also requires that defendants use high quality, accurate scientific  
21 information and ensure the scientific integrity of the analysis in an EIS. *See* 40 C.F.R.  
22 § 1500.1(b); 40 C.F.R. § 1502.24.

1 97. The regulations promulgated by the federal agency responsible for overseeing  
2 implementation of NEPA, the Council on Environmental Quality (“CEQ”), authorize agencies to  
3 specify categories of actions “[w]hich normally do not require either an environmental impact  
4 statement or an environmental assessment (categorical exclusions (§ 1508.4)).” 40 C.F.R. §  
5 1507.3(b)(2)(ii). The CEQ regulations define “categorical exclusion” as “a category of actions  
6 which do not individually or cumulatively have a significant effect on the human environment,”  
7 and they require that all federal agencies establish those categories by rule. 40 C.F.R. § 1508.4.  
8 The CEQ regulations also require that agency regulations establishing categorical exclusions  
9 “shall provide for extraordinary circumstances in which a normally excluded action may have a  
10 significant environmental effect.” *Id.*

11 98. FWS has defined a categorical exclusion as “[p]olicies, directives, regulations,  
12 and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or  
13 whose environmental effects are too broad, speculative, or conjectural to lend themselves to  
14 meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-  
15 case.” 43 C.F.R. § 46.210(i).

16 99. NMFS similarly defined categorical exclusions in NOAA Administrative Order  
17 216-6A and Companion Manual, Policy and Procedures for Compliance with the National  
18 Environmental Policy Act and Related Authorities (Jan. 13, 2017), Appendix E.

19 100. FWS and NMFS have stated that the regulatory revisions were categorically  
20 excluded from NEPA because the revisions’ environmental impacts are “fundamentally  
21 administrative, legal, technical, or procedural in nature,” and “too broad, speculative, or  
22 conjectural to lend themselves to meaningful analysis.” To the contrary, the ESA revisions  
23 remove substantive protections from threatened and endangered species, revise the conditions for  
24



1 listing, delisting, and designating critical habitat, and change substantive measures in ESA  
2 biological consultations. The revisions are likely to have significant adverse environmental  
3 effects and are likely to harm threatened and endangered species and their designated critical  
4 habitat.

5 101. Even if the revisions could be covered by a categorical exclusion, extraordinary  
6 circumstances require the preparation of an EIS or EA. The revisions have highly controversial  
7 environmental effects, involve unresolved conflicts concerning alternative uses of available  
8 resources, have highly uncertain and potentially significant environmental effects, involve  
9 unique or unknown environmental risks, establish a precedent for future action and represent a  
10 decision in principle about future actions with potentially significant environmental effects, and  
11 have significant impacts on listed species, species proposed to be listed, and designated critical  
12 habitat under the ESA. 43 C.F.R. § 46.215.

13 102. FWS and NMFS are subject to NEPA, and the final decisions revising the ESA  
14 regulations are major federal actions significantly affecting the human environment within the  
15 meaning of 42 U.S.C. § 4332(2)(C) for at least the following reasons:

16 a. The revised regulations “may adversely affect an endangered or threatened  
17 species or its [critical] habitat.” 40 C.F.R. § 1508.27(b)(9).

18 b. The effects of the revised ESA regulations will fall on areas with unique  
19 geographic characteristics, including recreation areas, designated wilderness, wild and scenic  
20 rivers, and ecologically critical areas within the meaning of 40 C.F.R. § 1508.27(b)(3).

21 c. The effects of the revised ESA regulations on the quality of the human  
22 environment are likely to be “highly controversial” within the meaning of 40 C.F.R. §  
23 1508.27(b)(4).

1 d. The possible effects on the human environment involve “unique [and] unknown  
2 risks” within the meaning of 40 C.F.R. § 1508.27(b)(5).

3 e. The revisions “may establish a precedent for future actions with significant  
4 effects” within the meaning of 40 C.F.R. § 1508.27(b)(6).

5 f. The revisions threaten a violation of federal law imposed for the protection of the  
6 environment, namely the ESA, within the meaning of 40 C.F.R. § 1508.27(b)(10).

7 103. FWS’s and NMFS’s promulgation of the 2019 Revised ESA Regulations under a  
8 categorical exclusion to NEPA; their promulgation of the ESA regulations without preparing an  
9 EIS that (a) examines an adequate range of alternatives, (b) has a statement of purpose and need  
10 that corresponds to the agencies’ proposed action, (c) identifies the correct no action alternative  
11 baseline for comparing and assessing direct, indirect, and cumulative environmental effects, and  
12 (d) uses high quality scientific information; and their promulgation of ESA revised regulations  
13 without preparing an EIS that examines the overarching direct, indirect, and cumulative  
14 environmental effects is arbitrary, capricious, an abuse of discretion, and otherwise not in  
15 accordance with law, in violation of NEPA, the CEQ regulations, the FWS and NMFS guidelines  
16 implementing NEPA, and the APA, 5 U.S.C. § 706(2)(A).

17 SECOND CLAIM FOR RELIEF

18 Violation of Administrative Procedure Act:  
19 Failure to Provide Adequate Notice and Comment

20 104. Fundamental to the APA’s procedural framework is the requirement that, absent  
21 narrow circumstances, a federal agency must publish as a proposal any rule that it is considering  
22 adopting and allow the public the opportunity to submit written comments on the proposal. 5  
23 U.S.C. § 553. The proposal must be detailed and described with reasonable specificity to allow a  
24 meaningful opportunity to comment.

1           105. In the packages of changes to regulations implementing ESA Sections 4 and 7,  
2 FWS and NMFS made it clear that they viewed these rulemakings as applying to “all of part  
3 402” and “all of part 424” and asserted that the “final rule[s] may include revisions to any  
4 provisions in [Parts 402 and 424] that are a logical outgrowth of this proposed rule....” 83 Fed.  
5 Reg. at 35,179; *id.* at 35,194.

6           106. On August 12, 2019, FWS and NMFS issued the final regulatory revisions for  
7 ESA Section 7, including changes that were not detailed or disclosed in the proposed rules.  
8 These include new language amending 50 C.F.R. § 402.17, purporting to define what “activities  
9 are reasonably certain to occur,” limiting the “consequences caused by the proposed action,” and  
10 redefining the “environmental baseline.” In changes to 50 C.F.R. § 424.12, the Services also  
11 finalized new regulatory language restricting the designation of unoccupied critical habitat by  
12 introducing a new requirement for the presence of “physical or biological features” that was not  
13 part of the proposed regulation, was not discussed in any way in the proposed regulation, and  
14 represents a departure from the Service’s past interpretation. In the same section, the Services  
15 finalized new regulatory language imposing a heightened certainty requirement with regard to  
16 the designation of unoccupied critical habitat that was not part of or intimated by the proposed  
17 rule.

18           107. The Services’ general requests for comments on topics or potential additional  
19 changes, disconnected from any specific proposals, did not provide fair notice of how the agency  
20 actually planned to amend those provisions, nor are the added revisions a logical outgrowth of  
21 the proposed rules.

22           108. FWS’s and NMFS’s promulgation of the 2019 Revised ESA Regulations without  
23 adequate notice and comment as required under 5 U.S.C. § 553, is arbitrary, capricious, an abuse  
24

1 of discretion, not in accordance with law, and without observance of procedure required by law  
2 with the meaning of the APA, 5 U.S.C. § 706(2).

3 THIRD CLAIM FOR RELIEF

4 Violation of the Endangered Species Act and Administrative Procedure Act:  
5 Contrary to Law and Failure of Rational Decisionmaking  
6 With Respect to ESA Section 7 Regulatory Revisions

7 109. The FWS and NMFS cannot adopt regulations that are manifestly contrary to the  
8 text and purpose of the ESA.

9 110. When promulgating regulations, FWS and NMFS must articulate a satisfactory  
10 explanation for their action, including a rational connection between the facts found and the  
11 choice made. A regulation is arbitrary and invalid if the agency relies on “factors which  
12 Congress has not intended it to consider” or “entirely fail[s] to consider an important aspect of  
13 the problem.”

14 111. When an agency issues a regulation changing or amending a prior regulation, it  
15 faces a high burden. The agency must demonstrate that (1) a new rule is permissible under the  
16 statute; (2) there are good reasons for it; (3) the agency believes it to be better; and (4) the  
17 agency displays awareness that it is changing its position. When a new regulation rests upon a  
18 factual finding contrary to prior policy, an agency must provide a more detailed justification than  
19 what would suffice if the new policy were created on a blank slate. Any unexplained  
20 inconsistency between the prior rule and its replacement is a basis for finding the agency’s  
21 interpretation arbitrary and capricious.

22 112. Numerous sections of the 2019 Revised ESA Regulations with respect to ESA  
23 Section 7 are contrary to the text and purpose of the ESA, including:

- 24 • Unchecked reliance on mitigation promises;

- Redefining ongoing harms as part of the environmental baseline;
- Definition of destruction or adverse modification of critical habitat;
- Limiting the effects and activities considered during consultation; and
- Reinitiation of consultation on land management plans.

113. Promulgation of these same sections by FWS and NMFS also lack detailed justification and rational basis for a change in longstanding agency practice and is not based on the best available science, as required by the ESA.

114. FWS's and NMFS's promulgation of the 2019 Revised Regulations with respect to ESA Section 7 is arbitrary, capricious, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

#### FOURTH CLAIM FOR RELIEF

##### FWS Violation of the Endangered Species Act and Administrative Procedure Act: Failure of Rational Decisionmaking With Respect To Repeal of Blanket 4(d) Rule

115. In adopting the ESA, Congress's intent was to provide a program for the conservation of ... endangered species and threatened species." 16 U.S.C. § 1531(b). The ESA defines "conservation" as "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 [the ESA] are no longer necessary." 16 U.S.C. § 1532(3).

116. Nothing in FWS's repeal of the FWS Blanket 4(d) Rule provides rational reasons for departing from the Blanket 4(d) Rule, and the agency provides no explanation of how the repeal of the Blanket 4(d) Rule will further the conservation purposes of the ESA, benefit threatened species, or increase regulatory flexibility. Rather, the repeal will reverse the presumption of protection that FWS has applied to threatened species for over 40 years. Indeed, the repeal allows — unless every threatened listing includes a separate species-specific rule —

1 incidental or even purposeful take of threatened species without identifying impacts on the  
2 threatened species, mitigation measures, or any reporting.

3 117. FWS's demonstrated delay in addressing listing petitions and species-specific  
4 rules stands in conflict with its assertion that repeal of the Blanket 4(d) Rule would advance  
5 conservation purposes and better tailor protections to the needs of threatened species. FWS faces  
6 a backlog of more than 500 species awaiting decisions about their protection. According to  
7 FWS's Draft Effect Data for the Revision of the Regulations for Listing Species and Designating  
8 Critical Habitat (June 26, 2018), FWS will need to issue six additional species-specific 4(d) rules  
9 every year above its historical average. Despite FWS's assertions that it intends to  
10 simultaneously issue species-specific 4(d) rules when listing threatened species, there is no  
11 regulatory requirement for these rules to be issued concurrently. Given the significant backlog  
12 of species awaiting protection, and the Service's own poor track record of issuing species-  
13 specific 4(d) rules, threatened species will inevitably be left unprotected. Finally, in its  
14 justification, FWS fails to acknowledge impacts to its other duties under the ESA by excluding  
15 consideration of incidental takings, the prohibition of which will no longer presumptively apply  
16 to threatened species.

17 118. The repeal provides no additional conservation benefits when compared to the  
18 Blanket 4(d) Rule. FWS provides no rational reason to explain why the Blanket 4(d) rule in any  
19 way prevents or impedes FWS from providing the tailored species-specific protections on a case-  
20 by-case basis at the time of listing, as it asserts it intends to do after rescinding the Blanket 4(d)  
21 rule. Rather, the Rule was adopted pursuant to a deregulatory agenda unmoored from the  
22 purposes of the ESA.

1 119. FWS’s failure to articulate a rational connection between the facts found and the  
2 choice made, and to provide an adequate and detailed justification for the elimination of the  
3 long-standing Blanket 4(d) Rule renders the repeal arbitrary, capricious, an abuse of discretion,  
4 not in accordance with law, and without observance of procedure required by law with the  
5 meaning of the APA, 5 U.S.C. § 706(2)(A).

6 FIFTH CLAIM FOR RELIEF

7 Violation of the Endangered Species Act and Administrative Procedure Act:  
8 Contrary to Law and Failure of Rational Decisionmaking  
9 With Respect To ESA Section 4 Regulatory Revisions

10 120. The FWS and NMFS cannot adopt regulations that are manifestly contrary to the  
11 text and purpose of the ESA.

12 121. When promulgating regulations, FWS and NMFS must articulate a satisfactory  
13 explanation for their action, including a rational connection between the facts found and the  
14 choice made. A regulation is arbitrary and invalid if the agency relies on “factors which  
15 Congress has not intended it to consider” or “entirely fail[s] to consider an important aspect of  
16 the problem.”

17 122. Numerous sections of the 2019 Revised ESA Regulations with respect to ESA  
18 Section 4 are contrary to the text and purpose of the ESA, including:

- 19 • elimination of the phrase “without reference to possible economic or other impacts of  
20 such determination” in 50 C.F.R. § 424.11(b);
- 21 • redefining “foreseeable future” to impose elevated certainty requirements;
- 22 • elimination of recovery criteria from delisting factors;
- 23 • expanding critical habitat exemptions; and

- restricting designation of unoccupied critical habitat by narrowing the definition of essential for the conservation of the species.

123. Promulgation of these same sections by FWS and NMFS also lacks detailed justification and rational basis and fails to use the best available science, as required by the ESA.

124. FWS's and NMFS's promulgation of the 2019 Revised Regulations with respect to ESA Section 4 is arbitrary, capricious, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

#### SIXTH CLAIM FOR RELIEF

##### Violation of the Endangered Species Act and Administrative Procedure Act: Failure to Consult Under ESA § 7 on the 2019 Revised ESA Regulations

125. Section 7(a)(2) of the ESA requires that each federal agency, in consultation with FWS and/or NMFS, ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of critical habitat of such species. 16 U.S.C. § 1536(a)(2). “Action is defined to include the promulgation of regulations; actions that may directly or indirectly cause modifications to the land, water, or air; and actions that are intended to conserve listed species or their habitat.” 50 C.F.R. § 402.02.

126. If a federal agency, including FWS and NMFS themselves, determines that its proposed action “may affect” listed species or critical habitat, the agency must engage in “formal consultation” with FWS and/or NMFS, depending on the species involved. 50 C.F.R. § 402.14. Courts have recognized that the “may affect” hurdle is extremely low, encompassing any possible effect, whether beneficial, benign, adverse, or of an undetermined character.

127. Formal consultation concludes with the preparation of a biological opinion by FWS and/or NFMS addressing whether the proposed action will jeopardize threatened or



1 endangered species or result in the destruction or adverse modification of critical habitat and  
2 setting forth any necessary measures for avoiding, minimizing, and mitigating any adverse  
3 impacts. 16 U.S.C. § 1536(b). An action agency may avoid formal consultation by engaging in  
4 “informal consultation” with FWS and/or NMFS and obtaining a written concurrence that the  
5 project is not likely to adversely affect threatened or endangered species or critical habitat. 50  
6 C.F.R. § 402.13(a).

7 128. The failure of FWS and NMFS to consult on the revised ESA regulations,  
8 regulations that clearly may affect ESA-listed species and critical habitat, is arbitrary, capricious,  
9 contrary to the ESA, and in violation of the APA, 5 U.S.C. § 706(2)(A).

10 PRAYER FOR RELIEF

11 Plaintiffs respectfully request that the Court:

12 (1) Declare that FWS and NMFS acted arbitrarily, capriciously, and contrary to  
13 NEPA and the CEQ regulations, in violation of the APA, 5 U.S.C. § 706(2)(A), by invoking  
14 categorical exclusions and failing to prepare an Environmental Impact Statement on the 2019  
15 Revised ESA Regulations, and by failing to evaluate alternatives to, and the full impacts of, the  
16 revised regulations;

17 (2) Declare that FWS and NMFS acted arbitrarily, capriciously, and contrary to the  
18 ESA, in violation of the APA, 5 U.S.C. § 706(2)(A), in promulgating the 2019 Revised ESA  
19 Regulations;

20 (3) Declare that FWS and NMFS violated Section 7(a)(2) of the ESA by  
21 promulgating the 2019 Revised ESA Regulations without first internally consulting on the  
22 regulations’ effects on listed species and their critical habitat;

23 (4) Hold unlawful and vacate the 2019 Revised ESA Regulations;

1 (5) Enjoin FWS and NMFS from applying or otherwise relying upon the 2019  
2 Revised ESA Regulations;

3 (6) Award plaintiffs their reasonable fees, costs, and expenses, including attorneys'  
4 fees; and

5 (7) Grant plaintiffs such further and additional relief as the Court may deem just and  
6 proper.

7 DATED this 23rd day of October, 2019.

8 Respectfully submitted,

9 *s/ Kristen L. Boyles*

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11 [Admitted Pro Hac Vice]

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13 [Pending Pro Hac Vice Application]

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 23, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Kristen L. Boyles  
Kristen L. Boyles