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**Application for admission pro hac vice forthcoming*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

Case No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

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

INTRODUCTION

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

1 2. Rushed to completion during the final months of the Trump administration, the Final
2 Rules violate the ESA’s plain language and conservation purposes, its precautionary approach to
3 protecting imperiled species and critical habitat, its legislative history, and binding judicial
4 precedent. The Final Rules also lack any reasoned basis and are otherwise arbitrary and
5 capricious under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551–59, 701–06.
6 Moreover, the Services violated the National Environmental Policy Act (“NEPA”), 42 U.S.C.
7 §§ 4321–47, by failing to consider and disclose the significant environmental impacts of their
8 actions.

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

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

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

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

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

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

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

11 JURISDICTION AND VENUE

12 8. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (action arising under the
13 laws of the United States), 28 U.S.C. § 1346 (civil action against the United States), and 5 U.S.C.
14 §§ 701–06 (APA). An actual controversy exists between the parties within the meaning of 28
15 U.S.C. § 2201(a), and this Court may grant declaratory relief, injunctive relief, and other relief
16 pursuant to 28 U.S.C. §§ 2201–02 and 5 U.S.C. §§ 705–06.

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

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

25 INTRADISTRICT ASSIGNMENT

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

1 which challenges three other final rules promulgated by the Services in 2019 implementing the
2 ESA, which similarly undermine the ESA's core requirements, including its provisions for
3 designating and protecting critical habitat. That case, along with two related challenges to the
4 same three final rules, have been assigned to the Oakland Division. Pursuant to Civil Local Rule
5 3-12(b), State Plaintiffs intend to promptly file an Administrative Motion to Consider Whether
6 Cases Should Be Related in the earlier-filed action.

7 **PARTIES**

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

16 13. The State of California has a sovereign interest in its natural resources and is the
17 sovereign and proprietary owner of all the State's fish and wildlife and water resources, which are
18 State property held in trust by the State for the benefit of the people of the State. *People v.*
19 *Truckee Lumber Co.*, 116 Cal. 397 (1897); *Betchart v. Cal. Dep't of Fish & Game*, 158 Cal. App.
20 3d 1104 (1984); *Nat'l Audubon Soc'y v. Superior Ct.*, 33 Cal. 3d 419 (1983); Cal. Water Code §
21 102; Cal. Fish & Game Code §§ 711.7(a), 1802. In addition, the State of California has enacted
22 numerous laws concerning the conservation, protection, restoration, and enhancement of the fish
23 and wildlife resources of the State, including endangered and threatened species, and their habitat.
24 Such laws include, but are not limited to, the California Endangered Species Act, which declares
25 that the conservation, protection, and enhancement of endangered and threatened species and
26 their habitat is a matter of statewide concern, and that it is the policy of the state to conserve,
27 protect, restore, and enhance endangered and threatened species and their habitat. Cal. Fish &
28 Game Code §§ 2050, 2051(c), 2052. As such, the State of California has a sovereign and

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

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

17 15. Plaintiff COMMONWEALTH OF MASSACHUSETTS brings this action by and
18 through Attorney General Maura Healey. The Attorney General is the chief legal officer of the
19 Commonwealth and brings this action on behalf of itself and its residents to protect the
20 Commonwealth’s sovereign and proprietary interest in the conservation and protection of its
21 natural resources and the environment. *See* Mass. Const. Am. Art. 97; Mass. Gen. Laws, ch. 12,
22 §§ 3 & 11D.

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

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

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

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

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

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

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

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

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

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

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

5 24. The State of Illinois has “ownership of and title to all wild birds and wild mammals”
6 (520 ILCS 5/2.1 (2018)) and “all aquatic life” within the State (515 ILCS 5 (2018)). *See United*
7 *Taxidermists Ass’n v. Illinois Dep’t of Natural Res.*, 436 Fed. Appx. 692, 695 (7th Cir. 2011).
8 Furthermore, the State of Illinois has enacted numerous laws to protect endangered species (e.g.,
9 520 ILCS 10 (2018)), animal habitat (e.g., 520 ILCS 20 (2018)), and the State’s natural areas and
10 caves (e.g., 525 ILCS 33 (2018), 525 ILCS 5/6 (2018)). Accordingly, the State has a substantial
11 interest in protecting wildlife both within and outside its borders.

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

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

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

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

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

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

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

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

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

7 32. The State of Nevada has a sovereign interest in its natural resources and is the
8 sovereign and proprietary owner of all the State's fish and wildlife and water resources, which are
9 State property held in trust by the State for the benefit of the people of the State. N.R.S. 501.100
10 provides that "[w]ildlife in this State not domesticated and in its natural habitat is part of the
11 natural resources belonging to the people of the State of Nevada [and] [t]he preservation,
12 protection, management and restoration of wildlife within the State contribute immeasurably to
13 the aesthetic, recreational and economic aspects of these natural resources." *See Ex parte Crosby*,
14 38 Nev. 389 (1915); *see also Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976) ("Unquestionably
15 the States have broad trustee and police powers over wild animals within their jurisdictions."). In
16 addition, the State of Nevada has enacted numerous laws concerning the conservation, protection,
17 restoration and enhancement of the fish and wildlife resources of the State, including endangered
18 and threatened species, and their habitat. As such, the State of Nevada has an interest in
19 protecting species in the State from actions both within and outside of the State.

20 33. Nevada has approximately 58,226,015.60 acres of federally-managed land, totaling
21 84.9 percent of the State's lands. The federal agencies that manage Nevada's many acres are
22 subject to the ESA's section 7 consultation requirements, including the Bureau of Indian Affairs,
23 the Bureau of Land Management, the Bureau of Reclamation, the Department of Defense, the
24 Department of Energy, FWS, the Forest Service, and the National Park Service. Moreover,
25 additional non-federal lands and facilities in Nevada are subject to federal permitting and
26 licensing requirements. There are currently over 38 species listed as endangered or threatened
27 under the ESA that reside wholly or partially within the State of Nevada. Examples include the
28 desert tortoise (*Gopherus agassizii*) and its critical habitat in the Mojave Desert, the Devil's Hole

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

7 34. Plaintiff STATE OF NEW JERSEY is a sovereign state of the United States of
8 America and brings this action on behalf of itself and as a trustee, guardian and representative of
9 the residents and citizens of New Jersey. New Jersey holds wildlife in trust for the benefit of all
10 of its people. The New Jersey Legislature has declared that it is the policy of the State to manage
11 all forms of wildlife to insure their continued participation in the ecosystem. N.J. Stat. Ann. §
12 23:2A-2.

13 35. At least fourteen federally listed endangered or threatened species are known to occur
14 in New Jersey, including, for example, the threatened piping plover (*Charadrius melodus*), red
15 knot (*Calidris canutus rufa*), and Northern long-eared bat (*Myotis septentrionalis*), and the
16 endangered Indiana bat (*Myotis sodalist*) and dwarf wedgemussel (*Alasmidonta heterodon*). In
17 2018, New Jersey designated the threatened bog turtle (*Clemmys muhlenbergii*) as the official
18 state reptile. New Jersey protects, conserves, restores and enhances plants, fish and wildlife
19 resources within the State through direct protective legislation such as the Endangered Non-Game
20 Species Conservation Act (ENSCA), N.J. Stat. Ann. §§ 23:2A-1 to -16, and the Endangered Plant
21 Species List Act, *id.* §§ 13:1B-15.151 to -158. New Jersey also considers federal and state-listed
22 species through other legislation including, but not limited to, the Freshwater Wetlands Protection
23 Act, *id.* § 13:9B-7(a)(2), and the Highlands Water Protection and Planning Act, *id.* § 13:20-
24 34(a)(4), and regulatory provisions such as the Pinelands Comprehensive Management Plan, N.J.
25 Admin. Code §§ 7:50-6.27 and -6.33 (adopted, in part, pursuant to 16 U.S.C. § 471i(f)(1)(A)) and
26 the Coastal Zone Management Rules, N.J. Admin. Code § 7:7-9.36.

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

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

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

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

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

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

11 40. Plaintiff STATE OF NEW YORK brings this action by and through Attorney General
12 Letitia James. The Attorney General is the chief legal officer of the State of New York and
13 brings this action on behalf of the State and its citizens and residents to protect their interests, and
14 in furtherance of the State's sovereign and proprietary interests in the conservation and protection
15 of the State's natural resources and the environment. The State of New York has an ownership
16 interest in all non-privately held fish and wildlife in the State and has exercised its police powers
17 to enact laws for the protection of endangered and threatened species, protections long recognized
18 to be vitally important and in the public interest. *See* N.Y. Env'tl. Conserv. Law §§ 11-0105, 11-
19 0535; *Barrett v. State*, 220 N.Y. 423 (1917). Wildlife conservation is a declared policy of the
20 State of New York. *See* N.Y. Const. art. XIV, § 3.

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

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

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

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

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

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

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

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

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

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

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

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

6 51. At least 19 federally listed and protected endangered or threatened species are known
7 to occur in Pennsylvania, including the endangered rusty patched bumble bee (*Bombus affinis*)
8 and piping plover (*Charadrius melodus*) and the threatened northern long-eared bat (*Myotis*
9 *septentrionalis*). Pennsylvania has enacted laws and regulations to protect endangered and
10 threatened species and their habitat in the Commonwealth. *See, e.g.*, 34 Pa. Stat. and Cons. Stat.
11 § 2167 (wild birds and animals); 30 Pa. Stat. and Cons. Stat. § 2305 (fish, reptiles, amphibians,
12 mussels); 32 Pa. Stat. and Cons. Stat. § 5311 (plants). Pennsylvania law explicitly extends state
13 protection to all federally listed wild birds, animals, fish, reptiles, amphibians, and mussels. 30
14 Pa. Stat. and Cons. Stat. § 102 (defining endangered and threatened fish, reptiles, amphibians,
15 mussels); 34 Pa. Stat. and Cons. Stat. § 102 (defining endangered and threatened wild birds and
16 animals). Pennsylvania further empowers Commonwealth agencies to list and protect additional
17 imperiled species. 30 Pa. Stat. and Cons. Stat. § 102 (fish, reptiles, amphibians, mussels); 34 Pa.
18 Stat. and Cons. Stat. § 102 (wild birds and animals); 17 Pa. Code ch. 45 (plants). As a result,
19 Pennsylvania protects hundreds of endangered or threatened species.

20 52. Plaintiff STATE OF RHODE ISLAND brings this action by and through Attorney
21 General Peter F. Neronha. The Attorney General is the chief law enforcement officer of the State
22 and has the authority to file civil actions in order to protect public rights and interests, including
23 actions to protect the natural resources of the State. R.I. Const. art. I, § 17; R.I. Gen. Laws R.I.
24 § 10-20-1, *et seq.* This challenge is brought in part pursuant to the Attorney General’s
25 independent constitutional, statutory, and common law authority to represent the people’s
26 interests in protecting the environment and natural resources of the State of Rhode Island from
27 pollution, impairment, or destruction. *Id.*; *Newport Realty, Inc. v. Lynch*, 878 A.2d 1021 (R.I.
28 2005).

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

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

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

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

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

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

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

22 59. Wildlife, fish, and shellfish are the property of the State of Washington. Rev. Code
23 Wash. (RCW) § 77.04.012. The Washington Department of Fish and Wildlife actively carries
24 forth the legislative mandate to, *inter alia*, preserve, protect, perpetuate, and manage wildlife, fish,
25 and wildlife and fish habitat. *Id.*; *id.* § 77.04.055; *see also id.* § 77.110.030 (declaring that
26 “conservation, enhancement, and proper utilization of the state’s natural resources ... are
27 responsibilities of the state of Washington”).
28

1 60. The Washington Fish and Wildlife Commission classifies forty-five species as
2 Endangered, Threatened, or Sensitive under State law. Wash. Admin. Code 220-610-010; 220-
3 200-100. More than half of these species are also federally listed as endangered or threatened
4 under the ESA, including southern resident killer whales (*Orcinus orca*), pygmy rabbits
5 (*Brachylagus idahoensis*), streaked horned larks (*Eremophila alpestris strigata*), and green sea
6 turtles (*Chelonia mydas*). In addition, the Washington Department of Fish and Wildlife
7 designates 102 species as candidates for state listing as endangered, threatened, or sensitive, and
8 more than twenty of the state candidate species, including chinook (*Oncorhynchus tshawytscha*),
9 chum (*Oncorhynchus keta*), and sockeye (*Oncorhynchus nerka*) salmon and steelhead
10 (*Oncorhynchus mykiss*), are listed as threatened or endangered under the ESA. In total, thirty-
11 seven federally listed species comprising 50 Evolutionarily Significant Units and Distinct
12 Population Segments live in Washington. Washington also has several species, including
13 wolverines (*gulo gulo*), Island Marble butterflies (*Euchloe ausonides*), and fishers (*Martes*
14 *pennanti*) that are candidates for federal listing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 STATUTORY BACKGROUND

14 I. ENDANGERED SPECIES ACT.

15 74. Congress enacted the ESA nearly fifty years ago in a bipartisan effort “to halt and
16 reverse the trend toward species extinction, whatever the cost.” *Tennessee Valley Auth. v. Hill*,
17 437 U.S. 153, 184 (1978); *see* 16 U.S.C. § 1531(a). The ESA accordingly enshrines a national
18 policy of “institutionalized caution,” *Hill*, 437 U.S. at 194, in recognition of the “overriding need
19 *to devote whatever effort and resources [are] necessary* to avoid further diminution of national
20 and worldwide wildlife resources,” *id.* at 177 (internal quotation omitted, emphasis in original).
21 The ESA constitutes “the most comprehensive legislation for the preservation of endangered
22 species ever enacted by any nation.” *Id.* at 180.

23 75. The ESA’s fundamental purposes are to “provide a means whereby the ecosystems
24 upon which endangered ... and threatened species depend may be conserved, [and] to provide a
25 program for the conservation of such endangered ... and threatened species[.]” 16 U.S.C.
26 § 1531(b). Furthermore, the ESA declares “the policy of Congress that all Federal departments
27 and agencies shall seek to conserve endangered ... and threatened species and shall utilize their
28 authorities in furtherance of the purposes of [the ESA].” *Id.* § 1531(c)(1). The ESA defines

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

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

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

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

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

8 79. Section 7 of the ESA, 16 U.S.C. § 1536, requires all federal agencies, including the
9 Services, to “utilize their authorities in furtherance of the purposes of [the ESA] by carrying out
10 programs for the conservation of” endangered and threatened species, *id.* § 1536(a)(1), and to
11 “insure” that any action they propose to authorize, fund, or carry out “is not likely to jeopardize
12 the continued existence” of any endangered or threatened species or, as particularly relevant here,
13 “result in the destruction or adverse modification of” any designated critical habitat, *id.*
14 § 1536(a)(2). If a federal agency action “may affect” any listed species or critical habitat, the
15 federal action agency must initiate consultation with the relevant Service. 50 C.F.R. § 402.14(a);
16 *see* 16 U.S.C. §§ 1536(a)–(b), (c)(1); 50 C.F.R. §§ 402.12, 402.14(b)(1).

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

25 **II. ADMINISTRATIVE PROCEDURE ACT.**

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

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

11 82. Additionally, “[a]gencies are free to change their existing policies,” but they must
12 “provide a reasoned explanation for the change.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct.
13 2117, 2125 (2016) (citing *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545
14 U.S. 967, 981–82 (2005)). While an agency need not show that a new rule is “better” than the
15 rule it replaced, it still must demonstrate that “it is permissible under the statute, that there are
16 good reasons for it, and that the agency *believes it to be better*, which the conscious change of
17 course adequately indicates.” *Federal Commc’ns. Comm’n v. Fox Television Stations, Inc.*, 556
18 U.S. 502, 515 (2009) (emphasis in original). Further, an agency must “provide a more detailed
19 justification than what would suffice for a new policy created on a blank slate” when “its new
20 policy rests upon factual findings that contradict those which underlay its prior policy,” “or when
21 its prior policy has engendered serious reliance interests that must be taken into account.” *Id.*
22 Any “[u]nexplained inconsistency” in agency policy is “a reason for holding an interpretation to
23 be an arbitrary and capricious change from agency practice.” *National Cable & Telecomms.*
24 *Ass’n*, 545 U.S. at 981.

25 83. Finally, prior to promulgating, amending, or repealing a rule, agencies must engage in
26 a public notice-and-comment process. 5 U.S.C. §§ 551(5), 553. Notice must include “either the
27 terms or substance of the proposed rule or a description of the subjects and issues involved.” *Id.*
28 § 553(b). To satisfy the requirements of APA, notice of a proposed rule must “provide an

1 accurate picture of the reasoning that has led the agency to the proposed rule,” to allow an
2 “opportunity for interested parties to participate in a meaningful way in the discussion and final
3 formulation of rules.” *Connecticut Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d
4 525, 528-30 (D.C. Cir. 1982). An agency must afford the public notice of specific regulatory
5 changes and its reasoned basis for those changes to provide the public an opportunity for
6 meaningful comment. *Home Box Office v. Federal Commc’ns Comm’n*, 567 F.2d 9, 35-36 (D.C.
7 Cir. 1977). The public may then submit comments, which the agency must consider before
8 promulgating a final rule. 5 U.S.C. § 553(c). This process is designed to “give interested persons
9 an opportunity to participate in the rule making through submission of written data, views, or
10 arguments.” *Id.*

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

17 **III. NATIONAL ENVIRONMENTAL POLICY ACT.**

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

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23
24 ¹ On July 16, 2020, the Council on Environmental Quality (“CEQ”) finalized an update to its
25 1978 regulations implementing NEPA, which took effect on September 14, 2020. 85 Fed. Reg.
26 43,304 (July 16, 2020). According to this rule, for NEPA reviews that have already begun
27 “before the final rule’s effective date, agencies may choose whether to apply the revised
28 regulations or proceed under the 1978 regulations and their existing agency NEPA procedures.
Agencies should clearly indicate to interested and affected parties which procedures it is applying
for each proposed action.” *Id.* at 43,340. Here, the Services do not indicate which procedures
they are applying, but cite only to regulatory language that follows the requirements of the 1978
regulations. *See* 85 Fed. Reg. at 81,421; 85 Fed. Reg. at 82,388. Consequently, the 1978
regulations apply and are cited here.

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

3 86. To achieve these purposes, NEPA requires the preparation of a detailed
4 environmental impact statement (“EIS”) for any “major federal action significantly affecting the
5 quality of the human environment.” 42 U.S.C. § 4332(2)(C). A “major federal action” includes
6 “new or revised agency rules [and] regulations.” 40 C.F.R. § 1508.18(a). To determine whether
7 a proposed action may significantly affect the environment, NEPA requires that both the context
8 and the intensity of an action be considered. 40 C.F.R. § 1508.27. In evaluating the context,
9 “[s]ignificance varies with the setting of the proposed action” and includes an examination of “the
10 affected region, the affected interests, and the locality.” *Id.* § 1508.27(a). Intensity “refers to the
11 severity of impact,” and NEPA’s implementing regulations list ten factors to be considered in
12 evaluating intensity, including “[t]he degree to which the action may adversely affect an
13 endangered or threatened species or its [critical] habitat” under the ESA. *Id.* § 1508.27(b)(9).
14 The presence of just “one of these factors may be sufficient to require the preparation of an EIS in
15 appropriate circumstances.” *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 865
16 (9th Cir. 2005).

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

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

5 **FACTUAL AND PROCEDURAL BACKGROUND**

6 **I. SPECIES PROTECTION UNDER THE ESA.**

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

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

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

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

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

17 92. The shortnose sturgeon (*Acipenser brevirostrum*) is an anadromous fish found in
18 rivers, estuaries, and coastal waters along the Atlantic Coast of North America. Overfishing,
19 river damming, and water pollution greatly reduced its numbers, and the shortnose sturgeon was
20 listed as endangered under the ESA's precursor in 1967. However, fishing prohibitions and
21 habitat protection efforts led by NMFS and New York have allowed the shortnose sturgeon
22 population to increase in New York's Hudson River from about 12,669 in 1979 to more than
23 60,000 today.

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

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

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

8 95. In August 2019, however, the Services published three “deregulatory” rules, under
9 the guise of increasing clarity and efficiency, that significantly weaken several key requirements
10 of the ESA’s implementing regulations, including provisions for listing imperiled species and
11 designating critical habitat. 84 Fed. Reg. 45,020 (Aug. 27, 2019); 84 Fed. Reg. 44,976 (Aug. 27,
12 2019); 84 Fed. Reg. 44,753 (Aug. 27, 2019). State Plaintiffs (and others) are currently
13 challenging those rules in this Court. *California, et al. v. Bernhardt, et al.*, Case No. 4:19-cv-
14 06013-JST.

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

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

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

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

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

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

4 99. The proposed Habitat Exclusion Rule sought to establish a new process for excluding
5 areas from critical habitat designations made by FWS pursuant to section 4(b) of the ESA, 16
6 U.S.C. § 1533(b). Among other unlawful changes, FWS proposed a new mandatory obligation
7 on FWS to undertake an “exclusion analysis” when a “proponent of excluding a particular area ...
8 presented credible information regarding ... meaningful economic” or other impacts supporting
9 exclusion benefits, and proposed to enable FWS to defer to outside experts on a variety of
10 impacts. 85 Fed. Reg. at 55,406–07. If FWS determined that the benefits of excluding a
11 particular area outweighed the benefits of including that area as critical habitat, the proposed rule
12 provided that the FWS “shall exclude” that area, unless exclusion would result in the extinction of
13 a species. *Id.* at 55,407. The proposed Habitat Exclusion Rule also proposed to reverse FWS’s
14 2016 policy of prioritizing federal lands for critical habitat designation by requiring it to consider
15 information supporting the exclusion of federal lands based on “impacts” such as federal
16 agencies’ ESA consulting costs and applicants’ costs to modify a project to avoid habitat impacts.
17 *Id.* at 55,402.

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

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

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

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

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

7 85 Fed. Reg. at 81,421.

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

- 12 a. Mandates that the FWS conduct a critical habitat exclusion analysis in any case where a
13 “proponent of excluding a particular area ... has presented credible information
14 regarding the existence of a meaningful economic or other relevant impact supporting a
15 benefit of exclusion”;
- 16 b. Requires FWS to defer to outside “experts” in, or “sources with firsthand knowledge
17 of,” a new non-exhaustive list of impacts deemed “outside of the scope of [FWS]’s
18 expertise”—including some biological impacts within FWS’s expertise—when
19 analyzing the benefits of including or excluding an area from designation as critical
20 habitat unless FWS has “knowledge or material evidence that rebuts that information”;
- 21 c. Biases the required economic analysis against designating critical habitat for species
22 conservation and instead favors excluding both federal and non-federal lands from such
23 designations;
- 24 d. Reverses FWS’s prior policy—which prioritized designation of critical habitat on
25 federal lands—by requiring FWS to consider information supporting the exclusion of
26 federal lands based on broadly defined “impacts,” such as ESA consulting costs borne
27 by federal agencies and costs borne by applicants to modify a project to avoid habitat
28 impacts;

- 1 e. Allows FWS to exclude critical habitat on both federal and nonfederal land based on a
2 wide range of economic impacts and “other relevant impacts,” including undefined
3 “community interests,” such as disruption of planned community development projects;
4 and
- 5 f. Requires FWS to consider implementation of conservation plans, agreements, or
6 partnerships authorized by incidental take permits under section 10 of the ESA when
7 determining whether to exclude areas covered by such plans from critical habitat.

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

13 **III. FINAL RULES’ INJURIES TO STATE PLAINTIFFS.**

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

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

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

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

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

17 111. Second, and relatedly, the ESA expressly declares that endangered and threatened
18 “species of fish, wildlife, and plants are of esthetic, ecological, educational, historical,
19 recreational, and scientific value to the Nation and its people.” *Id.* § 1531(a)(3). Reducing the
20 State Plaintiffs’ wealth of wild species would damage each of these values and “diminish[] a
21 natural resource that could otherwise be used for present and future commercial purposes.”
22 *National Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041, 1053 (D.C. Cir. 1997); *see also San*
23 *Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1176–77 (9th Cir. 2011). And
24 although the harms that would result from the loss of biological diversity are enormous, the
25 nation cannot fully apprehend their scope because of the “*unknown* uses that endangered species
26 might have and ... the *unforeseeable* place such creatures may have in the chain of life on this
27 planet.” *Hill*, 437 U.S. at 178-79 (emphases in original); *see also id.* at 178 (noting that “[t]he
28

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

3 112. Third, with the Final Rules’ unlawful and arbitrary weakening of federal protections,
4 the responsibility for, and burden of, protecting imperiled species and their habitats within state
5 borders would fall more heavily on State Plaintiffs. *See Texas v. United States*, 809 F.3d 134,
6 155 (5th Cir. 2015) (impact on state resources provides basis for standing). Filling that regulatory
7 gap would detract from State Plaintiffs’ efforts and resources to carry out their own programs and
8 impose significantly increased costs and burdens on the State Plaintiffs. For example, under the
9 new Habitat Definition Rule and Habitat Exclusion Rule, the ESA will no longer protect as
10 “critical habitat” areas that are essential to the conservation of species whose current habitat is
11 threatened by climate change or other environmental threats, but that do not yet contain the
12 features that will contribute to such conservation. In such cases, State Plaintiffs will bear the
13 burden of identifying and protecting that habitat under state regulatory programs to ensure species
14 conservation and recovery. *See, e.g.,* Mass. Gen. Laws. Ch. 131A, §§ 2, 4-5 (providing for
15 review and designation of “significant habitats” for state-listed rare species and barring alteration
16 of such habitat without permit); 321 Code Mass. Regs. §§ 10.00 *et seq.* (providing for delineation
17 of, and standards and procedures for conducting activities in, “priority habitat” for state-listed rare
18 species); *see Air Alliance Hous. v. U.S. Env’tl. Prot. Agency*, 906 F.3d 1049, 1059-60 (D.C. Cir.
19 2018) (“Monetary expenditures to mitigate and recover from harms that could have been
20 prevented absent the [federal rule] are precisely the kind of ‘pocketbook’ injury that is incurred
21 by the state itself.”).

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

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

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

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

9 **FIRST CAUSE OF ACTION**
10 **(Violations of the ESA and APA,**
11 **16 U.S.C. §§ 1531, 1532, 1533, 1536; 5 U.S.C. § 706)**

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

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

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

21 119. The Habitat Definition Rule’s new definition of “habitat” to limit critical habitat
22 designations to the area that “currently or periodically contains the resources and conditions
23 necessary to support one or more life processes of a species” is contrary to 16 U.S.C. §
24 1532(5)(A) and 16 U.S.C. § 1533(b)(1)(A), and the ESA’s conservation purposes and mandate in
25 16 U.S.C. §§ 1531(b) & (c), and 1536(a)(1).

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

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

1 ESA's conservation purposes and mandate in 16 U.S.C. §§ 1531(b) and (c), and
2 1536(a)(1);

- 3 b. The new extensive list in 50 C.F.R. §§ 17.90(a) and (d)(1) of "economic impacts" and
4 "other relevant impacts" to be considered in the exclusion analysis is contrary to 16
5 U.S.C. §§ 1532(5)(A) and 1533(a)(3)(A) and (b)(2), and the ESA's conservation
6 purposes and mandate in 16 U.S.C. §§ 1531(b) and (c), and 1536(a)(1);
- 7 c. The requirements in 50 C.F.R. § 17.90(c)(2) and (e) that FWS "will" conduct an
8 exclusion analysis when a "proponent of excluding a particular area ... has presented
9 credible information regarding the existence of a meaningful economic or other relevant
10 impact supporting a benefit of exclusion for that particular area" and "shall exclude" an
11 area from critical habitat designation if FWS "determines that the benefits of excluding
12 a particular area from critical habitat outweigh the benefits of specifying that area as part
13 of critical habitat" are contrary to 16 U.S.C. § 1533(a)(3)(A) and (b)(2) and the ESA's
14 conservation purposes and mandate in 16 U.S.C. §§ 1531(b) and (c), and 1536(a)(1);
- 15 d. The requirement in 50 C.F.R. § 17.90(d)(1) that FWS defer to outside "experts in" or
16 those with "firsthand knowledge of" areas that are "outside of the scope of the [FWS]'s
17 expertise" unless FWS has "knowledge or material evidence" rebutting that information,
18 and to only consider information from proponents of critical habitat exclusion, is
19 contrary to 16 U.S.C. § 1533(a)(3)(A) and (b)(2) and the ESA's conservation purposes
20 and mandate in 16 U.S.C. §§ 1531(b) and (c), and 1536(a)(1); and
- 21 e. The requirement in 50 C.F.R. § 17.90(d)(3) that FWS consider implementation of
22 conservation plans, agreements, or partnerships authorized by an incidental take permit
23 under section 10 of the ESA is contrary to 16 U.S.C. §§ 1533(a)(3)(A) and (b)(2) and
24 1536(a)(2) and (b)(4) and the ESA's conservation purposes and mandate in 16 U.S.C. §§
25 1531(b) and (c), and 1536(a)(1).

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

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

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

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

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

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

21 125. Moreover, the APA requires that interested parties have a “meaningful opportunity to
22 comment on proposed regulations.” *See Safe Air for Everyone v. U.S. Env’tl. Prot. Agency*, 488
23 F.3d 1088, 1098 (9th Cir. 2007). To satisfy the requirements of APA section 553, notice of a
24 proposed rule must “provide an accurate picture of the reasoning that has led the agency to the
25 proposed rule,” so as to allow an “opportunity for interested parties to participate in a meaningful
26 way in the discussion and final formulation of rules.” *Connecticut Light & Power*, 673 F.2d at
27 528-30; *see also Prometheus Radio Project v. Federal Comm’n. Comm’n*, 652 F.3d 431, 449
28 (3d Cir. 2011) (“an agency proposing informal rulemaking has an obligation to make its views

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

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

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

- 9 a. Failed to provide any reasoned explanation for adding a new definition of “habitat” in
10 50 C.F.R. § 424.02 that limits critical habitat designations to the area that “currently or
11 periodically contains the resources and conditions necessary to support one or more life
12 processes of a species”;
- 13 b. Failed to explain or provide any reasoned justification for changing their position from
14 their prior approach to defining what constitutes habitat for listed species;
- 15 c. Failed to consider the impact of the new definition on listed species and their habitat,
16 including the need to protect and restore areas of currently unoccupied habitat so that
17 species may expand their current ranges or migrate to new territory to avoid existential
18 human and environmental threats such as climate change and habitat destruction; and
- 19 d. Failed to consider how the Services will fulfill the ESA’s policy of institutionalized
20 caution and species recovery mandates despite the rule’s significant limitations on
21 designation of habitat that is essential to species conservation.

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

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

- 26 a. Failed to provide any reasoned explanation for its requirement in 50 C.F.R.
27 § 17.90(c)(2) and (e) that FWS must undertake an exclusion analysis when “proponent
28 of excluding a particular area ... has presented credible information regarding the

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

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

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

17 d. Failed to provide any reasoned explanation for its requirement in 50 C.F.R.
18 § 17.90(d)(4) that, in determining whether to exclude areas covered by conservation
19 plans or agreements, FWS consider “information provided by proponents” of an
20 exclusion, but not proponents of designation, of an area as critical habitat, and failed to
21 consider the impacts to listed species and critical habitat from that change;

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

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

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

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

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

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

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

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

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

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

9 **PRAYER FOR RELIEF**

10 WHEREFORE, State Plaintiffs respectfully request that this Court:

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

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

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

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

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

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

26 7. Award such other relief as the Court deems just and proper.
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1 Dated: January 19, 2021

Respectfully submitted,

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