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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ANIMAL LEGAL DEFENSE FUND,

Plaintiff,

v.

DEB HAALAND, et al,

Defendant.

and

STATE OF ALABAMA, et al,

Intervenor-Defendants.

Case No. 4:19-cv-06812-JST

Related Cases: No. 4:19-cv-06013-JST
No. 4:19-cv-05206-JST

PLAINTIFF'S NOTICE OF MOTION AND RE-FILED MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: TBD
Time: 2:00 pm
Courtroom: 6, 2nd Floor
Judge: Hon. Jon S. Tigar

NOTICE OF MOTION AND RE-FILED MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE, that Plaintiff Animal Legal Defense Fund, by and through its undersigned counsel, will, and hereby does, move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Civil Local Rule 7. This motion will be made before the Honorable Jon S. Tigar, United States District Judge, Oakland Courthouse, 1301 Clay Street, Oakland, CA 94612.

By its motion, Plaintiff seeks an order holding unlawful, vacating, enjoining application and reliance upon, and reinstating the predecessors to, the following three related final rules: "Regulations for Listing Species and Designating Critical Habitat," 84 Fed. Reg. 45020 (Aug. 27, 2019), "Revision of Regulations for Interagency Cooperation," 84 Fed. Reg. 44976 (Aug. 27, 2019), and "Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants," 84 Fed. Reg. 44753 (Aug. 27, 2019), on the ground that Defendants, in promulgating the same, acted arbitrarily, capriciously, contrary to the Endangered Species Act, in violation of the Administrative Procedure Act, and in violation of the National Environmental Policy Act.

In support of its motion, Plaintiff submits the accompanying Memorandum of Points and Authorities and Proposed Order.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This action arises from three final rules (the "Final Rules") that represent the outgoing presidential administration's attempt to weaken the Endangered Species Act ("ESA") and hand opponents of the ESA their "biggest victory in decades."[1] The Final Rules, signed by Defendants David Bernhardt (outgoing U.S. Secretary of Interior) and Wilbur Ross (outgoing U.S. Secretary of Commerce) in August 2019, turn more than 40 years of effective regulations and policy on their head, to the detriment of the imperiled species that Defendants U.S. Fish & Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (together, "the Services" and with Messrs. Bernhardt and Ross, the "Federal Defendants") are charged with conserving.

As FWS admits, the prior regulatory regime "worked." 84 Fed. Reg. 44753, 44756 (Aug. 27, 2019). The ESA, as implemented by all administrations since 1973, has protected 99% of listed species from extinction and has led to the recovery of the American alligator, bald eagle, and Louisiana black bear, among many others. AR_94648.[2] According to researchers, at least 227 species would have gone extinct between 1976 and 2006 without the ESA's protection. AR_76507 n.14. Through the Final Rules, however, the Services abandon their congressional mandate of species conservation and science-based decision-making in favor of "thinly veiled giveaways to industry lobbyists and interests."[3] Indeed, the identity of the intervenors in this action—special interest groups from the timber, oil, and construction industries—shows who stands to benefit from the Final Rules. *See, e.g.*, Dkt. 24, 29.

Each Final Rule is arbitrary and capricious in violation of the Administrative Procedure Act ("APA") and must be vacated. The Services' failure to analyze the environmental impacts of the Final Rules violates the National Environmental Policy Act ("NEPA") and independently

[1] Lisa Friedman, *U.S. Significantly Weakens Endangered Species Act*, THE NEW YORK TIMES, *available at* https://nyti.ms/3sx7cpV (Aug. 12, 2019).

[2] Federal Defendants produced two volumes of the Administrative Record on July 23 and October 5, 2020, with Bates prefixes "ESA" and "ESA2." Documents in these volumes are referred to as "AR_[page number]" and "AR2_[page number]" with leading zeros omitted.

[3] Kristoffer Whitney, *Critics of the Endangered Species Act are right about what it does. But they miss the point*, WASHINGTON POST, *available at* https://wapo.st/3bP6n5Q (Aug. 2, 2018).

warrants vacatur as well.

First, the Final Rule entitled "Revisions of the Regulations for Prohibitions to Threatened Wildlife and Plants," 84 Fed. Reg. 44753 (Aug. 27, 2019) (the "4(d) Rule"), robs newly listed threatened species, and endangered species that are "downlisted" to threatened species, of all protections from "take" and other unlawful acts under Section 9 of the ESA for an indeterminate length of time—and possibly indefinitely.[4] Under the prior regulatory framework, which FWS previously and successfully defended in the D.C. Circuit Court of Appeals,[5] threatened species automatically enjoyed the same protections from "take" and other Section 9 protections applicable to endangered species upon listing, unless FWS subsequently modified those protections in a species-specific 4(d) rule. Under the new rules, those species get ***no*** protection unless and until the Services come up with species-specific rules—a historically lengthy process[6] that may never occur, as such species-specific rules are not mandatory under the revised 4(d) Rule. In that time period, of course, newly listed and threatened species will suffer further decline and their risk of extinction will go up, which is the exact opposite of what the ESA was passed (on a bipartisan basis) to accomplish. FWS does not hide its intent in this regard; nor does it *attempt* to suggest that the purpose of the 4(d) Rule has anything to do with promoting the overriding conservation purposes of the ESA. Instead, the agency boasts nearly a dozen times that the 4(d) Rule reduces "permitting requirements"—*i.e.*, that the real purpose of the rule is to create economic benefits for industry. 84 Fed. Reg. at 44754-57.

Second, the Final Rule entitled "Revision of the Regulations of Listing Species and Designating Critical Habitat," 84 Fed. Reg. 45020 (Aug. 27, 2019) (the "Listing Rule") erects numerous barriers—each contrary to the ESA—to listing species as threatened and endangered and designating their habitat as "critical." It also removes safeguards for delisting species. In so

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[4] "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Other Section 9 prohibitions include importing and exporting such species and selling or offering to sell such species in interstate or foreign commerce, among many others. 16 U.S.C. § 1538(a)(1), (a)(2).

[5] *Sweet Home Chapter of Comms. for a Great Oregon v. Babbitt*, 1 F.3d 1, 6 (D.C. Cir. 1993).

[6] It turns out that it is hard to calculate an average length of time because, for over 300 threatened species, FWS has never issued a species-specific rule. *See infra*, at Background, Section II.B.

doing, the Listing Rule deletes a prior regulatory restriction on considering the economic impacts of a listing decision, unlawfully enabling the Services to pitch the economic case *against* listing a species as threatened or endangered. This revision is a brazen attempt to undermine the ESA, not administer it as the Services are legally required to do. The Listing Rule also recklessly expands the circumstances under which the Services may decide it is "not prudent" to designate critical habitat, alters definitions of key terms in the ESA to create heightened standards found nowhere in the statute for listing decisions and critical habitat designations, facilitates the Services' ability to ignore climate change science, and removes "recovery" as a criterion for delisting a species. The Services offer no reasoned explanations for these substantial revisions, opting instead to invoke vague notions of "public transparency" and to pretend as if they are only clarifying previously "confusing" definitions, rather than fundamentally overhauling the manner in which the Services make listing and critical-habitat designation decisions.

Third, the Final Rule entitled "Revision of Regulations for Interagency Cooperation," 84 Fed. Reg. 44976 (Aug. 27, 2019) (the "Interagency Consultation Rule") arbitrarily and capriciously attempts to disrupt and abbreviate the mandatory interagency consultation process under Section 7 of the ESA, which the Ninth Circuit has described as "[t]he heart of the ESA."[7] As in the Listing Rule, the Services redefine key terms in the ESA to further their deregulatory agenda, this time to facilitate their ability to greenlight potentially harmful federal agency actions without due consideration and mitigation of their impacts on listed species and critical habitat. The Services also introduce new types of interagency consultations, which invite agencies to cut corners during the consultation process. Additionally, the Services abdicate their duty to craft independent, science-based biological opinions by creating a regulation that allows them to rubber stamp another federal agency's inexpert biological analysis. Each of these revisions is contrary to the ESA, and the Services fail to articulate any reasoned explanations for any of them as required under the APA.

Fourth, the Final Rules should be vacated because the Services failed to prepare an environmental impact statement ("EIS") for any of the rules, in violation of NEPA. NEPA

[7] *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011).

requires that agencies prepare an EIS for all "major federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), so as to evaluate the environmental impacts of the proposed actions and inform the public and decisionmakers of possible alternatives and mitigation measures that would avoid or minimize any adverse impacts, 40 C.F.R. § 1502.1 (1978).[8] Given the adverse impacts that each of the Final Rules will have on listed species and their habitats, the Final Rules qualify as major federal actions requiring the "hard look" of an EIS.[9] Nonetheless, the Services took the position that the Final Rules were merely "of a legal, technical, or procedural nature," rather than major deregulatory actions, to justify ignoring their obligations pursuant to NEPA. 84 Fed. Reg. at 44759, 45015, 45051. The remedy for the Services' failure to comply with NEPA is vacatur.

Fifth, the Services' notice-and-comment process was flawed. The Services included material provisions in the Final Rules that were absent from the Proposed Rules, depriving the public of the opportunity to comment on those provisions. The new provisions included heightened burdens of proof for designating unoccupied habitat as critical and issuing jeopardy opinions in the interagency consultation process. The Services also failed to address the Animal Legal Defense Fund's ("ALDF") unique comment letter regarding the especially problematic effects of the 4(d) Rule on captive animals, *e.g.*, those animals that are held in roadside zoos, fur farms, and canned hunting ranches, who are in closer, daily proximity to humans than their wild counterparts, and who depend on ESA protections for their daily well-being. AR_164956. These procedural infirmities warrant vacatur as well.

Summary judgment should be granted and the Final Rules vacated.

[8] After the Services promulgated the Final Rules, the Council on Environmental Quality ("CEQ") revised the NEPA regulations, which had been in effect since 1978. *See* 85 Fed. Reg. 43304 (July 16, 2020). As the Services' rulemaking process took place before CEQ revised the NEPA regulations, the prior regulations are cited herein.

[9] *Ocean Advocates v. U.S. Army Corps. of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005).

BACKGROUND

I. STATUTORY BACKGROUND

A. Endangered Species Act

The ESA was enacted in response to a species extinction crisis that remains ongoing. 16 U.S.C. § 1531(a); AR_260 & nn. 9-11. The purpose of the statute is to conserve threatened and endangered species and their habitat. 16 U.S.C. § 1531(b).[10] The Supreme Court made this clear over 40 years ago when it held that the law's "plain intent," embedded in "literally every section of the statute" is ***conservation***, and that the law's primary design was "to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). Through the ESA, Congress deemed the value of endangered species to be "incalculable," given such species may have as-yet "unknown uses" and an "unforeseeable place . . . in the chain of life on this planet." *Id.* at 178-79, 187 (emphases removed). Accordingly, Congress has, through the ESA, prioritized the conservation of endangered species "over the 'primary missions' of federal agencies." *Id.* at 186; *see* 16 U.S.C. §§ 1531(b)-(c), 1536(a)(1). The Secretaries of Commerce and Interior are responsible for administering the ESA and have delegated that responsibility to FWS for terrestrial species and to NMFS for marine and anadromous species. *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 973-74 (9th Cir. 2003).

Congress implemented the ESA's conservation mandate through multiple channels, three of which are at issue in the Final Rules. First, the ESA provides for the listing of threatened and endangered species "solely on the basis of the best scientific and commercial data available," and generally requires, with certain limited exceptions, the designation of their "critical habitat" at the time of listing. 16 U.S.C. § 1533 ("Section 4").[11] Second, the ESA requires that all federal

[10] The ESA defines "conservation" expansively as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3).

[11] An "endangered species" is a species that is currently "in danger of extinction." 16 U.S.C. § 1532(6). A "threatened species" is a species "likely to become endangered within the foreseeable future." 16 U.S.C. § 1532(20). An endangered or threatened species' "critical habitat" is both: (a) "specific areas within the geographical area occupied by the species" that are essential to its conservation and require special management measures; and (b) "specific areas outside the

agencies consult with the Services to ensure that any action that they authorize, fund, or carry out does not jeopardize threatened or endangered species or destroy or adversely modify their designated critical habitat. 16 U.S.C. § 1536 ("Section 7"). Third, among other prohibitions, the ESA outlaws "take" of endangered species, meaning that no person may "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" any endangered species "or attempt to engage in any such conduct." 16 U.S.C. § 1538 ("Section 9"); 16 U.S.C. § 1532(19). Protections from "take" extend not only to wild animals, but to captive animals, such as those exhibited at zoos, used in experimentation, and killed for sport at canned hunting ranches. 80 Fed. Reg. 7380, 7388 (Feb. 10, 2015) ("On its face the ESA does not treat captives differently . . . . Section 9(a)(1)(A)-(G) of the ESA applies to endangered species regardless of their captive status"); 50 C.F.R. § 17.3 (including captive animals in the definition of "harass"). The ESA expressly allows the Services to extend to threatened species the same Section 9 "take" protections applicable to endangered species, in order to provide for their conservation, 16 U.S.C. § 1533(d), which the FWS did shortly after the ESA was enacted in 1973, 40 Fed. Reg. 44411, 44425 (Sept. 26, 1975).

Embedded throughout the ESA is a precautionary principle, which compels federal agencies to undertake conservation measures in the absence of scientific certainty or consensus. *See Tenn. Valley Auth.*, 437 U.S. at 194 (holding that the ESA effectuates a policy of "institutionalized caution"). Although the Services must list species and designate critical habitat on the basis of the "best scientific data available," that standard "does not require" that the Services act only in situations of "absolute confidence." *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010).

B. National Environmental Policy Act

NEPA is the United States' "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It "requires that federal agencies perform environmental analysis before taking any 'major Federal actions significantly affecting the quality of the human environment.'" *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1094 (9th Cir. 2013) (quoting 42 U.S.C.

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geographical area occupied by the species . . . upon a determination by the Secretary that such areas [also] are essential for the conservation of the species." 16 U.S.C. § 1532(5).

§ 4332(2)(C)); *see also Ocean Advocates*, 402 F.3d at 864 (NEPA compels agencies "to take seriously" and take a "hard look" at the "potential environmental consequences of a proposed action"). In so doing, it imposes "procedural requirements to ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Winter v. Natural Resource Defense Council*, 555 U.S. 7, 23 (2008) (internal quotation marks and citations omitted).

An EIS must include a "full and fair discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts . . . ." 40 C.F.R. § 1502.1; *see also, e.g.*, *id.* §§ 1502.14, 1502.16 (requiring evaluation of "the environmental impacts of the proposed action," "reasonable alternatives," "appropriate mitigation measures," "adverse environmental effects that cannot be avoided"). Agencies should prepare an EIS "as close as practicable to the time the agency is developing" a proposed action "so that it can serve as an important practical contribution to the decision-making process." 40 C.F.R. § 1502.5. Draft and final EISes must be circulated for public comment. 40 C.F.R. § 1502.20; 43 C.F.R. § 46.435. The remedy for failure to comply with NEPA by preparing an EIS is vacatur of the agency action. *California v. Bernhardt*, 472 F. Supp. 3d 573, 630 (N.D. Cal. 2020).

II. STATEMENT OF FACTS

A. The Rulemaking Process

The Final Rules mark the first substantial revision to the regulations implementing the ESA since the 1980s. *See* 83 Fed. Reg. 35178 (July 25, 2018). Each of the Final Rules is a "deregulatory action" promulgated under the outgoing President's Executive Order that federal agencies eliminate at least two regulations for every new regulation introduced. 84 Fed. Reg. at 44758, 45014, 45050; E.O. 13771 (Jan. 30, 2017); AR2_17358. One of the primary architects of the Final Rules was Defendant Bernhardt, a political appointee and former oil and gas lobbyist[12] who penned an op-ed calling FWS's prior regulatory framework "an unnecessary regulatory

[12] Coral Davenport, *Trump's Pick for Interior Dept. Continued Lobbying After Officially Vowing to Stop, New Files Show*, THE NEW YORK TIMES, *available at* https://nyti.ms/38STpSU (Apr. 4, 2019).

burden."[13]

Despite the breadth and magnitude of the regulatory reversals contained in the Final Rules, the drafting process was rushed, characterized by Department of Commerce ("DOC") employees as a "fire drill" with "completely unrealistic" deadlines. AR2_7503, 57945.[14] Moreover, the content of the Final Rules was not driven by scientists, environmentalists, or experienced Department of Interior ("DOI") or DOC employees—but by various industry groups and the outgoing administration's industry-driven political agenda. *See, e.g.*, AR2_119551 ("[T]his document reflects the coordinated attempt of the joint FWS/NMFS writing team to effectuate the ***political direction*** they have been given . . . ." (emphasis added)).[15] Although agency staff were asked for their views, they knew they had little say on the content of the changes. *See, e.g.*, AR2_54918 ("Given how the proposed regs played out, it[']s unlikely internal comments will have much influence in developing any final regulations that may come out of this."); 54934 ("I agree . . . , but I think staff would appreciate knowing that we at least went on record with our comments about proposed changes that are workable and those that are problematic."); 55105 ("[H]ow should we voice our concerns regardless of the fact that it has been stated that we have no voice in changing what has already been presented?").

The administrative record also shows the Services searched for "concrete examples of

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[13] David Bernhardt, *At Interior, we're ready to bring the Endangered Species Act up to date*, WASHINGTON POST, *available at* https://wapo.st/3qs85xX (Aug. 9, 2018). A government scientist called Mr. Bernhardt's op-ed "misleading." AR2_140437. Given Mr. Bernhardt's recent lobbying work, and the tangible benefits the Final Rules confer on the industries he serviced, there are serious questions as to whether he should have been involved in the rulemaking process at all. *See* 5 C.F.R. § 2635.502(b)(iv); E.O. 13770 § 6 (Jan. 28, 2017). Mr. Bernhardt appears to have belatedly realized this, as he sought clearance from a DOI ethics attorney in July 2018 as to whether he "may participate in the rulemaking process," AR2_52202, *after* he had already been at the helm of the process for eight months. *See, e.g.*, AR2_3466, 4685, 4959, 7456, 11581, 16765, 17073, 17620, 21495, 37682, 37990, 39249. Although the attorney provided the requested clearance, former DOI officials have described the exchanges between this attorney and his long-time superior, Mr. Bernhardt, as "extraordinary," "atypical," and "intimidation." Coral Davenport, *Interior Chief's Lobbying Past Has Challenged the Agency's Ethics Referees*, NEW YORK TIMES, *available at* https://nyti.ms/2XQcQVS (Nov. 9, 2019).

[14] *See also* AR2_4445, 5239, 5385, 7503, 10288, 35621, 50817 (internal DOC and DOI correspondence regarding rushed drafting process).

[15] *See also, e.g.*, AR_2206, 2214, 2230, 2369, 2424, 2572, 2656, 2713, 2847, 2869 (industry group letters pre-dating Proposed Rules, proposing many of the changes ultimately adopted); AR2_3466, 4685, 4959, 7456, 11581, 16765, 17073, 17620, 21495, 37682, 37990, 39249 (internal DOC and DOI correspondence showing Proposed Rules driven by political appointees).

how the proposed regs will help implementation of the ESA" *after* they had already been written and shortly before publication of the proposed rules. AR2_51269 (July 13, 2018); *see also* AR2_50662 (July 12, 2018) ("Gary [Frazer of FWS] also requested we characterize the conservation benefits of species-specific 4(d) rules – not just saying get us consistent with NMFS."). It therefore appears Federal Defendants knew what they wanted to accomplish and sought to justify their actions after the fact to attempt to comply with the APA. They failed.

The proposed rules were published on July 25, 2018 and set forth a potpourri of changes to ESA regulations, specifically designed to weaken implementation of the ESA. 83 Fed. Reg. 35174 (July 25, 2018) ("Proposed 4(d) Rule"); 83 Fed. Reg. 35193 (July 25, 2018) ("Proposed Listing Rule"); 83 Fed. Reg. 35178 ("Proposed Interagency Consultation Rule") (together, the "Proposed Rules"). Internal correspondence shows the Services predicted that the Proposed Rules would be controversial. *See, e.g.*, AR2_16876, 25908. They were right. During the 60-day comment period, the Services were flooded with over 200,000 comments in opposition to the Proposed Rules, including from ALDF (AR_164955), members of the U.S. Senate and House of Representatives (*e.g.*, AR_545, 71834), a legion of environmental groups (*e.g.*, AR_54603, 73602, 75403, 86073, 95261), hundreds of scientists (*e.g.*, AR_94648, 99923), law professors (*e.g.*, AR_73938), State and local governments (*e.g.*, AR_83182, 91280, 91395), and numerous other concerned members of the public. These comments made clear to the Services that the Proposed Rules were unlawful and detrimental to the species and habitat they are statutorily required to protect.

For example, ALDF and the Animal Welfare Institute submitted a joint comment highlighting how the Proposed 4(d) Rule violated Section 4(d) of the ESA, which requires the Services to issue regulations to provide for the conservation of species listed as threatened, by leaving threatened species without legal protections unless and until the Services issue species-specific regulations. AR_164955. The comment further explained how the Proposed 4(d) Rule was especially problematic for captive animals in the contexts of exhibition and canned hunts. AR_164956. Without the protections afforded by the former Blanket 4(d) Rule, captive threatened animals would be left vulnerable to "harm, harassment, and death" without any

oversight from the Services, without any means to address mistreatment, and without the vital safeguards essential to ensure their proper treatment. *Id*.

Additionally, members of both chambers of Congress urged the Services to reconsider the Proposed Rules and to strengthen the ESA and related regulations instead. AR_546, 71836. One hundred and five members of the U.S. House of Representatives submitted a joint comment opposing the Proposed Rules, arguing that they "undermine essential conservation tools that have protected imperiled species and their habitats for decades." AR_545. Similarly, 20 members of the U.S. Senate submitted a joint comment opposing the Proposed Rules, arguing that they were inconsistent with the letter and spirit of the ESA, and expressing concerns regarding various proposed revisions. AR_71834. Senators identified many proposed revisions as problematic, including those that allowed the creation of economic impact assessments for purported informational purposes, limited the consideration of climate change during listing decisions, rescinded blanket 4(d) protections for threatened species, and altered definitions in a manner that made it harder to conserve imperiled species and their critical habitats. AR_71834-36.

The Services also received numerous comments specific to the Proposed 4(d) Rule. For example, Woodland Park Zoo (the "Zoo") submitted a comment arguing that the blanket 4(d) protections afforded by the prior rule provided an important safeguard for threatened species. AR_55198. The Zoo explained that the Proposed 4(d) Rule was unnecessary because FWS could, and had, issued species-specific 4(d) rules under the prior rule. *Id.* The Zoo further urged that, to the extent the Services' approaches to 4(d) protections needed to be harmonized, NMFS should adopt FWS's more protective approach because "[t]he Services already suffer a lack of resources, with USFWS currently facing a backlog of more than 300 species awaiting determination for protected status." *Id*.; *see also* AR _17009, 17011 (opposing removal of blanket 4(d) protections from future threatened species and highlighting that, in light of the administration's regulatory reform agenda, species-specific rules are "fraught with opportunity to gut protection altogether").

Similarly, the Services received numerous comments opposing the Proposed Listing Rule. For example, World Wildlife Fund ("WWF") submitted a comment highlighting several

problematic revisions in the Proposed Listing Rule. AR_76504. WWF opposed the removal of the phrase "without reference to possible economic or other impacts of such determinations" as risking the introduction of non-science-based considerations into the listing decision-making process. AR_76530. WWF's comment further argued the Proposed Listing Rule's definition of "foreseeable future" was contrary to the precautionary principle at the heart of the ESA and allowed for "undue speculation" to permeate listing decisions, "rather than the best scientific and commercial data available" as required by the ESA. AR_76531. Additionally, WWF opposed the expansion of "not prudent" exceptions to the designation of critical habitat as impeding the Services' actions mandated by the conservation purposes of the ESA. AR_76532-33; *see also* AR_46190 (opposing the Proposed Rules as "part of an orchestrated assault on our nation's conservation framework" and highlighting problems with the Proposed Listing Rule's various new definitions and expansion of imprudent exceptions to critical habitat designations as providing "a blank check to deny designation of critical habitat for indeterminate reasons"); AR _50369 (opposing the proposed definition of "foreseeable future" as overly narrow and restricting the Services' ability to list species as threatened, especially those imperiled by climate change); AR_17012 (opposing regulation as merely serving to justify the Services' inaction and failure to acknowledge and address the impact of climate change on imperiled species and critical habitat).

Additionally, the Services received numerous comments opposing the Proposed Interagency Consultation Rule. For example, the Animal Law Committee of the New York City Bar Association submitted a comment taking issue with the Proposed Rule's definition of "destruction or adverse modification" of critical habitat, stressing that it discounted "climate change – one of the biggest perils facing endangered and threatened species today" and "create[d] uncertainty, invite[d] litigation, and put[] species at risk." AR_56163, 56173; *see also* AR_50369 (opposing changes that would permit the Services to entrust impact determinations to other Federal agencies and thereby decline to render opinions they are uniquely qualified to provide).

The Final Rules were published on August 27, 2019, with an effective date of September 26, 2019. 84 Fed. Reg. at 44753, 44976, 45020. In promulgating the Final Rues, the Services did not prepare EISes pursuant to NEPA, reasoning that the revisions were "fundamentally

administrative, legal, technical, or procedural in nature." 84 Fed. Reg. at 44759, 45015, 45051. Nor did the Services honor requests to extend the comment period or hold a public hearing regarding the rules. *See, e.g.*, 84 Fed. Reg. at 44754.

Notwithstanding the over 200,000 comments received in opposition, with certain exceptions for which the Services were required to seek further comment, the Services made minimal substantive revisions to the rules, carrying through in full their core attacks on Sections 4, 7, and 9 of the ESA. *See infra*, at Argument, Section II.A-C. Moreover, the Services made certain further revisions to the Final Rules that were not a logical outgrowth of the Proposed Rules, compounding their attempts to weaken the ESA. *See infra*, at Argument, Section IV. The Services also responded to many serious comments with cursory denials or vague assertions that the public should simply trust that they will work to conserve listed species, notwithstanding the Final Rules' removal of many of the prior safeguards ensuring such conservation.

B. Listing and Backlog Data and Harm to ALDF

Data show that listing and regulations protecting against "take" are effective in helping threatened and endangered species recover. AR_27864, 27870. Accordingly, experts believe that "imperiled species should be listed under the ESA as soon as possible." *Id.* Notwithstanding this research, FWS has a long, documented history of delayed listing decisions. AR_76504, 76507-10. From 1983 to 2014, species waited an average of 12 years for a listing decision. AR_76509. The consequences of this inaction were dire: between 1973 and 1995, at least 42 species went extinct while awaiting a listing decision and without ever receiving protections under the ESA. AR_76507.

The Services currently have a significant petition backlog of imperiled species that are awaiting a listing decision. FWS's Environmental Conservation Online System ("ECOS") shows that there are currently 78 ESA listing petitions pending with FWS that are either awaiting findings or have been found to be "warranted" and "not precluded." *See* 16 U.S.C. § 1533(b)(3). The oldest of these pending petitions was filed in 1994. *See* ECOS, Endangered Species Act Petitions Received by Fish and Wildlife Service, *available at* https://bit.ly/2kjTCI2 (last visited Dec. 30, 2020). Despite this, FWS has made little progress on reducing its backlog. Currently,

only 26 species are proposed for listing. *See* ECOS, Species Proposed for Listing, *available at* https://bit.ly/2kQc7Ej (last visited Dec. 30, 2020). Since the start of 2017, FWS has only listed a total of 19 species as threatened or endangered: specifically, nine in 2017, five in 2018, four in 2019, and one in 2020. *See* ECOS, U.S. Federal Endangered and Threatened Species by Calendar Year, *available at* https://bit.ly/3rU93Vi (last visited Dec. 30, 2020).[16]

Moreover, notwithstanding FWS's representations in the Final Rules, they have not become more efficient at creating species-specific rules for threatened species over time.[17] To the contrary, FWS's own data demonstrate that its efficiency has remained stagnant or worsened:

Table 1. Number of Threatened Species Listed by FWS Without a Species-Specific 4(d) Rule Per Year[18]

	2014	2015	2016	2017	2018
Number of Species Listed as Threatened	19	11	16	5	4
Number Listed with Species-Specific Rules	8	3	5	0	1
Number of Species Downlisted from Endangered to Threatened	2	0	5	1	3
Number Downlisted with a Species-Specific 4(d) Rule	1	0	1	0	0

In fact, there are currently 365 threatened species listed by the FWS without a species-specific rule. *See* ECOS, Species with 4d Rules, *available at* https://bit.ly/38ba3MR (last visited Dec. 30, 2020) (showing 28 threatened species with a species-specific rule); ECOS, FWS Listed Species Data Explorer, *available at* https://bit.ly/2X8RXoz (last visited Dec. 30, 2020) (showing 393 total species listed as threatened). Further, FWS admits that it has historically finalized an average of only two species-specific rules per year, yet expects to list at least four new species as threatened per year. AR_98-99. FWS further admits that it intends to evaluate 64 endangered species over the next three years for potential downlisting, and therefore may need to develop "up to five *additional* species-specific 4(d) rules per year" for these newly-downlisted threatened

[16] *See also In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704 F.3d 972, 975 (D.C. Cir. 2013) (summarizing certain listing backlog data as of 2013).

[17] For instance, the Trispot darter was listed as threatened on January 28, 2019, but a final species-specific 4(d) rule for the species was only adopted 612 days after the listing decision. *See* ECOS, Trispot darter (*Etheostoma trisella*), *available at* https://ecos.fws.gov/ecp/species/8219 (last visited Jan. 7, 2021). The species-specific 4(d) rule was adopted on September 30, 2020 and went into effect on October 30, 2020. 85 Fed. Reg. 61614 (Sept. 30, 2020).

[18] Data taken from AR_100-02, compiled by the FWS.

species. AR_99 (emphasis added). In short, the data show FWS cannot keep up and it is arbitrary, capricious, and (frankly) irrational to build a set of regulations around the *opposite* supposition, *i.e.*, that FWS will promulgate species-specific 4(d) rules concurrently with each new threatened species listing. 84 Fed. Reg. at 44753. Indeed, all the available data shows that, if the 4(d) Rule is not vacated, numerous species will be listed (or downlisted) as threatened without a species-specific rule and without any Section 9 protections under the ESA, and will remain unprotected for an indeterminate length of time.

The Final Rules will therefore harm the species that ALDF's members observe and from which they derive recreational, aesthetic, and conservation benefits. Dkts. 62-2, 62-3, 62-4, 62-5. The Final Rules will also harm captive animals, whom ALDF works to protect. Dkt. 62-1 ¶¶ 3-9. ALDF has relied extensively on the ESA to protect threatened and endangered species from inadequate housing, treatment, and conditions for threatened animals at commercial facilities, to improve their physical and mental well-being, and to relocate them to sanctuaries where they can recover and flourish. *Id.* ¶¶ 4-9. If a captive animal is deemed "threatened," they will not have any take protections under the ESA unless and until FWS finalizes a species-specific rule for them—which, as discussed, can take years or never happen. During this indefinite waiting period, exhibited animals at zoos would be subject to mistreatment and poor living conditions and other captive animals could be bred and killed on canned hunting ranches without a permit or any federal oversight. Neither the APA nor the ESA allow for such a result.

ARGUMENT

I. STANDARD OF REVIEW

On summary judgment in an APA case, "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985). Under the APA, the Court must "hold unlawful and set aside" any agency action that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D); *see also Chevron,*

U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984) (holding that an agency may not promulgate regulations "manifestly contrary to the statute" it is charged with implementing). An agency action is "arbitrary and capricious" where the agency (i) "relied on factors which Congress has not intended it to consider," (ii) "entirely failed to consider an important aspect of the problem," (iii) "offered an explanation for its decision that runs counter to the evidence before the agency," or (iv) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency action "without adequate notice and comment" is also arbitrary and capricious. *Natural Resource Defense Council. v. U.S. E.P.A.*, 279 F.3d 1180, 1186 (9th Cir. 2002).

Administrative agencies "cannot flip-flop regulations on the whims of each new administration." *California v. Bernhardt*, 472 F. Supp. 3d at 600-01. Rather, agencies must provide a "'reasoned explanation' for disregarding prior factual findings," *id.* (citations omitted), and "good reasons for the new policy," *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). In articulating the reasons for any "changed position, an agency must be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2120 (2016) (quoting *Fox*, 556 U.S. at 515). Any "'[u]nexplained inconsistency' in agency policy" is sufficient in itself to render an agency action arbitrary and capricious. *Id.* (citation omitted). For example, in *Organized Vill. of Kake v. U.S.D.A.*, the Ninth Circuit held that an agency's contrary conclusions "[o]n precisely the same record" that was before the prior administration were arbitrary and capricious. 795 F.3d 956, 968 (9th Cir. 2015).

The arbitrary and capricious standard also applies to an administrative agency's decision not to complete an EIS under NEPA. *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1465-66 (9th Cir. 1996). Under this standard, the court "'must ensure that an agency has taken a 'hard look' at the environmental consequences of its proposed action.'" *Id.* at 1466 (quoting *Inland Empire Public Lands Council v. Schultz*, 992 F.2d 977, 980 (9th Cir. 1993)).

II. THE FINAL RULES VIOLATE THE APA AND ARE CONTRARY TO THE ESA.

The 4(d) Rule, Listing Rule, and Interagency Consultation Rule are each arbitrary and capricious under the APA and contrary to the ESA. Each rule should be vacated.

A. The 4(d) Rule Is Arbitrary and Capricious.

The 4(d) Rule prospectively flips the entire regulatory framework for the protection of threatened species on its head, abandoning 40 years of effective regulatory practice, without providing a single coherent or good-faith reason for doing so.

Section 4(d) of the ESA expressly provides the Services with authority to extend to threatened species, by regulation, the same protections afforded to endangered species under Section 9 of the ESA. 16 U.S.C. § 1533(d). In 1975, FWS exercised its authority under the ESA to accomplish this for all threatened species under its jurisdiction, subject to future issuance of a species-specific 4(d) rule that would tailor Section 9 protections for individual threatened species. 40 Fed. Reg. 44411, 44425 (Sept. 25, 1975). FWS later defended its decision to implement this so-called "Blanket 4(d) Rule" in the D.C. Circuit and won. *See Sweet Home*, 1 F.3d at 6 (holding that FWS's reading and application of Section 4(d) was reasonable). Accordingly, "as a general rule," for over 40 years, "all of the prohibitions applying to endangered species would apply to threatened species, unless otherwise provided for in a special rule." 42 Fed. Reg. 46539 (Sept. 16, 1977).

The Blanket 4(d) Rule provided significant protections to threatened species while FWS formulated species-specific rules—often times a years-long process, *see supra*, at Background, Section II.B—furthering FWS's conservation mandate under the ESA. Significantly, FWS itself concedes "***[t]he blanket rules have worked***, and will continue to work, to conserve already-threatened species." 84 Fed. Reg. at 44756 (emphasis added).

The new 4(d) Rule arbitrarily and capriciously rescinds these protections without any reasoned explanation. It provides that the protections extended to endangered species shall apply only to those threatened species listed "on or prior to September 26, 2019, unless the Secretary has promulgated species-specific provisions." 84 Fed. Reg. at 44760. Thus, going forward, a threatened animal, *i.e.*, one deemed likely to become endangered in the foreseeable future, 16

U.S.C. § 1532(20), receives ***no protections*** under the ESA unless and until the FWS creates a species-specific rule for that animal. Thus, upon listing, a threatened animal is just as unprotected under federal law as an animal who is not listed at all.

FWS's purported justifications for this drastic rule change—alleged increased efficiencies at FWS, aligning policies with NMFS, highlighting statutory distinctions, and speculation about creating new incentives for industry—are so cursory and unsupported that they can only be understood as pretextual. Indeed, the actual reason for this sea change is found in the final rule text: reducing permitting requirements for the outgoing administration's favored interest groups, which have moved in droves to intervene in this case, and some of which previously petitioned FWS for this exact change. *See* AR2_51586. FWS gives away the game by mentioning "permits" nearly a dozen times in the preamble to the final rule. 84 Fed. Reg. at 44754-57 (repeatedly stating that the 4(d) Rule would "remov[e] redundant permitting requirements," "reduc[e] the need for section 10 permits," and "reduce unneeded permitting"). This pretext is further belied by the administrative record, which suggests the changes were meant to appease industry groups as a political maneuver. *See supra*, at Background, Section II.A. Economic handouts, however, are not the charge of the FWS or mandate of the ESA; rather, the purpose of the law is conservation, "whatever the cost." *Tenn. Valley Auth.*, 437 U.S. at 184. Thus, in promulgating the 4(d) Rule, FWS "has relied on factors which Congress has not intended it to consider," and the rule must be vacated. *State Farm*, 463 U.S. at 43.

None of FWS's other purported reasons for promulgating the 4(d) Rule constitute a "reasoned explanation" for changing a position the agency held for over 40 years. *See Fox*, 556 U.S. at 515-16. The alleged problem FWS identified as needing fixing was that threatened species received too many protections while FWS drafted and finalized species-specific rules, and those protections purportedly burdened the regulated community unnecessarily during this interim period. *See* 84 Fed. Reg. at 44754-57. But rather than taking steps to shorten this interim period or committing to drafting species-specific rules faster, FWS chose to remove the interim protections altogether. FWS's justifications for taking this route—championing the outgoing administration's deregulatory agenda over their conservation mandate under the ESA—are

implausible and contrary to the evidence before the agency.

First, FWS tries to argue that there has been a change in circumstances such that the agency is more efficient and able to promulgate species-specific rules concurrently with a listing determination. 84 Fed. Reg. at 44754 ("We have gained considerable experience in developing species specific rules over the years."). But that is not a reason for a rule change: the agency has always had the authority to promulgate species-specific rules at listing, and did not need a new regulation to be able to do that. 16 U.S.C. § 1533(d). Moreover, it is demonstrably untrue and "counter to the evidence before the agency" that FWS has become more efficient at listing species over time. *State Farm*, 463 U.S. at 43. The data before the agency show the opposite. *See supra*, at Background, Section II.B. In 2014, for example, FWS promulgated nine species-specific rules for 21 species newly listed as threatened, whereas in 2017, it did not promulgate any species-specific rules for the six species newly listed as threatened. AR_100-02. FWS notes that it finalized 22 species-specific 4(d) rules between 2009 to 2018 compared to only 13 from 1997 to 2008, 84 Fed. Reg. at 44756, but that uptick is explained by settlement agreements FWS reached with environmental groups arising from lawsuits regarding FWS's listing practices, *see* AR_76508. The last few years of inefficiency are more reflective of business as usual at FWS.

Moreover, as discussed above, FWS would need to more than double its historical efficiency to keep pace with new listings and address the current backlog of 365 threatened species currently without species-specific rules. *See supra* at Background, Section II.B. FWS identifies no plausible plan or additional funding that would allow them to get this done. *See, e.g.*, AR_97 (admitting that resources to complete species-specific rules will continue to be "subject to the Congressionally established cap on ESA listing activities").[19] FWS suggests it will improve its efficiency because it "intend[s] to review existing species-specific 4(d) rules that could be used as a model or applied to the [newly listed] species in question." 84 Fed. Reg. at 44756. But that is something FWS could do before the revised rule, not a novel invention of the current FWS or a reason that the rule needed to be changed. Indeed, assuming that FWS really

[19] *See also* AR_260 (letter from U.S. Senators noting that "ESA recovery funding is less than 25% of what scientists say is necessary to protect species").

could speed up the drafting of species-specific rules (it cannot), it could just go ahead and *start doing that*, thereby reducing regulatory burdens where those reductions are consistent with science. Also, FWS's "plan" assumes—without any factual basis—that newly listed species will be sufficiently similar to species for which FWS has already made species-specific 4(d) rules to allow for the old rules to be used as models. The bottom line is that FWS's "model" theory is a counterfactual pretext: if referring to prior species-specific 4(d) rules increased FWS's efficiency in finalizing new such rules, we would have seen that increased efficiency in the more than 22 years of data presented by FWS. But the data shows no such efficiency gains. AR_100-02.

Tellingly, despite claiming that it is able to promulgate species-specific rules concurrently with each listing and that it intends to do so, FWS states multiple times in the Final Rule that it is *not* required to do so. In the Final Rule, FWS claims that it has "discretion to revise or promulgate species-specific rules *at any time* after final listing." 84 Fed. Reg. at 44753, 44757 (emphasis added). FWS even rejected a proposal to impose "a regulatory timeframe to reflect [its] intention to promulgate 4(d) rules at the time of listing," determining that "a binding requirement was not needed." *Id.* Accordingly, FWS's stated intention to promulgate species-specific rules at the time of listing is meaningless. There is no obligation in the Final Rule to provide threatened species with a species-specific rule *at all* and FWS will not bind itself to any specific deadline for issuing species-specific rules because, as the historical data shows, it cannot.

Indeed, if FWS really could draft species-specific rules concurrently with all listing decisions (and make those listing decisions on the same timeline it currently makes them), then the 4(d) Rule would be entirely unnecessary under FWS's own reasoning: *i.e.*, because there would be no interim period during which the Blanket 4(d) Rule would be in effect in the first place. FWS's argument is thus not only contrary to the historical data but also circular and self-defeating. If FWS really were to finalize species-specific rules and listings at the same time, it would only do so by further delaying the listing process. *See, e.g.*, *id.* at 44755 (admitting that creating "species-specific 4(d) rules for every threatened species may require additional resources at the time of listing relative to our prior practice of defaulting to . . . the blanket rules"). But that result would also undermine the conservation purpose of the ESA, because it would leave

threatened species without protections for a longer period of time as compared to the old rules.

Second, FWS justifies its policy reversal on the ground it desires to align itself with NMFS, which has not adopted a blanket 4(d) rule but has instead finalized species-specific rules at listing. 84 Fed. Reg. at 44754. As a practical matter, FWS could align itself with NMFS without the 4(d) Rule simply by promulgating species-specific rules at listing, which it has always had the authority to do. 16 U.S.C. § 1533(d). Moreover, FWS ignores the fact that NMFS is a smaller agency with a smaller workload and thus not a relevant point of comparison. *See, e.g.*, AR_76510 (NMFS is responsible for only 2.5% of wildlife subject to the ESA in the United States (93 of 3,730) and 0.02% of plants (1 of 4,854), whereas FWS is responsible for the rest); AR_112-23 (from 1997 to 2018, FWS evaluated 975 species for listing compared to NMFS's 259 species; from 1997 to 2018, FWS finalized 187 critical habitat designations compared to NMFS's 24 designations). Additionally, FWS does not explain how NMFS is a model agency to be emulated in this regard. Nowhere does FWS present data showing that NMFS has been more successful than, or even as successful as, FWS at conserving threatened or endangered species. Aligning the two agencies' procedures with regard to species-specific 4(d) rules is therefore not a reasoned, let alone coherent, explanation for overturning 40 years of successful regulatory practice, much less something that (at least on this record) is rationally related to the *conservation* mission of the ESA.

Third, FWS states that the rule change "further highlight[s] the statutory distinction between" endangered species and threatened species. 84 Fed. at 44756. As an initial matter, the revised 4(d) Rule is a capricious way to make this largely academic point. The statute specifically defines threatened species in terms of their risk of becoming endangered, and not as some entirely independent category which has no need for similar protections. *See* 16 U.S.C. § 1532(20). Indeed, Section 4(d) contemplates that threatened species receive protections "necessary and advisable to provide for [their] conservation." 16 U.S.C. § 1533(d). Additionally, threatened and endangered species were subject to clear differences under the prior regulatory regime. Most apparent in this context, FWS could strip threatened species, but not endangered species, of certain protections under the ESA by promulgating a species-specific rule under 16

U.S.C. § 1533(d). The D.C. Circuit held this was a "very real difference[]." *Sweet Home*, 1 F.3d at 7. FWS has also promulgated other regulations that highlight the distinction between threatened and endangered species, namely a "two-tier" permitting scheme that makes permits "more readily available for threatened species." *Id.* (citing 50 C.F.R. §§ 17.22-.23, .32; 40 Fed. Reg. 28713 (1975)). Furthermore, while perhaps emphasizing the difference between "threatened" and "endangered" species, the 4(d) Rule blurs the distinction between *unlisted* species and "threatened" species, as neither receives Section 9 protections under the new rule, at least until FWS finds the time and resources to draft a species-specific rule.

Fourth, FWS presents abject speculation about how the 4(d) Rule will promote conservation to justify its policy reversal. FWS muses that it "anticipate[s] landowners would be incentivized to take actions that would improve the status of endangered species" given the new rule, and that it "believe[s] that species-specific 4(d) rules for threatened species tailor species' protection with appropriate regulations that may incentivize conservation[.]" 84 Fed. Reg. at 44755-56; *see also id.* at 44756 ("[W]e believe these measures to increase public awareness, transparency, and predictability will enhance and expedite conservation"). But FWS provides no factual support for these vague assertions and platitudes, which do not constitute a reasoned explanation for rescinding the Blanket 4(d) Rule, and instead underscore that FWS's purported justifications for the 4(d) Rule are pretextual.

Finally, nowhere does FWS justify its policy reversal in light of the evidence before it, including that 42 species went extinct between 1973 and 1995 while awaiting a listing decision and ESA protections; the fact FWS has a backlog of over 350 threatened species awaiting a species-specific rule; or the fact that FWS itself projects needing to draft nine such rules per year and has historically only been able to draft two per year. *See supra*, at Background, Section II.B.

B. The Listing Rule is Arbitrary and Capricious.

The Listing Rule arbitrarily and capriciously makes it harder to list species as threatened, easier to delist threatened and endangered species, and easier not to designate critical habitat. It does so by introducing economics into what is supposed to be purely a scientific listing process; narrowly defining "foreseeable future," which is a key term in the definition of threatened

species; eliminating "recovery" as a delisting criterion; and expanding the narrow statutory "not prudent" exception to designating critical habitat.

1. The Listing Rule Improperly Injects Economic Considerations Into the Listing Process.

The Listing Rule improperly removes the former regulatory prohibition on considering the economic impacts of listing determinations and states that the Services intend to present economic data associated with proposed listings to the public during the listing process. 84 Fed. Reg. at 45023-25, 45052. These revisions lack any basis in the ESA and the Services have failed to provide any reasoned explanation for them.

Section 4 of the ESA requires the Services to determine which species should be listed as threatened or endangered, and to make such determinations "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). Congress added this language to the ESA in 1982, and in so doing, was adamant that "economic considerations have ***no relevance*** to determinations regarding the status of species" as threatened or endangered. H.R. Rep. No. 97-835, at 20 (1982) (emphasis added); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1266 (11th Cir. 2007) (discussing legislative history).[20] In 1983, the Services promulgated 50 C.F.R. § 424.11(b), which contained the now-stricken language, prohibiting "reference to possible economic or other impacts of such determination" in listing decisions, consistent with the statute. 48 Fed. Reg. 36062, 36065-66 (Aug. 9, 1983). The Services reasoned that this language was necessary "to ensure that decisions in every phase of the listing process are based solely on biological considerations, and to prohibit considerations of economic or other nonbiological factors from affecting such decisions." *Id.* at 36062.

Through the Listing Rule, the Services removed the clause "without reference to possible economic or other impacts of such determination" from 50 C.F.R. § 424.11(b) for the first time in 35 years. According to the Services, this language is allegedly problematic now because "some

[20] *See also Ariz. Cattle Growers' Assoc. v. Salazar*, 606 F.3d 1160, 1173 (9th Cir. 2010) ("Congress has directed the FWS to list species, and thus impose a regulatory burden, without consideration of the costs of doing so."); *N.M. Cattle Growers Assoc. v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1284 (10th Cir. 2001) ("[T]he ESA clearly bars economic considerations from having a seat at the table when the listing determination is being made.").

members of the public and Congress" want to know the economic impacts of proposed listings. 84 Fed. Reg. at 45025. The Services' reasoning is tortured and illogical. To start, the Services concede that under the ESA they cannot consider the economic impacts of a listing proposal in making a listing determination. *Id.* at 45024. Nevertheless, they argue that the ESA "does not prohibit the Services from compiling economic information or presenting that information to the public, as long as such information does not influence the listing determination." *Id.* While it is true that the ESA does not expressly *prohibit* the Services from disseminating economic information, it does make it clear that the mission of the Services is to implement the statute "solely on the basis of the best scientific and commercial data available," 16 U.S.C. § 1533(b)(1)(A), which is hardly consistent with the Services spending their limited conservation budget to study and publish information on the economic impacts of its decisions, which they clearly (and admittedly) are not authorized to consider in making their final listing determinations. Indeed, it is hard to understand how the Services' evaluation of economic impacts could meet their statutory obligation to act "solely" on the basis of science.

In addition, nothing about these revisions furthers the conservation mandate of the ESA. Informing the public that listing a particular animal as endangered might cost some interest group, business, or landowner money does nothing to protect that species from extinction, "whatever the cost." *Tenn. Valley Auth.*, 437 U.S. at 184. In the Final Rule, the Services offer vague references to "public transparency" to justify these revisions. 84 Fed. Reg. at 45024-26. But using limited government resources to make an economic case against a listing decision—a case which the Services admit they are statutorily bound to ignore—is not an exercise in transparency, but a wasteful, bad-faith attempt to undercut a decades-old statute. As noted in *Tennessee Valley Authority*, Congress has already deemed the value of endangered species to be "incalculable" and has otherwise "spoken in the plainest words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities[.]" 437 U.S. at 178, 194. The Services' revisions defy this precedent.

Additionally, nowhere do the Services explain where the resources and expertise to perform these economic analyses will come from. Given the chronic underfunding of the

Services and existing delays and backlogs in the listing process, *see supra*, at Background, Section II.B, resource constraints are "an important aspect of the problem," which the Services have "entirely failed to consider." *State Farm*, 463 U.S. at 43. Indeed, commenters asked how the Services "will deal with this additional workload," and the Services' answer was utterly non-responsive. 84 Fed. Reg. at 45026 (stating that they "intend to comply with statutory, court-ordered, and settlement agreement timelines," but "recognize the uncertainty of budget cycles and appropriated funding"). The Listing Rule must also be vacated for this reason.

Lastly, because performing these economic analyses can only delay the listing process further, these revisions are not neutral in their effects on endangered and threatened species—they are detrimental. Species that are not listed as endangered or threatened receive no protections under the ESA, and delaying listing so that the Services can cobble together an irrelevant economic study (as well as draft species-specific rules for threatened species prior to listing) will only accelerate an imperiled species' fall into extinction.

2. The Listing Rule Narrowly and Arbitrarily Defines the Term "Foreseeable Future" to Make Listing Threatened Species More Difficult.

Additionally, the Listing Rule arbitrarily defines "foreseeable future" in a manner that is contrary to the policy of "institutionalized caution" in the ESA and the requirement that the Services base listing decisions on the best available science. *Tenn. Valley Auth.*, 437 U.S. at 194; 16 U.S.C. § 1533(b)(1)(A). Under the ESA, the Services must list a species as "threatened" if the species "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). While the ESA does not define "foreseeable future," the Listing Rule defines the term as "only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely," where the Services define "likely" to mean "more likely than not." 84 Fed. Reg. at 45020, 45052.

Again, this definition is a thinly-veiled attempt by the Services to empower themselves to ignore the best available science, including climate change science, as it allows the Services to discount such science as not "reasonably determinable" and as having less than a 50% chance of

occurring.[21] This definition also ignores a basic risk assessment principle that, if a threat is sufficiently serious in magnitude—like the threat of extinction—then it should not be ignored simply because "it cannot be said that the probability of harm is more likely than not." *Reserve Mining Co. v. E.P.A.*, 514 F.2d 492, 520 (8th Cir. 1975); *see also Ethyl Corp. v. E.P.A.*, 541 F.2d 1, 18 (D.C. Cir. 1976) ("Danger . . . is not set by a fixed probability of harm, but rather is composed of reciprocal elements of risk and harm, or probability and severity."). Indeed, as the Ninth Circuit recently held, "[t]he fact that climate projections . . . may be volatile does not deprive those projections of value in the rulemaking process." *Alaska Oil & Gas Assoc. v. Pritzker*, 840 F.3d 671, 680 (9th Cir. 2016). The Services fail to offer any reasoned explanation for these changes, and willfully ignore evidence and arguments in the record that run contrary to their decision, instead offering once again the hollow and unconvincing assertion that they "fully intend to continue to apply the best available data when making conclusions about the foreseeable future." 84 Fed. Reg. at 45027. That is insufficient given the language of the new rule.

3. The Listing Rule Improperly Eliminates "Recovery" as a Factor to Be Considered in Delisting Determinations.

In addition to making it harder to list a species as "threatened," the Listing Rule arbitrarily and capriciously makes it easier to remove species from the threatened and endangered lists by deleting "recovery" from the list of factors the Services may consider in making a delisting decision. 84 Fed. Reg. at 45035. Species recovery, however, is one of the fundamental purposes of the ESA, and removing the criterion from the rules creates an unacceptable risk of premature delisting. *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004), *amended*, 387 F.3d 968 (9th Cir. 2004) ("[T]he ESA was enacted . . . to allow a species to recover to the point where it may be delisted."); *see also* 16 U.S.C. § 1533(f) (requiring the Services to develop and implement "recovery plans" incorporating "objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the [threatened or endangered] list").

[21] "More likely than not" is typically and logically construed as meaning greater than 50%. *See, e.g.*, *Onyx Pharm., Inc. v. Bayer Corp.*, 863 F. Supp. 2d 894, 903-04 (N.D. Cal. 2011) (collecting authorities).

Once again, the Services fail to provide a reasoned explanation for this change or justify their decision in light of the record, stating only that "the existing regulatory language [in 50 C.F.R. § 424.11], which was intended to provide examples of when a species should be removed from the lists, has been, in some instances, misinterpreted as establishing criteria for delisting," and paying lip service to "the goal of the Act and the Services . . . to recover threatened and endangered species." 84 Fed. Reg. at 45035. This reasoning is incoherent and empty; it does not explain why "recovery" was singled out for removal from the list of delisting factors in 50 C.F.R. § 424.11 if every other factor on that list is a mere "example" too.

4. The Listing Rule Improperly Expands the Circumstances Under Which the Services May Refuse to Designate Critical Habitat.

The Listing Rule also improperly expands the circumstances under which the Services may find it "not prudent" to designate critical habitat. 84 Fed. Reg. at 45053. The ESA provides that the Services "shall" designate a species' critical habitat concurrently with a listing determination "to the maximum extent prudent and determinable" and "on the basis of the best scientific data available." 16 U.S.C. § 1533(a)(3)(A), (b)(2). The "imprudence exception" to designating critical habitat is "narrow," and, according to Congress, is only to be invoked in "'rare circumstances.'" *Natural Resources Defense Council. v. U.S. Dep't of Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997) (quoting H.R. Rep. No. 95-1625, at 17 (1978)); *see also Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 443 (5th Cir. 2001) (rejecting the Services' attempt to "invert[] the intent" of the statute by improperly treating "critical habitat designation [as] the exception and not the rule"). Undeterred by their statutory mandate, legislative history, and appellate case law, the Services created a laundry list of new exceptions to the critical habitat designation statute, which they admit "may increase the likelihood that they would determine that designating critical habitat would not be prudent." AR_119. Each of these new exceptions is arbitrary, capricious, and without any basis in the ESA or the evidence in the record before the Services.

Especially problematic is the new imprudence exception that permits the Services to decline to designate critical habitat merely if "[t]he Secretary otherwise determines that

designation of critical habitat would not be prudent based on the best scientific data available." 84 Fed. Reg. at 45053. This vague and unbridled authority to deny a critical habitat designation for unspecified reasons invites abuse and conflicts with the conservation mandate of the ESA. It also contradicts Congress's intent that the imprudence exception only be applied in "rare circumstances." *Natural Resources Defense Council*, 113 F.3d at 1126.

The Listing Rule further allows the Services to decline to designate critical habitat where the relevant threats to the habitat "stem solely from causes that cannot be addressed through management actions resulting from [section 7] consultations." 84 Fed. Reg. at 45053. This is a thinly-veiled attempt to allow the Services to disregard climate change science in making critical habitat determinations, *see id.* at 45042 (providing the examples of "melting glaciers, sea level rise, or reduced snowpack" as problems that management actions cannot address), which is improper given the ESA's requirement that the Services consult and rely upon the best scientific data available, 16 U.S.C. § 1533(b)(2). Indeed, as the record shows, the impacts of climate change on habitat are a necessary consideration in effectively identifying habitat that will ensure the continued survival of a displaced species. *See, e.g.*, AR_91299 at n.40 (collecting sources).

In tying the critical habitat designations to management actions that can address particular threats, the Services make two arbitrary and flawed assumptions: first, that the ESA requires such management actions to be available before critical habitat may be designated (it does not), and second, that the only value of a critical habitat designation comes from management actions identified through section 7 consultations (again, untrue). As an initial matter, nowhere does the ESA state that management actions that can address certain threats are a prerequisite to critical habitat designations. Rather, the ESA mandates critical habitat designations and interagency consultations in separate sections of the statute, *see* 16 U.S.C. §§ 1533(a)(3), 1536(a)(2), and requires that critical habitat be designated on the basis of enumerated factors that do not include management actions with a particular effect, *see* 16 U.S.C. § 1533(b)(2). Additionally, the Services themselves have elsewhere admitted that designation of critical habitat "can contribute to the conservation of listed species in several ways," only one of which is section 7

consultations. 81 Fed. Reg. 7414, 7414-15 (Feb. 11, 2016)[22]; *see also Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280, 1288 (D. Haw. 1998) (observing that "there are significant substantive and procedural protections that result from the designation of a critical habitat outside of the consultation requirements of Section 7").

The Listing Rule also flouts the ESA by creating an overly heightened standard for designating unoccupied habitat as critical. Under the ESA, the Services "shall" designate unoccupied habitat as critical "on the basis of the best scientific data available" and "upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. §§ 1532(5)(A)(ii), 1533(b)(2). The Listing Rule ratchets up this standard by requiring that the Services "first evaluate areas occupied by the species[]" and determine that such occupied habitat is "inadequate to ensure the conservation of the species[,]" and then "determine that there is a reasonable certainty both that the [unoccupied] area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species." 84 Fed. Reg. at 45053. The Services admit this formulation "impos[es] a heightened standard for unoccupied areas to be designated as critical habitat," purportedly to reduce "regulatory burden . . . when species are not present in an area."[23] This formulation is arbitrary and capricious for multiple reasons.

First, the Services rejected precisely this "rigid step-wise approach" in 2016 based on "years" of experience, finding that "concurrent evaluation of occupied and unoccupied areas for a critical habitat designation" is a more effective conservation tool, particularly for wide ranging species. 81 Fed. Reg. at 7415; *see also id.* at 7434 (admitting "there is no suggestion in the legislative history that the Services were expected to exhaust occupied habitat before considering

[22] For example, the Services indicated that designating critical habitat "identif[ies] areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the Act," "helps focus the conservation efforts of other conservation partners, such as State and local governments, nongovernmental organizations, and individuals," "provides a form of early conservation planning guidance . . . to bridge the gap until the Services can complete recovery planning." *Id.*

[23] U.S. Department of the Interior, *Trump Administration Improves the Implementing Regulations of the Endangered Species Act*, Press Release, *available at* https://www.doi.gov/pressreleases/endangered-species-act (Aug. 12, 2019).

whether any unoccupied area may be essential."). The record before the agency has not changed and yet the Services have neither explained nor justified their diametrically different approach to critical habitat designations. *See Organized Vill. of Kake*, 795 F.3d at 968; *Fox*, 556 U.S. at 515. Moreover, concurrent evaluation is fully consistent with the ESA, as the ESA does not require the Services to first designate occupied habitat as critical, but instead requires the Services to follow the best available science and determine what areas should be designated as necessary to provide for the species' long-term conservation. 16 U.S.C. § 1533(b)(2). And this makes sense, as explained by comments in the record: a threatened or endangered species is, by definition, shrinking in population size and likely does not occupy all of the same habitat it historically occupied; further, due to climate change, animals are migrating to currently unoccupied habitat in order to adapt to rapidly changing circumstances.[24] Indeed, as the Services explained in 2016, "there may be instances in which particular unoccupied habitat is more important to the conservation of the species than some occupied habitat." 81 Fed. Reg. at 7434 (listing examples). To prioritize occupied habitat over unoccupied habitat as the Listing Rule does is therefore arbitrary and capricious, and contrary to the conservation mandate of the ESA.

Second, the notion that there must be "reasonable certainty" that unoccupied habitat will contribute to conservation injects a higher standard of proof into the analysis than the ESA requires. The ESA requires that the Services designate critical habitat "on the basis of the best scientific data available," 16 U.S.C. § 1533(b)(2); it does not require "reasonable certainty," which the Services define as a "high degree of certainty," 84 Fed. Reg. at 45022. *See Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1664 (holding that the "best scientific data available" standard "accepts agency decisions in the face of uncertainty"); AR_76505 ("[T]he science of extinction is not always certain[.]"). Imposing this heightened standard is also inconsistent with the policy of "institutionalized caution" that permeates the ESA. *Tenn. Valley Auth.*, 437 U.S. at 194.

Third, the requirement that the unoccupied "area contains one or more of those physical or biological features essential to the conservation of the species" is contrary to the ESA, which only imposes those requirements on *occupied* habitat. 16 U.S.C. § 1532(5)(A)(i). This

[24] *See* AR_91299 at n.40 (compiling scholarly sources).

requirement is also contrary to the Services' position on this identical issue in 2018. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, No. 17-71, Br. for Federal Respondents at 37-38 (June 2018) (arguing that "an unoccupied area may be 'essential' even if it currently lacks all features of the species' occupied critical habitat"). Again, the ESA requires that the Services follow the science, 16 U.S.C. § 1533(b)(2), and this aspect of the Listing Rule attempts to circumvent that requirement by adding new and arbitrary obstacles to designating unoccupied habitat as critical.

The Services have also failed to provide any "reasoned explanation" for their reversal on these issues. *Fox*, 556 U.S. at 515-16. They claim that they have "revisited [their] interpretation [of unoccupied critical habitat] in light of the recent *Weyerhaeuser* decision," 84 Fed. Reg. at 45023, but that case merely held that a "critical habitat" must also be a "habitat," *Weyerhaeuser Co v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018). The Court remanded to the Fifth Circuit to interpret the meaning of "habitat," which the Fifth Circuit did not do,[25] and did not in any way address the steps the Services should take in determining whether unoccupied habitat is critical. *Id.* at 369. The Services' attempt to justify their revision on this basis is therefore unjustified.

Finally, in light of the substance of the revisions to the Listing Rule, the Services' vague assertion that not prudent determinations should "remain rare" is utterly hollow. 84 Fed. Reg. at 45041. Indeed, between 1997 and 2018, FWS made only 12 not prudent determinations out of 187 critical habitat designations (6 percent). AR_119-20. Since the Listing Rule became effective, however, FWS has made not prudent determinations for 4 out of 9 species considered (44 percent).[26]

[25] Instead, the Fifth Circuit remanded to the District Court, which did not decide the issue either, as the parties settled prior to any decision of the court. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, No. 2:13cv234 (E.D. La. July 3, 2019), Dkt. 174 (Consent Decree).

[26] Not prudent determinations: 85 Fed. Reg. 63764 (Oct. 8, 2020) (Eastern Black Rail); 85 Fed. Reg. 54281 (Sept. 1, 2020) (Rusty Patched Bumble Bee); 84 Fed. Reg. 64210 (Nov. 21, 2019) (Meltwater Lednian Stonefly and Western Glacier Stonefly). Prudent determinations: 85 Fed. Reg. 61619 (Sept. 30, 2020) (Trispot Darter); 85 Fed. Reg. 39077 (June 30, 2020) (Elfin-Woods Warbler); 85 Fed. Reg. 37576 (June 23, 2020) (Sonoyta Mud Turtle); 85 Fed. Reg. 26786 (May 5, 2020) (Island Marble Butterfly); 85 Fed. Reg. 11238 (Feb. 26, 2020) (Black Pinesnake).

C. The Interagency Consultation Rule is Arbitrary and Capricious.

Through the Interagency Consultation Rule, the Services attempt to undercut the Section 7(a)(2) consultation process by arbitrarily and capriciously revising defined terms; adding new terms designed to make greenlighting potentially detrimental federal agency actions easier and faster, thereby risking harm to listed species and critical habitat; and delegating their statutory duties to make biological determinations to other federal agencies.

Under Section 7 of the ESA, if a federal agency contemplates any action that "may affect" a threatened or endangered species or its critical habitat, the agency must consult with either FWS or NMFS to ensure that the action is not likely to jeopardize the species or result in the "destruction or adverse modification" of the habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). This consultation process is intended to result in FWS or NMFS issuing a biological opinion, using "the best scientific and commercial data available," *id.*, discussing the "environmental baseline" of the species and habitat, evaluating the "effects of the action" on the species or habitat against that baseline, and determining whether the action is likely to jeopardize the species or result in the destruction or adverse modification of the habitat, 50 C.F.R. § 402.14(h). If the Services conclude that jeopardy, destruction, or adverse modification is likely, then any "take" resulting from the proposed action exposes those responsible to civil and criminal penalties. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1107 (9th Cir. 2012). The Interagency Consultation Rule disrupts the consultation process in numerous ways.

First, the rule redefines what it means to destroy or adversely modify critical habitat, by adding that the agency action must appreciably diminish the value of the habitat "as a whole," and deleting the second sentence in the definition: "Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features." 84 Fed. Reg. at 44981, 44985.[27] The addition of the phrase "as a whole" makes it easier for the Services to issue no-

[27] The full definition now reads: "Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat *as a whole* for the conservation of a listed species." 84 Fed. Reg. at 45016 (emphasis added).

jeopardy opinions for agency actions that only diminish a portion of a listed species' critical habitat, even if the best available science indicates that such a localized impact or the cumulative effect of multiple localized impacts may be biologically significant. This result is contrary to Section 7(a)(2) of the ESA, which requires that the Services rely on the best available science, as well as the conservation mandate of the ESA. 16 U.S.C. §§ 1531(b)-(c), 1536(a)(2), (b)(3)(A), (c)(1). It is also contrary to Ninth Circuit authority. *See Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1037 (9th Cir. 2001) ("If in fact NMFS disregards these effects as 'localized' when they can have significant aggregate effects, it acts arbitrarily and capriciously."); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008) ("This type of slow slide into oblivion is one of the very ills the ESA seeks to prevent."). The Services' response to comments raising this concern is a conclusory denial that they would discount or ignore localized impacts, *see* 84 Fed. Reg. at 44983, but the plain language of the words "as a whole" permit them to do exactly that, as they admit, *see id.* at 44981 (affirming the Services' intent that the jeopardy determination be "made at the scale of the entire critical habitat designation").

The Services' justification for deleting the second sentence of the definition is equally conclusory and unreasoned. Despite stating in 2016 that the sentence provided "clarity and transparency to the definition and its implementation," including by emphasizing the proper focus of the Services' jeopardy inquiry, 81 Fed. Reg. 7214, 7219 (Feb. 11, 2016), the Services reverse their prior position and now say the sentence causes unspecified "confusion" and is therefore "unnecessary," 84 Fed. Reg. at 44985. This reasoning makes little sense. On its face, the deleted sentence provided non-exhaustive examples of destruction and adverse modification, rooted in the ESA, 16 U.S.C. § 1532(5), that helped guide understanding of those terms. The Services provide no explanation as to how removing illustrative examples from the definition remedies the alleged confusion or does anything but make it easier to issue no-jeopardy opinions in response to agency actions that threaten "physical or biological features essential" to conservation.

Second, also under the specious guise of clarifying an allegedly "confus[ing]" definition, the Services re-define "effects of the action" in a manner that also makes it easier for the Services

to issue no-jeopardy opinions. 84 Fed. Reg. at 44977. "Effects of the action" was previously defined as "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline." 50 C.F.R. § 402.02 (2016). The Services now narrow the definition, revising it as "all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur *but for* the proposed action and it is *reasonably certain* to occur." 84 Fed. Reg. at 45016 (emphasis added). The Services also define actions "reasonably certain to occur" as those that are "based on clear and substantial information." *Id.* at 44981. Put differently, in deciding whether to issue a no-jeopardy opinion, the Services now will *not* consider the effects of an agency action on listed species or critical habitat unless they find but-for causation and reasonable certainty, based on clear and substantial information. This is a heightened standard absent from the prior definition that, like many other of the Services' revisions, arbitrarily permits them to ignore the best available science—including climate change science—in executing their statutory duties.

Additionally, the Services also re-define "environmental baseline" to include "[t]he consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify[.]" 84 Fed. Reg. at 45016. The environmental baseline is meant to be used to compare the condition of the listed species and critical habitat "in the action area with and without the effects of the proposed action[.]" *Id.* at 44978. But including consequences from ongoing activities in the baseline arbitrarily precludes the Services from considering the full range of effects of an agency action on listed species and critical habitat, particularly where the action is ongoing. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008) (holding that NMFS may not "sweep so-called 'nondiscretionary' operations into the environmental baseline, thereby excluding them from the requisite ESA jeopardy analysis"); *Am. Rivers v. Fed. Energy Reg. Comm'n*, 895 F.3d 32, 47 (D.C. Cir. 2018) (holding that "attributing ongoing project impacts" of existing dams "to the 'baseline' and excluding those impacts from the jeopardy analysis" is

"arbitrary").

Third, contrary to established law and without any reasoned explanation, the Services add to the formal consultation regulation that, in formulating their biological opinions, the Services will consider "[m]easures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action" without "requir[ing] any additional demonstration of binding plans." 84 Fed. Reg. at 45017. This addition allows the Services to issue a no-jeopardy opinion if a federal agency merely states it will implement mitigation measures without any binding agreement to do so. The Ninth Circuit, however, expressly rejected the Services' ability to accept "even a sincere general commitment" from another agency to engage in mitigation efforts, instead requiring "specific and binding plans" and "a clear, definite commitment of resources for future improvements." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d at 935-36. The Services acknowledge the Ninth Circuit's ruling on this issue, but repudiate it, stating, "[t]his judicially created standard is not required by the [ESA] or the existing regulations." 83 Fed. Reg. at 35187; *see also* 84 Fed. Reg. at 45002-03 (repeating they "disagree" with the Ninth Circuit's ruling and do not intend to follow it). Moreover, in response to comments that they should comply with Ninth Circuit case law, the Services state, without any legal support, that they are entitled to presume that proposed mitigation actions will occur and defer to the federal action agencies. 84 Fed. Reg. at 45003. The Services are wrong. Without any specific, binding mitigation plan, the federal action agency, "in consultation with [the Services]," fails to "insure" that its proposed action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat" as required under 16 U.S.C. § 1536(a)(2).

Fourth, the rule attempts a further end-run around Section 7(a)(2) by introducing "expedited consultations," which allow the Services and other federal agencies to cut corners rather than fulfill their statutory obligations. *See* 83 Fed. Reg. at 35188 (admitting "expedited consultations are a new process and likely involve proposed actions that would otherwise go through the regular formal consultation process"). The rule broadly defines "expedited consultations" as "an optional formal consultation process" on an expedited timeline "that a

Federal agency and the Service may enter into upon mutual agreement." 84 Fed. Reg. at 45017. The definition offers only vague guidance as to when an expedited consultation would be appropriate, stating that the Services and federal agency "shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat and other relevant factors." *Id.* This amorphous definition invites abuse as it provides the Services and federal agencies unfettered discretion, with no public oversight, to rush consultations and greenlight agency actions that harm listed species and destroy or adversely modify critical habitat without adequate study, deliberation, and analysis. The Services' only responses to comments to this effect are that expedited consultations are "optional"—the equivalent of no response at all—and that the public should just trust that they will still fully comply with Section 7(a)(2). 84 Fed. Reg. at 45008-09. Given the anti-conservation bent of each of the revisions in the Final Rules, however, the Services' assurances should not carry any weight.

Finally, the Services abdicate their duty to issue independent, science-based biological determinations by creating a regulation that allows them to "adopt all or part of" another federal agency's consultation "initiation package" in the Services' biological opinion. 84 Fed. Reg. at 45017. But "[t]he purpose of consultation is to obtain the expert opinion of wildlife agencies[,]" *i.e.*, the expert opinion of the Services. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012); *see also Cooling Water Intake Structure Coal. v. U.S. E.P.A.*, 905 F.3d 49, 80 (2d Cir. 2018) ("The ESA requires the Services to independently evaluate the effects of agency action on a species or critical habitat."). This new regulation authorizes the Services to rubber stamp another agency's biological opinion, defeating this core purpose of Section 7 of the ESA. The Services' response is that they will not "indiscriminately" adopt other agency's biological analyses, but nothing in the rule stops them from doing exactly that. 84 Fed. Reg. at 45007-08. The Interagency Consultation Rule is thus contrary to the ESA and should be vacated.

III. THE SERVICES' FAILURE TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT VIOLATES NEPA.

Under NEPA, a federal agency "***must***" prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment," including where "substantial

questions are raised as to whether a project . . . ***may*** cause significant degradation of some human environmental factor." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d at 864 (citation omitted; emphasis in original); 42 U.S.C. § 4332(2)(C). These requirements are met here, and the Services therefore violated NEPA by failing to prepare an EIS for each of the Final Rules.

First, it cannot be disputed that the Final Rules qualify as a "major Federal action," because such actions include "new or revised agency rules, regulations, plans, policies, or procedures[.]" 40 C.F.R. § 1508.18(a); *see also Cal. ex rel. Lockyer v. U.S. Dep't of Ag.*, 575 F.3d 999, 1005, 1018 (9th Cir. 2009) (holding that federal agency violated NEPA by promulgating final rule).

Second, for the reasons stated above, the Final Rules significantly affect the quality of the human environment, or, at minimum, raise substantial questions as to whether they may do so in the future. The threshold triggering the requirement for environmental analysis under NEPA is "relatively low." *Lockyer*, 575 F.3d at 1012. The presence of even one factor in 40 C.F.R. § 1508.27 bearing on the "significance" of the federal action is "sufficient to require preparation of an EIS." *Ocean Advocates*, 402 F.3d at 865. Numerous significance factors are present here: the Final Rules "may adversely affect" listed species and critical habitat by stripping imperiled species of protections from take and decreasing the likelihood that habitat will be designated as critical; they "threaten[] a violation of Federal . . . law," namely the APA and ESA; and their "effects on the quality of the human environment," whether considered "cumulatively" or not, are "highly controversial" given the more than 200,000 opposition comments—including from over 100 members of Congress who raised concerns that the Proposed Regulations were inconsistent with the spirit of Congress' intent in passing the ESA (AR_545, 71834)—and are otherwise "highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(3), (4), (5), (6), (7), (9), (10). Moreover, just as in *Lockyer*, where the Ninth Circuit determined that a federal agency should have prepared an EIS, the 4(d) Rule, which repeals the prior Blanket 4(d) Rule, removes "substantive protections" afforded by a prior rule. *Lockyer*, 575 F.3d at 1014-15.

In justifying their decision not to prepare an EIS for any of the Final Rules, the Services invoked "categorical exclusions" to NEPA review. 84 Fed. Reg. at 44759, 45015, 45051.

"Categorical exclusions," however, apply only to "actions which do not individually or cumulatively have a significant effect on the human environment[.]" 40 C.F.R. § 1508.4. For the reasons set forth above, none of the Final Rules fit this description; collectively and individually, they are detrimental to threatened and endangered species.

The Services contend that each of the Final Rules is "of a legal, technical, or procedural nature," stating that they merely "clarify" existing regulations, rather than give them the most substantial makeover in over 30 years. 84 Fed. Reg. at 44759, 45015, 45051. This argument is meritless. The Services themselves stated that each of the Final Rules is a deregulatory action pursuant to Executive Order 13771, which required agencies to eliminate at least two regulations for every new regulation introduced. 84 Fed. Reg. at 44758, 45014, 45050; E.O. 13771. Moreover, at minimum, the Final Rules prospectively strip substantive protections from threatened species, limit the scope of critical habitat designations and section 7 consultations, and increase the likelihood of premature de-listings—all to the detriment of threatened and endangered species and their critical habitat. *See supra*, at Argument, Section II.A-C. As for the 4(d) Rule, FWS also claims that "any potential impacts" of the rule "are too broad, speculative, and conjectural." 84 Fed. Reg. at 44759. But "speculation is . . . implicit in NEPA," and agencies may not "shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry." *N. Plain Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011). The Blanket 4(d) Rule was in place for over 40 years, providing over 40 years of data; to suggest it would be too "speculative" to study the impact of removing that rule is highly dubious. *See id.* ("'NEPA requires that an EIS engage in reasonable forecasting.'" (citation omitted)).[28] Indeed, FWS itself stated that the "[t]he blanket rules have worked, and will continue to work, to conserve already-listed threatened species," 84

[28] Moreover, even if the Final Rules did somehow qualify for a categorical exclusion, that would not be the end of the inquiry. An EIS is required for categorically excluded actions where "extraordinary circumstances" are present. 40 C.F.R. § 1508.4. For the reasons above, several "extraordinary circumstances" are present, including "significant impacts on . . . natural resources," "highly controversial environmental effects," "highly uncertain and potentially significant environmental effects or . . . unique or unknown environmental risks," "significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or . . . on designated Critical Habitat for these species," and violations of federal law, including the APA and NEPA. 43 C.F.R. § 46.215(b), (c), (d), (e), (f), (h), (i).

Fed. Reg. at 44756, and presumably had a factual basis for making that statement.

To undo over 40 years of protections to threatened species without even attempting to study the impact of doing so is a remarkable and brazen violation of NEPA. Moreover, the Services' failure to prepare an EIS denied ALDF and its members of the opportunity to comment on and influence the decision-making process. Dkt. 62-1 ¶ 10; Dkt. 62-5 ¶ 14; *see Citizens for Clean Energy v. U.S. Dep't of the Interior*, 384 F. Supp. 3d 1264, 1275 (D. Mont. 2019) (failure to prepare EIS inflicted procedural injury, depriving plaintiff of "a meaningful opportunity to influence" contested federal action).

IV. THE SERVICES' NOTICE AND COMMENT PROCEDURE WAS FLAWED.

Under the APA, federal agencies are required to publish "the terms or substance" of any proposed rule "or a description of the subjects and issues involved" for public comment. 5 U.S.C. § 553(b), (c). Notice must be "sufficient to 'fairly apprise interested persons of the 'subjects and issues' before the [a]gency[,]'" so that they may meaningfully engage in and affect the rulemaking process. *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 863 F.2d 1420, 1429 (9th Cir. 1988) (citation omitted). Accordingly, agencies may not "deviate[] too sharply" from their proposed rules without opening up their revisions for additional public comment. *Id.* Rather, any final rule that departs from a proposed rule must be a "logical outgrowth" of the proposed rule. *Id.*; *see also Natural Resources Defense Council v. U.S. E.P.A.*, 279 F.3d 1180, 1186 (9th Cir. 2002) (holding that a new round of notice and comment is required where it "'would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule'" (citation omitted)). Additionally, an agency may not simply ignore material comments with which it is unable or unwilling to grapple, as "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35-36 (D.C. Cir. 1977). Final rules that do not comply with the notice-and-comment procedure required by the APA "must [be] set aside." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018).

Here, the Services included in the Final Rules material provisions that were not contained in and were not logical outgrowths of provisions contained in the Proposed Rules.

First, the final version of the Listing Rule added the requirement that "the Secretary must determine that there is a reasonable certainty both that the [unoccupied] area [to be designated as critical habitat] will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species." 84 Fed. Reg. at 45021. By contrast, the Proposed Rule only required a "reasonable likelihood" that the unoccupied area would contribute to the conservation of the species, 83 Fed. Reg. at 35198, which the Services concede is a lower standard of proof, 84 Fed. Reg. at 45020-21, and did not at all contain the additional requirement regarding "physical or biological features essential to the conservation of the species." These revisions are sharp deviations from the proposed rule, as they materially decrease the likelihood that unoccupied areas will be designated as critical habitat, contrary to the ESA. *See supra*, at Argument, Section II.B.

Second, the final version of the Interagency Consultation Rule defines for the first time "activities that are reasonably certain to occur" to require "clear and substantial information," and "environmental baseline" to include "[t]he consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify." 84 Fed. Reg. at 44977-78. These revisions are also sharp deviations from the proposed rule, as they materially increase the likelihood that the Services will issue no-jeopardy opinions for potentially detrimental agency actions, in violation of the ESA. *See supra*, at Argument, Section II.C.

The Services were not at liberty to make these significant changes to the Proposed Rules without soliciting additional public comment. *See Citizens for Better Forestry v. U.S. Dep't of Ag.*, 481 F. Supp. 2d 1059, 1076 (N.D. Cal. 2007) (holding agency "was required to afford interested parties the opportunity to comment on the changes," which were not a "logical outgrowth" of the proposed rule, "and its failure to do so violated the APA").

Additionally, the Services did not at all address ALDF's comment that the 4(d) Rule is "especially problematic for captive animals" and would "fundamentally alter how captive animals are treated in the context of exhibition, experimentation, and canned hunts." AR_164956. FWS regulations recognize that captive animals require different considerations than their wild

counterparts. *See* 50 C.F.R. § 17.3 (distinguishing captive from wild animals in the context of the terms "[e]nhance the propagation or survival" and "harass"); 63 Fed. Reg. 48634, 48336 (Sept. 11, 1998) ("[T]he captive or non-captive status of a particular specimen is a significant factor in determining whether particular actions would 'harass' that specimen or whether such actions would 'enhance the propagation or survival' of the species."). Indeed, captive animals—whether in roadside zoos, fur farms, canned hunting ranches, or elsewhere—are generally in more immediate contact with humans than wild animals, and thus are more readily susceptible to mistreatment and harm. *See* AR_164956. If one of these animals is newly listed as threatened, then under the 4(d) Rule, they would receive no protections under the ESA for an indeterminate length of time, placing that at imminent risk of "take." FWS should have confronted and addressed the fact that the 4(d) Rule places captive animals in particular jeopardy, but they did not. In failing to do so, they violated their APA notice-and-comment obligations. *Home Box Office*, 567 F.2d at 35-36.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment, vacate the Final Rules, and reinstate their predecessors. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force.").

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Respectfully submitted,

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