STAFF SUMMARY FOR OCTOBER 17, 2018

3B. ACTING EXECUTIVE DIRECTOR'S REPORT – LEGISLATIVE UPDATE AND FEDERAL REGULATORY PROPOSALS

Today's Item **Information** ☒ **Action** ☐

Review and discuss legislation of interest and federal regulatory notices, and provide staff direction.

Summary of Previous/Future Actions

- Approved letters to secretaries Zinke and Ross — Aug 22-23, 2018: Fortuna
- Last day for California State Legislature to pass bills; final recess began upon adjournment — Aug 31, 2018
- Last day for Governor Brown to sign or veto bills — Sep 30, 2018
- General election in California — Nov 6, 2018
- Legislature adjourns *Sine Die* at midnight — Nov 30, 2018
- Legislature convenes 2019-20 regular session — Dec 3, 2018
- Most new state statutes take effect — Jan 1, 2019

Background

FGC staff has prepared a list of legislation that may affect FGC's resources and workload (see below); each description includes a brief synopsis and current bill status. DFW staff prepares a more extensive list of state legislation potentially affecting DFW, which is included as Exhibit 1. Today is an opportunity for FGC to provide direction to staff concerning legislation; at any meeting, FGC may direct staff to provide information to or share concerns with bill authors.

Staff has also included in this summary information about federal regulatory notices with proposed regulation changes for which staff submitted comments on behalf of FGC, per FGC direction at its Aug 22-23, 2018 meeting.

Federal Legislation

Below is a list of federal bills that FGC has previously shown an interest in, or may be of interest, and the status as of October 5, 2018.

- *S. 793 Shark Finning – Shark Fin Trade Elimination Act of 2017:* Sen. Cory Booker (NJ).

  Status: Senate - 05/18/2017 Committee on Commerce, Science, and Transportation. Ordered to be reported with an amendment in the nature of a substitute favorably. Summary: This bill makes it illegal to possess, buy, sell, or transport shark fins or any product containing shark fins. A person may possess a shark fin that was lawfully taken consistent with a license or permit under certain circumstances. Penalties are imposed for violations under the Magnuson-Stevens Fishery Conservation and Management Act. The maximum civil penalty for each violation shall be $100,000, or the fair market value of the shark fins involved, whichever is greater.

- *S. 2773 Driftnet Modernization and Bycatch Reduction Act:* Sen. Dianne Feinstein (CA).

  Status: Senate – 09/05/2018 Committee on Commerce, Science, and Transportation. Ordered to be reported with an amendment in the nature of a substitute favorably. Summary: This bill calls for prioritizing the phase-out of large-scale driftnet fishing within the nation's exclusive economic zone and promoting alternative fishing methods and gear types, in order to reduce the incidental catch of living marine resources. The bill adds language to the Magnuson-Stevens Fishery Conservation and Management Act to instruct the U.S. secretary of commerce to coordinate a transition program to assist in phasing out large-scale driftnet fishing and adopting alternative fishing methods. The secretary is authorized to provide funding to individuals who surrender their permit for large-scale driftnet fishing, or surrender any gear associated with that permit, and purchase new fishing gear that minimizes the incidental catch of living marine resources. The bill authorizes $450,000 for each of the fiscal years 2018 through 2020 for the purposes of providing the funding to individuals.

- *H.R. 200 – MSA Reauthorization – Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act:* Rep. Don Young (AK).

  Status: Senate - 07/12/2018 received in the Senate and read twice and referred to the Committee on Commerce, Science, and Transportation. Summary: To amend the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to provide flexibility for fishery managers and stability for fishermen, and for other purposes. This bill revises and reauthorizes MSA through Fiscal Year 2022. No revisions have been made since the previous report.

- *H.R. 1456 – Shark Fin Sales Elimination Act of 2017:* Rep. Edward Royce (CA).

  Status: Introduced 03/09/17; Referred to House Committee on Natural Resources; 3/20/17 referred to the Subcommittee on Water, Power and Oceans; 4/17/18 subcommittee hearings held. Summary: This bill makes it illegal to possess, buy, or sell shark fins or any product containing shark fins. A person may possess a shark fin that was lawfully taken consistent with a license or permit under certain circumstances. Penalties are imposed for violations under the Magnuson-Stevens Fishery Conservation and Management Act.

- *H.R. 5638 Driftnet Modernization and Bycatch Reduction Act:* Ted Lieu (CA).

  Status: House – 05/08/2018 Referred to the Subcommittee on Water, Power and Oceans. Summary: This is the companion bill to S. 2773, which calls for prioritizing the phase-out of large-scale driftnet fishing within the nation's exclusive economic zone and promoting alternative fishing methods and gear types, in order to reduce the incidental catch of living marine resources.

State Legislation

- *AB 1337 (Patterson) Fish and Game Commission: meetings and hearings: live broadcast.*

  Status: Vetoed by the Governor. Summary: Would require FGC to provide live video broadcast on its Internet website of every FGC meeting or hearing that is open and

public and every meeting or hearing conducted by MRC, WRC, or TC that is open and public.

- *AB 1573 (Bloom) marine fisheries: experimental fishing permits.*

  Status: Approved by the Governor and chaptered 9/18/18. Summary: This bill would repeal existing experimental gear permit provisions and instead would authorize FGC to approve experimental fishing permits to be issued by the department for specified purposes that would authorize commercial or recreational marine fishing activity otherwise prohibited by the Fish and Game Code or regulations adopted pursuant to that code. Requires FGC to establish by regulation an expeditious process for DFW review, public notice and comment, FGC approval, and prompt DFW issuance of EFPs.

- *AB 1884 (Calderon) Food facilities: Single-use plastic straws*.

  Status: Approved by the Governor and chaptered 9/20/18. Summary: Requires specified restaurants to provide plastic straws only upon request. Specifically, this bill: (1) Prohibits a food facility, as specified, where food may be consumed on the premises from providing single-use plastic straws to consumers unless requested by the consumer. (2) Specifies that the first and second violation shall result in a warning, and any subsequent violations shall constitute an infraction punishable by a fine of $25 for each day of the violation, not to exceed $300 annually. (3) Specifies that no reimbursement is required for costs incurred by a local agency or school district because this bill creates a new crime or infraction.

- *AB 2369 (Fletcher) Fishing: Marine protected areas: violations*.

  Status: Approved by the Governor and chaptered 8/24/18. Summary: This bill would increase the penalty for unlawfully taking a fish for commercial purposes within a marine protected area to the penalties established for a person who holds a commercial fishing license or a commercial passenger fishing boat license. The bill would also require a person's commercial fishing license or commercial passenger fishing boat license, as applicable, to be revoked if the person is convicted of a second violation of this provision. By changing the penalty for this crime, this bill would impose a state-mandated local program.

- *AB 2958 (Quirk) State bodies: meetings: teleconference*.

  Status: Approved by the Governor and chaptered 9/28/18. Summary: Current law, among other things, requires a state body that elects to conduct a meeting or proceeding by teleconference to post agendas at all teleconference locations, to identify each teleconference location in the notice and agenda, and to make each teleconference location accessible to the public. This bill, for a state body that is an advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body, would authorize an additional way of holding a meeting by teleconference, as prescribed, provided it also complies with all other applicable requirements of the Bagley-Keene Open Meeting Act.

- *AB 2805 (Bigalow) Wild pigs.*

  Status: 8/27/2018 - Re-referred to Senate Rules. Died in committee. Summary: Would have revised multiple code provisions applicable to wild pigs to, among other things,

change the designation, expand the definition, switch from wild pig tags to a wild pig validation, and eliminate the requirement to obtain a depredation permit and instead add provisions for take pursuant to regulations adopted by FGC. The bill also authorized California Department of Food and Agriculture to adopt regulations to require marking of swine that meet the new definition of a wild pig. Because a violation of the new provisions would have been a crime, this bill would have imposed a state-mandated local program.

- *SB 187 (Berryhill) Sport fishing licenses: duration.* Introduced: 1/25/2017.

  Status: 9/1/2017 - failed deadline pursuant to Rule 61(a)(12). (Last location was Appropriations. Suspense File on 7/19/2017) Summary: Would require a resident or a nonresident, 16 years of age or older, upon payment of a specified fee, to be issued a sport fishing license for the period of 12 consecutive months beginning on the date specified on the license, instead of for the period of a calendar year, or the remainder thereof. The bill would require FGC to include, among the costs required to be recovered by an adjustment of the fee amount, transition costs related to the new licensing period.

- *SB 234 (Berryhill) Fishing: local regulation: report.*

  Status: 9/1/2017 - failed deadline pursuant to Rule 61(a)(12). (Last location was Appropriations. Suspense File on 7/19/2017) Summary: Would require FGC to undertake a survey and evaluation of local ordinances that regulate fishing and to submit the survey and evaluation to the legislature in a report by Dec 31, 2018.

- *SB 473 (Hertzberg) California Endangered Species Act.*

  Status: 9/10/2018 – Approved by the Governor and chaptered on 9/10/2018. Summary: Among other things, the bill requires DFW to adopt regulations for issuance of incidental take permits and would apply take prohibitions to public agencies. Requires listing of endangered or threatened species by FGC to be based solely upon the best available scientific information. Allows a petition to result in a species being designated a different status than what the petition was filed for originally. Exempts a change in species status from the Administrative Procedures Act and adds flexibility to private landowners by adding a voluntary program for declining and vulnerable species. Makes the five-year status review of listed species contingent upon available funding. Revises the ability of FGC to authorize the taking of any candidate species or the taking of any fish that is listed as an endangered, threatened, or candidate species provided that the take is based on the best available scientific information. Allows DFW, relying on the best available scientific information, to make a recommendation to FGC that it authorize or not authorize the taking, as specified.

- *SB 1017 (Allen) Commercial fishing: drift gill net shark and swordfish fishery (2017-2018) Drift Gillnets*.

  Status: Approved by the Governor and chaptered on 9/27/2018. Summary: Would require DFW by March 31, 2020, to establish a voluntary permit transition program that includes specified conditions, including a condition that a permittee who voluntarily surrenders his or her drift gill net shark and swordfish permit (DGN permit) and shark or

swordfish gill net or nets receive, to the extent that funds for the transition program are available, a specified payment, as prescribed.

- *SB 1309 (McGuire) Fishing: Fisheries omnibus bill of 2018.*

  Status: Approved by the Governor and chaptered on 9/30/2018. Summary: (1) Makes Salmon Stamp revisions. (2) Permits taking of anchovies in Humboldt Bay between May 1 and Dec 1 without restrictions on area or use, with a 60-ton limit on the total per year. Would delete provisions regarding inspection and notification of bait operations. (3) Authorizes the director, on an emergency basis, to close Dungeness crab season in any waters due to whale entanglements or reopen season in those waters if the risk of whale entanglements has abated. (4) Repeals limintations on conditions for transfer of California halibut bottom trawl vessel permts and authorizes DFW, rather than FGC, to consider a request to transfer a California halibut trawl vessel permit to another vessel, as provided. (5) Designates two additional areas of ocean waters as California halibut trawl grounds, one in Monterey Bay, and one offshore of Port San Luis that would remain closed to trawling until FGC determines that trawling in those areas is consistent with provisions, as provided. If opened, trawl gear may only be deployed in those areas between sunrise and sunset. (6) Requires DFW to implement regulations requiring all traps and buoys to include standardized gear marking and clear identification of ownership.

Federal Regulatory Notices

On Jul 25, 2018, the U.S. Fish and Wildlife Service (USFWS) and NOAA's National Marine Fisheries Service (NMFS) published three proposed rules to change regulations interpreting and implementing the federal Endangered Species Act (ESA). Each rule affects an important aspect of how USFWS and NMFS manage their responsibilities under the ESA and how other federal agencies comply with the ESA.

At its Aug 22-23, 2018 meeting, FGC authorized its executive director to work with President Sklar and Vice President Williams to incorporate key themes into a comment letter from FGC to Secretary Zinke and Secretary Ross regarding the proposed federal regulatory changes; ultimately, a joint letter was sent from FGC and DFW (Exhibit 2).

In addition, on Sep 24, 2018, the attorney's general of ten states submitted a joint comment letter to Secretary Zinke and Secretary Ross, identifying a number of "troubling" defects in the proposed rules and urging both agencies to withdraw the proposals (Exhibit 3).

Significant Public Comments (N/A)

Recommendation (N/A)

Exhibits

1. DFW legislative update, dated Oct 1, 2018
2. Joint letter from FGC and DFW to Secretary Ryan Zinke and Secretary Wilbur Ross, dated Sep 24, 2018

3. Comments of the attorneys general of Massachusetts, California, Maryland, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington and the District of Columbia, dated Sep 24, 2018

Motion/Direction (N/A)

Department of Fish & Wildlife
Final 2018 Legislative Report

October 2018
(as of October 1, 2018)

AB 424 **(McCarty D) Possession of a firearm in a school zone.**

Introduced: 2/9/2017

Last Amend: 8/30/2017

Status: 10/14/2017-Approved by the Governor. Chaptered by Secretary of State - Chapter 779, Statutes of 2017.

Location: 10/14/2017-A. CHAPTERED

Summary: Would delete the authority of a school district superintendent, his or her designee, or equivalent school authority to provide written permission for a person to possess a firearm within a school zone. By expanding the scope of a crime, the bill would create a state-mandated local program. The bill would exempt from that crime the activities of a program involving shooting sports or activities that are sanctioned by a school, school district, college, university, or other governing body of the institution, as specified, and the activities of a certified hunter education program, as specified. The bill would make other conforming changes to related provisions.

AB 474 **(Garcia, Eduardo D) Hazardous waste: spent brine solutions.**

Introduced: 2/13/2017

Last Amend: 8/21/2017

Status: 10/15/2017-Approved by the Governor. Chaptered by Secretary of State - Chapter 840, Statutes of 2017.

Location: 10/15/2017-A. CHAPTERED

Summary: Current law exempts from certain requirements of the Hazardous Waste Control Law wastes from the extraction, beneficiation, or processing of ores and minerals that are not subject to regulation under the federal Resource Conservation and Recovery Act of 1976, including spent brine solutions used to produce geothermal energy that meet specified requirements. This bill would exempt spent brine solutions that are byproducts of the treatment of groundwater to meet California drinking water standards from those same requirements if certain conditions are met, including that the spent brine solutions are transferred for dewatering via a closed piping system to lined surface impoundments regulated by the California regional water quality control boards.

AB 661 **(Mayes R) Magnesia Spring Ecological Reserve: Mirage Trail.**

Introduced: 2/14/2017

Last Amend: 7/3/2017

Status: 9/27/2017-Approved by the Governor. Chaptered by Secretary of State - Chapter 315, Statutes of 2017.

Location: 9/27/2017-A. CHAPTERED

Summary: Current law requires, until January 1, 2018, that the Mirage Trail within the Magnesia Spring Ecological Reserve be open 9 months of the year during the months of May to January, inclusive, and closed for 3 months during the months of February to April, inclusive, to recreational hiking if the Fish and Game Commission determines that specified conditions relating to providing funding and ensuring the proper use and monitoring of the reserve are met. This bill would require the commission, beginning January 1, 2020, and by January 1 every 2 years thereafter, at a public hearing, to assess compliance with the requirements of those provisions and post its findings and any recommendations on its Internet Web site.

AB 707 **(Aguiar-Curry D) Clear Lake.**

Introduced: 2/15/2017

Last Amend: 7/3/2017

Status: 10/15/2017-Approved by the Governor. Chaptered by Secretary of State - Chapter 842, Statutes of 2017.

Location: 10/15/2017-A. CHAPTERED

Summary: Would establish in the Natural Resources Agency, the Blue Ribbon Committee for the Rehabilitation of Clear Lake. The bill would require the committee to consist of specified persons, including the Secretary of the Natural Resources Agency, or his or her designee. The bill would require the committee to meet quarterly for the purposes of discussion, reviewing research, planning, and providing oversight regarding the health of Clear Lake. The bill would require the committee to hold 2 meetings per year in the County of Lake.

AB 718 **(Frazier D) Mosquito abatement and vector control districts: managed wetland habitat: memoranda of understanding.**

Introduced: 2/15/2017

Last Amend: 9/8/2017

Status: 10/3/2017-Approved by the Governor. Chaptered by Secretary of State - Chapter 446, Statutes of 2017.

Location: 10/3/2017-A. CHAPTERED

Summary: Current law provides for the formation of mosquito abatement and vector control districts, and prescribes the powers, functions, and duties of those districts, as specified. This bill would authorize a private landowner whose property includes managed wetland habitat, as defined, located within the boundaries of a district and meets other criteria to initiate the opportunity to enter into a memorandum of understanding with the district to establish a process to implement best management practices with regard to the managed wetland habitat.

AB 1031 **(Waldron R) Personal income taxes: voluntary contributions: Rare and Endangered Species Preservation Program: Native California Wildlife Rehabilitation Voluntary Tax Contribution Fund.**

Introduced: 2/16/2017

Last Amend: 8/24/2017

Status: 10/5/2017-Approved by the Governor. Chaptered by Secretary of State - Chapter 504, Statutes of 2017.

Location: 10/5/2017-A. CHAPTERED

Summary: Current law allows an individual taxpayer to contribute amounts in excess of his or her personal income tax liability for the support of specified funds and accounts, including among others, to the Endangered and Rare Fish, Wildlife, and Plant Species Conservation and Enhancement Account. Current law authorizes contributions to be made to this account pursuant to these provisions until January 1, 2018, or until an earlier date if specified minimum contributions are not received. Current law requires all moneys contributed to this account pursuant to these provisions to be allocated, upon appropriation by the Legislature, to the Franchise Tax Board and the Controller for the costs of collection and administration of the funds, and to the Department of Fish and Wildlife for specified purposes. This bill would authorize contributions to be made to this account pursuant to these provisions until January 1, 2025, or until an earlier date if the Franchise Tax Board determines that the amount of contributions estimated to be received during a calendar year will not at least equal the minimum contribution amount of $250,000.

AB 1133 **(Dahle R) California Endangered Species Act: experimental populations.**

Introduced: 2/17/2017

Last Amend: 8/21/2017

Status: 9/25/2017-Approved by the Governor. Chaptered by Secretary of State - Chapter 276, Statutes of 2017.

Location: 9/25/2017-A. CHAPTERED

Summary: Would provide that a person who obtains a federal enhancement of survival permit that authorizes the take of endangered or threatened species that is also listed as endangered, threatened, or candidate under CESA, in order to establish or maintain an experimental population of the species pursuant to FESA, requires no further authorization or approval under CESA for that person to take that species as identified in, and in accordance with, the enhancement of survival permit, if specified requirements are met. These provisions would remain in effect only until the effective date of an amendment to FESA that alters the requirements for issuing an enhancement of survival permit.

AB 1197 **(Limón D) Oil spill contingency plans: spill management teams.**

Introduced: 2/17/2017

Last Amend: 8/21/2017

Status: 10/8/2017-Approved by the Governor. Chaptered by Secretary of State - Chapter 584, Statutes of 2017.

Location: 10/8/2017-A. CHAPTERED

Summary: Current law provides for the rating of oil spill response organizations (OSROs) by the administrator pursuant to specified provisions and requires an oil spill contingency plan to identify at least one rated OSRO for each rating level established pursuant to those provisions. This bill would no longer require an oil spill contingency plan to identify at least one rated OSRO for each rating level and would instead require the plan to identify at least one OSRO rated pursuant to those provisions, and would authorize an owner or operator to rely on its own response equipment and personnel, if they have been rated by the administrator, as specified.

AB 1228 **(Bloom D) Marine fisheries: experimental fishing permits.**

Introduced: 2/17/2017

Last Amend: 7/17/2017

Status: 1/12/2018-Stricken from file.

Location: 10/7/2017-A. VETOED

Summary: Would authorize the Fish and Game Commission to approve experimental fishing permits to be issued by the Department of Fish and Wildlife for specified purposes that would authorize commercial or recreational marine fishing activity otherwise prohibited by the Fish and Game Code or regulations adopted pursuant to that code, subject to certain requirements, including a requirement that activities conducted under the permit be consistent with specified policies enacted as part of the Marine Life Management Act of 1998 and any applicable fishery management plan and a requirement that the permit be subject to certain commission conditions.

AB 1282 **(Mullin D) Transportation Permitting Task Force.**

Introduced: 2/17/2017

Last Amend: 6/29/2017

Status: 10/10/2017-Approved by the Governor. Chaptered by Secretary of State - Chapter 643, Statutes of 2017.

Location: 10/10/2017-A. CHAPTERED

Summary: Would require, by April 1, 2018, the Secretary of Transportation, in consultation with the Secretary of the Natural Resources Agency, to establish a Transportation Permitting Taskforce consisting of representatives from specified entities to develop a process for early engagement for all parties in the development of transportation projects, establish reasonable deadlines for permit approvals, and provide for greater certainty of permit approval requirements. The bill would require the Secretary of Transportation, by December 1, 2019, to prepare and submit to the relevant policy and fiscal committees of the Legislature a report of findings based on the efforts of the taskforce.

AB 1337 **(Patterson R) Fish and Game Commission: meetings and hearings: live broadcast.**

Introduced: 2/17/2017

Status: 8/15/2018-Last day to consider Governor's veto pursuant to Joint Rule 58.5.

Location: 5/14/2018-A. VETOED

Summary: Would require the Fish and Game Commission to provide a live video broadcast on its Internet Web site of every commission meeting or hearing that is open and public and every meeting or hearing conducted by the marine resources committee, wildlife resources committee, or tribal committee that is open and public.

AB 1479 **(Bonta D) Public records: custodian of records: civil penalties.**

Introduced: 2/17/2017

Last Amend: 9/1/2017

Status: 1/12/2018-Stricken from file.

Location: 10/13/2017-A. VETOED

Summary: Would, until January 1, 2023, require public agencies to designate a person or persons, or office or offices to act as the agency's custodian of records who is responsible for responding to any request made pursuant to the California Public Records Act and any inquiry from the public about a decision by the agency to deny a request for records. The bill also would make other conforming changes. Because the bill would require local agencies to perform additional duties, the bill would impose a state-mandated local program.

AB 1573 **(Bloom D) Marine fisheries: experimental fishing permits.**

Introduced: 2/17/2017

Last Amend: 8/17/2018

Status: 9/18/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 477, Statutes of 2018.

Location: 9/18/2018-A. CHAPTERED

Summary: Current law requires the Fish and Game Commission to encourage the development of new types of commercial fishing gear and new methods of using existing commercial fishing gear by approving permits, known as experimental gear permits, to be issued by the Department of Fish and Wildlife, consistent with specified policies, for that development or use, subject to certain restrictions. This bill would repeal these experimental gear permit provisions and instead would authorize the commission to approve experimental fishing permits to be issued by the department for specified purposes that would authorize commercial or recreational marine fishing activity otherwise prohibited by the Fish and Game Code or regulations adopted pursuant to that code.

AB 1804 **(Berman D) California Environmental Quality Act: exemption: residential or mixed-use housing projects.**

Introduced: 1/10/2018

Last Amend: 8/24/2018

Status: 9/22/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 670, Statutes of 2018.

Location: 9/22/2018-A. CHAPTERED

Summary: Would, until January 1, 2025, exempt from CEQA residential or mixed-use housing projects, as defined, located in unincorporated areas of a county meeting certain requirements. The bill would require a lead agency, if the lead agency determines that a residential or mixed-use housing project is exempt from CEQA, to file a notice of exemption with the Office of Planning and Research and the county clerk in the county in which the project is located. Because a lead agency would be required to determine the applicability of this exemption and to file a notice with the office and the county clerk, this bill would impose a state-mandated local program.

AB 1945 **(Garcia, Eduardo D) California Global Warming Solutions Act of 2006: Greenhouse Gas Reduction Fund: investment plan.**

Introduced: 1/29/2018

Last Amend: 8/24/2018

Status: 9/27/2018-Vetoed by Governor.

Location: 9/27/2018-A. VETOED

Summary: Would, beginning July 1, 2019, require state agencies administering competitive grant programs that allocate moneys from the Greenhouse Gas Reduction Fund to give specified communities preferential points during grant application scoring for programs intended to improve air quality and to include a specified application timeline and to allow applicants from the Counties of Imperial and San Diego to include daytime population numbers in grant applications.

AB 2151 **(Gray D) Hunting: reduced-price antelope, elk, bear, and bighorn sheep tags: resident junior hunters.**

Introduced: 2/12/2018

Last Amend: 6/14/2018

Status: 9/7/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 295, Statutes of 2018.

Location: 9/7/2018-A. CHAPTERED

Summary: Would, beginning July 1, 2019, and until July 1, 2025, reduce the fee required to obtain an antelope, elk, bear, or bighorn sheep tag to $20, as adjusted pursuant to the specified index, for a person who is a resident of the state and who possesses a junior hunting license. The bill would require the department to prepare a report to the Legislature no later than July 1, 2024, on the effect of these reduced-price tags on rates of participation by junior hunters, the Big Game Management Account, and the Fish and Game Preservation Fund. The bill would make other related and conforming changes.

AB 2175 **(Aguiar-Curry D) Vessels: removal.**

Introduced: 2/12/2018

Last Amend: 6/11/2018

Status: 9/11/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 341, Statutes of 2018.

Location: 9/11/2018-A. CHAPTERED

Summary: This bill would authorize a peace officer or marine safety officer, while engaged in the performance of official duties, to remove a vessel from, and, if necessary, store a vessel removed from, public property within the territorial limits in which the officer may act, under specified circumstances relating to the use of the vessel in the commission of a crime. The bill would authorize a court to order a person convicted of a crime involving the use of a vessel that is removed and impounded pursuant to these provisions to pay the costs of towing and storage of the vessel and any related administrative costs imposed in connection with the removal, impoundment, storage, or release of the vessel.

AB 2192 **(Stone, Mark D) State-funded research: grant requirements.**

Introduced: 2/12/2018

Last Amend: 6/21/2018

Status: 9/7/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 296, Statutes of 2018.

Location: 9/7/2018-A. CHAPTERED

Summary: Would expand the scope of the California Taxpayer Access to Publicly Funded Research Act to include research grants provided in whole or in part by any state agency within the executive branch, as specified. The bill would specify that the public availability requirements apply only to peer-reviewed manuscripts accepted for publication. The bill would require the grantee to ensure that the peer-reviewed manuscript is available to the state agency on an appropriate publicly accessible repository approved by that agency and would eliminate the references to the California Digital Open Source Library. The bill would also extend the operation of these provisions indefinitely.

AB 2222 **(Quirk D) Crime prevention and investigation: informational databases: firearms.**

Introduced: 2/12/2018

Last Amend: 8/24/2018

Status: 9/28/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 864, Statutes of 2018.

Location: 9/28/2018-A. CHAPTERED

Summary: Current law directs police and sheriffs' departments to submit the description of serialized or uniquely inscribed nonserialized property that has been reported stolen, lost, found, recovered, or under observation, directly to an automated Department of Justice system. Current law requires that any information entered into the Department of Justice system regarding a firearm remain in the system until the firearm is found, recovered, no longer under observation, or the record is deemed to have been entered in error. Current law also requires the costs resulting from this requirement to be reimbursed from funds other than those collected from specified fees relating to firearms. This bill would extend this firearms reporting requirement to all law enforcement agencies in the state, as defined, and would require that the report be entered within 7 days of the agency being notified of the precipitating event.

AB 2252 **(Limón D) State grants: state grant administrator.**

Introduced: 2/13/2018

Last Amend: 8/17/2018

Status: 9/10/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 318, Statutes of 2018.

Location: 9/10/2018-A. CHAPTERED

Summary: Would enact the Grant Information Act of 2018. The bill would require the California State Library, on or before July 1, 2020, to create a funding opportunities Internet Web portal that provides a centralized location for grant seekers to find state grant opportunities. The bill would additionally require each state agency, on or before July 1, 2020, to register every grant the state agency administers with the California State Library prior to commencing a solicitation or award process for distribution of the grant, as specified. The bill would require each state agency, on or before July 1, 2020, to provide for the acceptance of electronic applications for any grant administered by the state agency, as appropriate.

AB 2348 **(Aguiar-Curry D) California Winter Rice Habitat Incentive Program.**

Introduced: 2/13/2018

Last Amend: 8/24/2018

Status: 9/21/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 649, Statutes of 2018.

Location: 9/21/2018-A. CHAPTERED

Summary: Current law authorizes the Director of Fish and Wildlife, pursuant to the California Waterfowl Habitat Program, to enter into land use contracts for an initial term of 10 years to conserve waterfowl and waterfowl habitat with nonpublic entities that are owners of record or with lessees of land determined by the director to be important for the conservation of waterfowl, subject to the appropriation of money for that purpose. Under those contracts, the use of the land is restricted for waterfowl conservation and habitat purposes and the Department of Fish and Wildlife makes payments for that restriction. This bill would establish a similar program, to be known as the California Winter Rice Habitat Incentive Program, to authorize the director to enter into contracts for an initial term of 3 years with nonpublic entities that are owners of record or with lessees of productive agricultural rice lands that are winter-flooded and that are determined by the director to be important for the conservation of waterfowl.

AB 2369 **(Gonzalez Fletcher D) Fishing: marine protected areas: violations.**

Introduced: 2/14/2018

Last Amend: 6/27/2018

Status: 8/24/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 189, Statutes of 2018.

Location: 8/24/2018-A. CHAPTERED

Summary: Under the The Marine Life Protection Act, the Fish and Game Commission is authorized to regulate commercial and recreational fishing and any other taking of marine species in marine protected areas, but the taking of a marine species in a marine life reserve, a type of marine protected area, is prohibited for any purpose, including recreational and commercial fishing, except as authorized by the commission for scientific purposes. This bill would expand the applicability of a misdemeanor for a violation of this regulation from a person who holds a commercial passenger fishing boat license to a person who is operating a boat or vessel licensed as a commercial passenger fishing boat at the time of the violation.

AB 2421 **(Stone, Mark D) Wildlife Conservation Board: Monarch Butterfly and Pollinator Rescue Program.**

Introduced: 2/14/2018

Last Amend: 7/3/2018

Status: 9/26/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 760, Statutes of 2018.

Location: 9/26/2018-A. CHAPTERED

Summary: Would establish the Monarch Butterfly and Pollinator Rescue Program, to be administered by the Wildlife Conservation Board, for the purpose of recovering and sustaining populations of monarch butterflies and other pollinators. To achieve these purposes, the bill would authorize the board to provide grants and technical assistance, as prescribed. The bill would require the board to develop and adopt project selection and evaluation guidelines, in coordination with the Department of Food and Agriculture, before disbursing these grants.

AB 2441 **(Frazier D) Sacramento-San Joaquin Delta: removal of abandoned commercial vessels.**

Introduced: 2/14/2018

Last Amend: 8/22/2018

Status: 9/19/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 540, Statutes of 2018.

Location: 9/19/2018-A. CHAPTERED

Summary: Current law authorizes the State Lands Commission to take immediate action, without notice, to remove from areas under its jurisdiction a vessel that is left unattended and is moored, docked, beached, or made fast to land in a position as to obstruct the normal movement of traffic or in a condition as to create a hazard to navigation, other vessels using a waterway, or the property of another. This bill would require the commission, upon receipt by the commission of funds appropriated by the Legislature and any federal or private funds for this purpose, in consultation with other relevant state and local agencies directly involved in the removal of abandoned vessels, by July 1, 2019, to develop a plan for the removal of abandoned commercial vessels, as prescribed.

AB 2470 **(Grayson D) Invasive Species Council of California.**

Introduced: 2/14/2018

Last Amend: 8/24/2018

Status: 9/28/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 870, Statutes of 2018.

Location: 9/28/2018-A. CHAPTERED

Summary: Would establish the Invasive Species Council of California, with a prescribed membership, to help coordinate a comprehensive effort to prevent the introduction of invasive species in the state and to advise state agencies how to facilitate coordinated, complementary, and cost-effective control or eradication of invasive species that have entered or are already established in the state, as specified.

AB 2528 **(Bloom D) Climate adaptation.**

Introduced: 2/14/2018

Last Amend: 7/3/2018

Status: 9/18/2018-Vetoed by Governor.

Location: 9/18/2018-A. VETOED

Summary: Current law requires the Natural Resources Agency by July 1, 2017, and every 3 years thereafter, to update the state's climate adaptation strategy to identify vulnerabilities to climate change by sectors, including the biodiversity and habitat sector, and priority actions needed to reduce the risks in those sectors. As part of the update, current law requires the Natural Resources Agency to coordinate with other state agencies to identify a lead agency or group of agencies to lead adaptation efforts in each sector. This bill would add 3 new sectors to the climate adaptation strategy: the land use and community development sector, the climate justice sector, and the parks, recreation, and California culture sector.

AB 2551 **(Wood D) Forestry and fire prevention: joint prescribed burning operations: watersheds.**

Introduced: 2/15/2018

Last Amend: 8/24/2018

Status: 9/21/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 638, Statutes of 2018.

Location: 9/21/2018-A. CHAPTERED

Summary: Current law authorizes the director of the Department of Forestry and Fire Protection to enter into an agreement with an eligible landowner pursuant to which the landowner will undertake forest resource improvement work in return for an agreement by the director to share the cost of carrying out that work. Current law authorizes the director to make various types of loans, including loans to cover all or part of the landowner's cost for the work. Current law requires these loans to be made for a term not exceeding 20 years and bearing interest at the prevailing rate. This bill would instead authorize the director to enter into those agreements with small nonindustrial landowners, as defined.

AB 2640 **(Wood D) Fully protected species: Lost River sucker and shortnose sucker limited take authorization: California condor limited take authorization.**

Introduced: 2/15/2018

Last Amend: 8/23/2018

Status: 9/20/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 586, Statutes of 2018.

Location: 9/20/2018-A. CHAPTERED

Summary: Under CESA, the Department of Fish and Wildlife may authorize, by permit, the take of listed species if the take is incidental to an otherwise lawful activity and the impacts are minimized and fully mitigated. Ths bill would permit the department to authorize, under CESA, the take or possession of the Lost River sucker and shortnose sucker resulting from impacts attributable to or otherwise related to the decommissioning and removal of the Iron Gate Dam, the Copco 1 Dam, the Copco 2 Dam, or the J.C. Boyle Dam, each located on the Klamath River, consistent with the Klamath Hydroelectric Settlement Agreement, if specified conditions are met.

AB 2697 **(Gallagher R) Nesting Bird Habitat Incentive Program: idled agricultural lands.**

Introduced: 2/15/2018

Last Amend: 8/21/2018

Status: 9/20/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 588, Statutes of 2018.

Location: 9/20/2018-A. CHAPTERED

Summary: Would require the Department of Fish and Wildlife to establish the Nesting Bird Habitat Incentive Program, which may include direct payments or other incentives, to encourage landowners to voluntarily cultivate or retain upland cover crops or other upland vegetation on idled lands to

provide waterfowl, upland game bird, and other wildlife habitat cover for purposes, including, but not limited to, encouraging the use of idle agricultural lands for wildlife habitat. The bill would authorize the department to develop guidelines and criteria for the program as it deems appropriate.

AB 2721 **(Quirk D) Cannabis: testing laboratories.**

Introduced: 2/15/2018

Last Amend: 3/23/2018

Status: 9/19/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 546, Statutes of 2018.

Location: 9/19/2018-A. CHAPTERED

Summary: Would authorize a testing laboratory to receive and test samples of cannabis or cannabis products from a person over 21 years of age when the cannabis has been grown by that person and will be used solely for his or her personal use pursuant to AUMA. The bill would prohibit a testing laboratory from certifying samples from the person over 21 years of age for resale or transfer to another person. The bill would require all tests pursuant to these provisions to be recorded with the name of the person submitting the sample and the amount of cannabis or cannabis product received.

AB 2864 **(Limón D) Coastal resources: oil spills.**

Introduced: 2/16/2018

Last Amend: 5/25/2018

Status: 9/8/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 311, Statutes of 2018.

Location: 8/27/2018-A. CHAPTERED

Summary: The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act provides that the administrator for oil spill response, subject to the Governor, has the primary authority to direct prevention, removal, abatement, response, containment, and cleanup efforts with regard to all aspects of any oil spill in waters of the state, in accordance with any applicable facility or vessel contingency plan and the California oil spill contingency plan. This bill, for spills affecting coastal resources, would require the administrator to invite the California Coastal Commission or the San Francisco Bay Conservation and Development Commission, as applicable according to jurisdiction, to participate in the natural resource damage assessment process regarding injuries to coastal resources and potential restoration and mitigation measures for inclusion in the damage assessment and restoration plan.

AB 2889 **(Caballero D) Timber harvesting plans: guidance and assistance.**

Introduced: 2/16/2018

Last Amend: 4/30/2018

Status: 9/21/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 640, Statutes of 2018.

Location: 9/21/2018-A. CHAPTERED

Summary: Current law prohibits a person, as defined, from conducting timber operations, as defined, unless a timber harvesting plan that meets specified requirements and is prepared by a professional forester for those operations has been submitted to the Department of Forestry and Fire Protection. Current law requires the department to review, approve, or require the modification of, timber harvesting plans in accordance with prescribed procedures. This bill would require the department to provide guidance and assistance to ensure the uniform and efficient implementation of processes and procedures regulating the filing, review, approval, required modification, completion, and appeal of decisions relating to timber harvesting plans, as provided.

AB 2958 **(Quirk D) State bodies: meetings: teleconference.**

Introduced: 2/16/2018

Last Amend: 8/24/2018

Status: 9/28/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 881, Statutes of 2018.

Location: 9/28/2018-A. CHAPTERED

Summary: The Bagley-Keene Open Meeting Act requires, with specified exceptions, that all meetings of a state body, as defined, be open and public, and all persons be permitted to attend any meeting of a state body, except as provided. Current law, among other things, requires a state body that elects to conduct a meeting or proceeding by teleconference to post agendas at all teleconference locations, to identify each teleconference location in the notice and agenda, and to make each teleconference location accessible to the public. This bill, for a state body that is an advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body, would authorize an additional way of holding a meeting by teleconference, as prescribed, provided it also complies with all other applicable requirements of the Bagley-Keene Open Meeting Act.

AB 2975 **(Friedman D) Wild and scenic rivers.**

Introduced: 2/16/2018

Last Amend: 5/29/2018

Status: 8/27/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 221, Statutes of 2018.

Location: 8/28/2018-A. CHAPTERED

Summary: Would, if (1) the federal government takes action to enact a statute that, upon enactment, would require the removal or delisting of any river or segment of a river in California that is included in the national wild and scenic rivers system and not in the state wild and scenic rivers system; or (2) the secretary determines that the federal government by enactment of a statute or by executive order has exempted a river or segment of a river in California that is not in the state wild and scenic river system from the protection of certain federal provisions governing restrictions on water resources projects, require the secretary, after holding a public hearing on the issue, based on the information obtained through the public hearing, to determine whether the provision of state protection for the river or segment of the river that has been removed, delisted, or exempted from the federal wild and scenic rivers system is in the best interest of the state and, if so, to take specified actions, until December 31, 2025, to add the river or segment of a river to the state wild and scenic rivers system and to classify that river or segment of a river, as prescribed.

AB 3133 **(Berman D) State Public Works Board.**

Introduced: 2/16/2018

Last Amend: 6/20/2018

Status: 8/28/2018-Approved by the Governor. Chaptered by Secretary of State - Chapter 242, Statutes of 2018.

Location: 8/28/2018-A. CHAPTERED

Summary: Would add the Secretary of the Natural Resources Agency as a member of the State Public Works Board for the purpose of hearing and deciding matters related to the acquisition of properties or construction of projects for any department, office, or other unit under the jurisdiction of the Natural Resources Agency. This bill would additionally require the chairperson of the board, when the Secretary of the Natural Resources Agency is serving as a member of the board, in the case of a vote of the board that results in a tie, to cast the deciding vote.

AB 3218 **(Arambula D) Millerton Lake State Recreation Area: acquisition of land.**

Introduced: 2/16/2018

Last Amend: 5/25/2018

Status: 9/18/2018-Vetoed by Governor.

Location: 9/18/2018-A. VETOED

Summary: Would require the Department of Parks and Recreation to effectively manage lands currently within its jurisdiction in the Millerton Lake State Recreation Area adjacent to the San Joaquin River, and would authorize the department to enter into an agreement with the conservancy to

manage lands acquired by the San Joaquin River Conservancy adjacent to the state recreation area, as specified.

SB 1 **(Beall D) Transportation funding.**

Introduced: 12/5/2016

Last Amend: 4/3/2017

Status: 4/28/2017-Approved by the Governor. Chaptered by Secretary of State. Chapter 5, Statutes of 2017.

Location: 4/28/2017-S. CHAPTERED

Summary: Would create the Road Maintenance and Rehabilitation Program to address deferred maintenance on the state highway system and the local street and road system. The bill would require the California Transportation Commission to adopt performance criteria, consistent with a specified asset management plan, to ensure efficient use of certain funds available for the program.

SB 5 **(De León D) California Drought, Water, Parks, Climate, Coastal Protection, and Outdoor Access For All Act of 2018.**

Introduced: 12/5/2016

Last Amend: 9/10/2017

Status: 10/15/2017-Approved by the Governor. Chaptered by Secretary of State. Chapter 852, Statutes of 2017.

Location: 10/15/2017-S. CHAPTERED

Summary: Would enact the California Drought, Water, Parks, Climate, Coastal Protection, and Outdoor Access For All Act of 2018, which, if approved by the voters, would authorize the issuance of bonds in an amount of $4,000,000,000 pursuant to the State General Obligation Bond Law to finance a drought, water, parks, climate, coastal protection, and outdoor access for all program. The bill, upon voter approval, would reallocate $100,000,000 of the unissued bonds authorized for the purposes of Propositions 1, 40, and 84 to finance the purposes of a drought, water, parks, climate, coastal protection, and outdoor access for all program.

SB 50 **(Allen D) Federal public lands: conveyances.**

Introduced: 12/5/2016

Last Amend: 9/5/2017

Status: 10/6/2017-Approved by the Governor. Chaptered by Secretary of State. Chapter 535, Statutes of 2017.

Location: 10/6/2017-S. CHAPTERED

Summary: Would establish, except as provided, a policy of the state to discourage conveyances of federal public lands in California from the federal government. The bill would, except as provided, specify that these conveyances are void ab initio unless the State Lands Commission was provided with the right of first refusal or the right to arrange for the transfer of the federal public land to another entity.

SB 80 **(Wieckowski D) California Environmental Quality Act: notices.**

Introduced: 1/11/2017

Last Amend: 6/21/2017

Status: 3/3/2018-Last day to consider Governor’s veto pursuant to Joint Rule 58.5.

Location: 10/16/2017-S. VETOED

Summary: The California Environmental Quality Act requires the lead agency to mail certain notices to persons who have filed a written request for notices. The act provides that if the agency offers to provide the notices by email, upon filing a written request for notices, a person may request that the notices be provided to him or her by email. This bill would require the lead agency to post those notices on the agency’s Internet Web site. The bill would require the agency to offer to provide those

notices by email. Because this bill would increase the level of service provided by a local agency, this bill would impose a state-mandated local program.

SB 92 **(Committee on Budget and Fiscal Review) Public resources.**

Introduced: 1/11/2017

Last Amend: 6/9/2017

Status: 6/27/2017-Approved by the Governor. Chaptered by Secretary of State. Chapter 26, Statutes of 2017.

Location: 6/27/2017-S. CHAPTERED

Summary: Current law regulating commercial fishing imposes, or authorizes the imposition of, various license, permit, and registration fees. Current law requires specified persons to pay commercial fishing fees, referred to as a "landing tax," calculated on the total weight of fish delivered, based on a rate-per-pound schedule applicable to specified aquatic species. This bill would rename the "landing tax" as a "landing fee" and would revise the rate schedule by increasing certain fees while decreasing other fees to specified amounts. The bill would make conforming and other related changes.

SB 94 **(Committee on Budget and Fiscal Review) Cannabis: medicinal and adult use.**

Introduced: 1/11/2017

Last Amend: 6/9/2017

Status: 6/27/2017-Approved by the Governor. Chaptered by Secretary of State. Chapter 27, Statutes of 2017.

Location: 6/27/2017-S. CHAPTERED

Summary: The Medical Marijuana Program also provides immunity from arrest to those exempt patients or designated primary caregivers who engage in certain acts involving marijuana, up to certain limits, and who have identification cards issued pursuant to the program unless there is reasonable cause to believe that the information contained in the card is false or fraudulent, the card has been obtained by means of fraud, or the person is otherwise in violation of the law. This bill would require probable cause to believe that the information on the card is false or fraudulent, the card was obtained by fraud, or the person is otherwise in violation of the law to overcome immunity from arrest to patients and primary caregivers in possession of an identification card.

SB 144 **(McGuire D) Fish and wildlife: steelhead trout: fishing report-restoration card.**

Introduced: 1/13/2017

Last Amend: 3/15/2017

Status: 9/26/2017-Approved by the Governor. Chaptered by Secretary of State. Chapter 305, Statutes of 2017.

Location: 9/26/2017-S. CHAPTERED

Summary: Current law requires revenues from steelhead trout fishing license fees to be deposited in the Fish and Game Preservation Fund and to be available for expenditure, upon appropriation by the Legislature, to monitor, restore, or enhance steelhead trout resources consistent with specified law, and to administer the fishing report-restoration card program. This bill would extend the operation of those provisions to July 1, 2022, to be repealed as of January 1, 2023. The bill would require the department to report to the Legislature regarding the fishing report-restoration card program's projects on or before July 1, 2021.

SB 161 **(McGuire D) Fish and Game Commission: tribal committee.**

Introduced: 1/19/2017

Status: 10/3/2017-Approved by the Governor. Chaptered by Secretary of State. Chapter 457, Statutes of 2017.

Location: 10/3/2017-S. CHAPTERED

Summary: Current law requires the Fish and Game Commission to form a marine resources committee and a wildlife resources committee from its membership. This bill would require the commission to form a tribal committee from its membership consisting of at least one commissioner

and would require the committee to report to the commission from time to time on its activities and to make recommendations on all tribal matters considered by the commission.

SB 214 **(Atkins D) San Diego River Conservancy.**

Introduced: 2/1/2017

Last Amend: 9/5/2017

Status: 9/26/2017-Approved by the Governor. Chaptered by Secretary of State. Chapter 306, Statutes of 2017.

Location: 9/26/2017-S. CHAPTERED

Summary: The San Diego River Conservancy Act establishes the San Diego River Conservancy in the Natural Resources Agency, and prescribes the territory, membership, functions, and duties of the conservancy with regard to, among other things, the acquisition, protection, and management of public lands within the San Diego River area, as defined. This bill would specify that the powers of the conservancy include improving, developing, and preserving lands for the purpose of protecting the natural, cultural, and historical resources, and entering into a joint powers agreement, as specified.

SB 269 **(McGuire D) Commercial fishing businesses and marine aquaria: landing receipts.**

Introduced: 2/8/2017

Last Amend: 8/6/2018

Status: 9/20/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 601, Statutes of 2018.

Location: 9/20/2018-S. CHAPTERED

Summary: Current law requires a person licensed as a commercial fish business who takes his or her own fish to make a legible record in the form of a landing receipt, as specified, at the time the fish are brought ashore. This bill would specify that the original signed copy of the paper landing receipt made under those provisions governing landing receipts for a licenced marine aquaria and a commercial fish business who takes his or her own fish shall be delivered to the department on or before the 16th or last day of the month in which the fish were landed, whichever date occurs first after the landing, as prescribed, and would require that landing receipt records that are completed and submitted electronically be submitted to the department within 3 business days, as defined, of the landing.

SB 345 **(Bradford D) Law enforcement agencies: public records.**

Introduced: 2/14/2017

Last Amend: 9/5/2017

Status: 3/3/2018-Last day to consider Governor’s veto pursuant to Joint Rule 58.5.

Location: 10/14/2017-S. VETOED

Summary: Would, commencing January 1, 2019, require the Department of Alcoholic Beverage Control, the Department of the California Highway Patrol, the Department of Corrections and Rehabilitation, the Department of Fish and Wildlife, the Department of Justice, the Commission on Peace Officer Standards and Training, and each local law enforcement agency to conspicuously post on their Internet Web sites all current standards, policies, practices, operating procedures, and education and training materials that would otherwise be available to the public if a request was made pursuant to the California Public Records Act.

SB 473 **(Hertzberg D) California Endangered Species Act.**

Introduced: 2/16/2017

Last Amend: 8/16/2018

Status: 9/10/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 329, Statutes of 2018.

Location: 9/10/2018-S. CHAPTERED

Summary: The California Endangered Species Act prohibits the taking of an endangered or threatened species, except in certain situations. Under the act, the Department of Fish and Wildlife

may authorize the take of listed species pursuant to an incidental take permit if the take is incidental to an otherwise lawful activity, the impacts are minimized and fully mitigated, and the issuance of the permit would not jeopardize the continued existence of the species. The act requires the department to adopt regulations for issuance of incidental take permits. This bill would also apply the take prohibition to public agencies.

SB 495 **(Vidak R) Protected species: blunt-nosed leopard lizard: taking or possession.**

Introduced: 2/16/2017

Last Amend: 6/28/2018

Status: 8/27/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 224, Statutes of 2018.

Location: 8/28/2018-S. CHAPTERED

Summary: Would permit the Department of Fish and Wildlife to authorize, under the California Endangered Species Act, by permit, the take or possession of the blunt-nosed leopard lizard resulting from impacts attributable to or otherwise related to the Allensworth Community Services District's drilling and construction of a new water well, connection of the new water well to the existing distribution system, and construction of a new water storage tank, if specified conditions are met. The bill would also make a conforming change and delete obsolete cross-references.

SB 506 **(Nielsen R) Department of Fish and Wildlife: lake or streambed alteration agreements: Internet Web site.**

Introduced: 2/16/2017

Last Amend: 6/5/2017

Status: 2/4/2018-Last day to consider Governor's veto pursuant to Joint Rule 58.5.

Location: 7/21/2017-S. VETOED

Summary: Would require the Department of Fish and Wildlife, on or before December 31, 2018, and periodically thereafter, to upgrade the information on its Internet Web site regarding lake or streambed alteration agreements, to update its "Frequently Asked Questions" document and other appropriate sources of information regarding the lake and streambed alteration program, and to provide guidance on its Internet Web site to facilitate members of the public in obtaining individualized guidance regarding the lake and streambed alteration program, as specified.

SB 580 **(Pan D) Water development projects: Sacramento-San Joaquin watersheds.**

Introduced: 2/17/2017

Status: 9/26/2017-Approved by the Governor. Chaptered by Secretary of State. Chapter 309, Statutes of 2017.

Location: 9/26/2017-S. CHAPTERED

Summary: Current law adopts and authorizes federally adopted and approved projects, including a project for flood control along the American and Sacramento Rivers. The projects are authorized at an estimated cost to the state of the sum that may be appropriated by the Legislature for state participation upon the recommendation and advice of the Department of Water Resources or the Central Valley Flood Protection Board. This bill would revise the authorization for the project for flood control along the American and Sacramento Rivers as further modified by a specified report adopted by Congress.

SB 615 **(Hueso D) Salton Sea restoration.**

Introduced: 2/17/2017

Last Amend: 9/8/2017

Status: 10/15/2017-Approved by the Governor. Chaptered by Secretary of State. Chapter 859, Statutes of 2017.

Location: 10/15/2017-S. CHAPTERED

Summary: Would specify that any barrier in the Salton Sea within or below a certain elevation would not be considered a dam and would provide that the construction of facilities to separate fresh water

from highly saline water for the purposes of implementing restoration activities pursuant to the act shall not be subject to review, approval, inspection, or fees associated with certain laws relating to dams and reservoirs. The bill would state various legislative findings and declarations relating to the Salton Sea, would name the state's comprehensive management plan for the Salton Sea the "John J. Benoit Salton Sea Restoration Plan."

SB 667 **(Atkins D) Department of Water Resources: riverine and riparian stewardship improvements.**

Introduced: 2/17/2017

Last Amend: 6/20/2017

Status: 10/6/2017-Approved by the Governor. Chaptered by Secretary of State. Chapter 543, Statutes of 2017.

Location: 10/6/2017-S. CHAPTERED

Summary: Current law authorizes the Director of Water Resources to establish a program of flood control and urban creek restoration, known as the Urban Streams Restoration Program, consisting of the development of the capability by the Department of Water Resources to respond to requests from local agencies and organizations for planning and design assistance for efficient and effective urban creek protection, restoration, and enhancement. This bill, upon an appropriation of funds from the Legislature, would require the department to establish a program to implement watershed-based riverine and riparian stewardship improvements by providing technical and financial assistance in support of projects with certain benefits.

SB 790 **(McGuire D) Dreissenid mussel infestation prevention: grants.**

Introduced: 2/17/2017

Last Amend: 8/24/2018

Status: 9/19/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 558, Statutes of 2018.

Location: 9/19/2018-S. CHAPTERED

Summary: Current law establishes a registration fee for vessels, and imposes an additional fee. Current law requires that all revenues from the additional prevention fee be deposited into the Harbors and Watercraft Revolving Fund, and, upon appropriation, be expended for certain purposes relating to the prevention, control, and management of dreissenid mussel infestations. Current law requires that a specified percentage of those revenues deposited into the fund from the prevention fee be made available to entities to be used for grants for the reasonable regulatory costs incident to the implementation of a dreissenid mussel infestation prevention plan. This bill would additionally make any person or entity that manages any aspect of the water in a reservoir, as defined, where recreational, boating, or fishing activities are permitted, eligible for a grant to be used for the reasonable regulatory costs of implementation of a dreissenid mussel infestation prevention plan.

SB 809 **(Committee on Natural Resources and Water) Natural resources.**

Introduced: 3/8/2017

Last Amend: 6/20/2017

Status: 10/5/2017-Approved by the Governor. Chaptered by Secretary of State. Chapter 521, Statutes of 2017.

Location: 10/5/2017-S. CHAPTERED

Summary: The California Constitution establishes the 5-member Fish and Game Commission, with members appointed by the Governor and approved by the Senate. Current statutory law requires the commissioners to annually elect one of their number as president and one as vice president, by a concurrent vote of at least 3 commissioners. Current law prohibits a president or vice president from serving more than 2 consecutive years. This bill would eliminate this prohibition.

SB 854 **(Committee on Budget and Fiscal Review) Public resources.**

Introduced: 1/10/2018

Last Amend: 6/11/2018

Status: 6/27/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 51, Statutes of 2018.

Location: 6/27/2018-S. CHAPTERED

Summary: Current law establishes the Department of Fish and Wildlife and vests the department with the jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitats necessary for biologically sustainable populations of those species. Current law designates the department as the trustee for fish and wildlife resources. This bill would specify the mission and the core programs of the department, as provided. The bill would require the department to contract with an independent entity to conduct a comprehensive service-based budget review and to consult on the development of a service-based budget tracking system.

SB 856 **(Committee on Budget and Fiscal Review) Budget Act of 2018.**

Introduced: 1/10/2018

Last Amend: 6/21/2018

Status: 6/27/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 30, Statutes of 2018.

Location: 6/27/2018-S. CHAPTERED

Summary: The Budget Act of 2018 made appropriations for the support of state government for the 2018–19 fiscal year.This bill would amend the Budget Act of 2018 by amending and adding items of appropriation and making other changes

SB 901 **(Dodd D) Wildfires.**

Introduced: 1/16/2018

Last Amend: 8/28/2018

Status: 9/21/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 626, Statutes of 2018.

Location: 9/21/2018-S. CHAPTERED

Summary: The Budget Act of 2018 appropriated $99,376,000 to the Office of Emergency Services for purposes of local assistance. Of those funds, $25,000,000 was made available, pursuant to a schedule, for equipment and technology that improves the mutual aid system. Current law authorizes the Department of Forestry and Fire Protection (CalFire) to administer various programs, including grant programs, relating to forest health and wildfire protection. This bill would revise the Budget Act of 2018 to provide that the $25,000,000 described above shall be applied to support activities directly related to regional response and readiness.

SB 1017 **(Allen D) Commercial fishing: drift gill net shark and swordfish fishery: permit transition program.**

Introduced: 2/7/2018

Last Amend: 8/24/2018

Status: 9/27/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 844, Statutes of 2018.

Location: 9/27/2018-S. CHAPTERED

Summary: Would require the Department of Fish and Wildlife by March 31, 2020, to establish a voluntary permit transition program that includes specified conditions, including a condition that a permittee who voluntarily surrenders his or her drift gill net shark and swordfish permit (DGN permit) and shark or swordfish gill net or nets receive, to the extent that funds for the transition program are available, a specified payment, as prescribed.

SB 1301 **(Beall D) State permitting: environment: processing procedures: dam safety or flood risk reduction project.**

Introduced: 2/16/2018

Last Amend: 8/6/2018

Status: 9/28/2018-Vetoed by the Governor. In Senate. Consideration of Governor's veto pending.

Location: 9/28/2018-S. VETOED

Summary: Would require the Office of Planning and Research to develop a joint multiagency preapplication for supplemental consultation and a model fee-for-service agreement, in consultation with a state agency with the power to issue a permit that would authorize a dam safety project or authorize a flood risk reduction project and any interested potential project applicants. The bill would authorize a project applicant to complete a joint multiagency preapplication and submit the preapplication to each state agency named in the preapplication at any time.

SB 1309 **(McGuire D) Fishing: Fisheries Omnibus Bill of 2018.**

Introduced: 2/16/2018

Last Amend: 8/6/2018

Status: 9/30/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 985, Statutes of 2018.

Location: 9/30/2018-S. CHAPTERED

Summary: Current law requires the Department of Fish and Wildlife to issue a commercial fishing salmon stamp upon application for the stamp and payment of a base fee of $85. That base fee is required to be adjusted during specified commercial salmon seasons. However, current law prohibits the total fees, as adjusted, from exceeding $260. Current law requires the department to deposit revenues from this fee, funds received from other sources, as specified, and other specified revenues in the Commercial Salmon Stamp Dedicated Subaccount in the Fish and Game Preservation Fund. This bill would extend the operation of these provisions until January 1, 2029.

SB 1310 **(McGuire D) Fishing: Dungeness crab.**

Introduced: 2/16/2018

Last Amend: 8/20/2018

Status: 9/21/2018-Approved by the Governor. Chaptered by Secretary of State. Chapter 663, Statutes of 2018.

Location: 9/21/2018-S. CHAPTERED

Summary: Current law sets forth the qualifications for initial issuance of a Dungeness crab vessel permit, including a person’s history of participating in the Dungeness crab fishery before the establishment of the permit program, provides that one category of permit issued pursuant to those provisions shall become null and void upon the death of the permittee, and provides a penalty for submitting false information in connection with initial issuance of the permit. Current law provides for renewal of a permit. Current law requires the owner of a permitted vessel to transfer the permit upon sale to the person purchasing the vessel. This bill would delete the provisions relating to the initial issuance of a permit, except for the provision that makes one category of permit null and void upon the death of the permittee.

SB 1487 **(Stern D) Iconic African Species Protection Act.**

Introduced: 2/16/2018

Last Amend: 7/2/2018

Status: 9/30/2018-Vetoed by the Governor. In Senate. Consideration of Governor's veto pending.

Location: 9/30/2018-S. VETOED

Summary: Would enact the Iconic African Species Protection Act and would prohibit the possession of specified African species and any part, product, or the dead body or parts thereof, including, but not limited to, the African elephant or the black rhinoceros, by any individual, firm, corporation, association, or partnership within the State of California, except as specified for, among other things, use for educational or scientific purposes by a bona fide educational or scientific institution, as defined.

For more information call:

Susan LaGrande, CDFW Deputy Director at (916) 651-6719
Julie Oltmann, CDFW Legislative Representative at (916) 653-9772

You can also find legislative information on the web at http://leginfo.legislature.ca.gov/ and follow the prompts from the ‘bill information’ link.

STATE OF CALIFORNIA
EDMUND G. BROWN JR., GOVERNOR

NATURAL RESOURCES AGENCY

California Fish and Game Commission
P.O. Box 944209
Sacramento, CA 94244-2090

California Department of Fish and Wildlife
P.O. Box 944209
Sacramento, CA 94244-2090

By Electronic Submission to www.regulations.gov

Docket ID Nos.
FWS-HQ-ES-2018-0006, FWS-HQ-ES-2018-0007, FWS-HQ-ES-2018-0009

September 24, 2018

Ryan K. Zinke, Secretary
U.S. Department of the Interior
1849 C. St. NW
Washington, DC 20240

Wilbur Ross, Secretary
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

Dear Secretaries Zinke and Ross:

Re: Proposed Amendments to Regulations Implementing the Federal Endangered Species Act (83 Fed. Reg. 35174, 35178, 35193, July 25, 2018).

The California Department of Fish and Wildlife (Department) and the California Fish and Game Commission (Commission) provide comments in response to the regulatory proposal from the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, Services) to amend regulations implementing the federal Endangered Species Act (ESA or Act) (16 U.S.C. § 1531 *et seq.*). We incorporate by reference the separate comments from California Attorney General Xavier Becerra and other States' Attorneys General. The Department and Commission appreciate the purpose of the regulatory proposal as described in the Services' press release is "to improve reliability, regulatory efficiency and environmental stewardship." These are good policy goals. We disagree the proposed amendments will achieve those goals.

Introduction

The Department and Commission understand it is the Services' prerogative to pursue administrative rulemaking. However, as California's Governor Brown informed Wyoming Governor Mead and the Western Governors' Association in 2017 with respect to Congressional action on Endangered Species Act reform, the current climate in Washington D.C., marked by chaos and partisanship, will "not result in good conservation policy." The same is true for the Services' current proposal. Durable and effective improvements to the federal ESA require balance and thoughtful dialogue, neither of which are reflected in the current proposal.

Portions of the Services' proposal are inconsistent with the Act. A number of the proposed amendments also contradict case law governing the interpretation and

application of the Act in California. The proposed amendments would disrupt the federal-state partnership for conservation in California, including in particular the Services' apparent proposal to treat climate science as irrelevant to the implementation of the Act.

These and other elements of the Services' proposal cannot be squared with the conservation and recovery purposes of the Act. Therefore, the Department and Commission respectfully request that the Services suspend further action on the proposal. Instead, the Services should convene a structured, transparent process involving the Department, other state wildlife agencies, and interested stakeholders to develop a more balanced and thoughtful package of regulatory amendments to improve the Services' administration of the Act.

California Overview

The Department and Commission agree that regulatory improvements can make processes more efficient and effective. We also agree with the introductory text in the regulatory packages that states the purposes of the Act are "to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species,..." and, as the Services' press release states, to further "the ESA's ultimate goal—recovery of our most imperiled species to the point they no longer need federal protection." The Department and Commission used this ultimate goal as the guide for our comments below – does the proposal overall or any proposed amendment specifically advance the conservation and recovery of California's most imperiled species to the point they no longer need federal protection? For the most part, we conclude they do not.

On September 7, 2018, Governor Brown issued an Executive Order underscoring a continued commitment to protect California's plants, animals, and unique biodiversity through the California Biodiversity Initiative. California is a world biodiversity hotspot. Among the 50 states, California is home to more species of plants and animals than any other state, and the highest number of species found nowhere else in the nation. California is also the fifth largest economy in the world and the most populous of the United States, with an expected population of 50 million people by the middle of this century. California's status as a global economic power and an international leader when it comes to addressing anthropogenic climate change reflects its commitment to science-based decision making and a fundamental understanding that the rich biodiversity of California is key to the state's continued economic growth and the well-being of our people.

Status as a State Wildlife Agency

Secretary Zinke noted in his September 10, 2018 Memorandum regarding "State Fish and Wildlife Management Authority" that "[e]ach of us must recognize the fundamental role of the States in fish and wildlife management, especially where States have primary

authority and responsibility, foster improved conservation of fish and wildlife, and encourage a good neighbor policy with the States." We appreciate that acknowledgement. We agree with the Secretary that state wildlife agencies have extensive capacity and competence to exercise responsibilities to serve as trustees for fish and wildlife. The Department and Commission believe in enhancing the federal-state partnership for conservation of imperiled species, and we thank the Services for their shared commitment to that goal.

The Department is California's designated trustee agency for fish and wildlife. As trustee, the Department is vested by state law with jurisdiction to conserve, protect, and manage California's native fish, wildlife, and plants, and the habitat necessary for biologically sustainable populations of those species. We do so in the sovereign interest of California and with its inherent police power to protect native fish and wildlife. The California Fish and Game Commission was the first wildlife agency in the United States beginning in 1870. The Commission establishes regulations and policies to protect and conserve California's fish and wildlife for future generations, including designating species under the California Endangered Species Act.

Disruption of Federal-State Partnership

The Department and Commission have long had a good neighbor relationship with the Services. That relationship and our shared success to date is often cited as the benchmark for innovative and effective partnership in furtherance of the Act.

California is home to some of the earliest and most successful Habitat Conservation Plans developed under the ESA. California has its own state law analog to that conservation tool in the Natural Community Conservation Planning Act (NCCPA) (Cal. Fish and Game Code § 2800 *et seq.*). Between federal and state efforts, there are 15 approved plans covering 2.5 million acres that provide regulatory streamlining and permitting to at least 85 entities while providing conservation benefit to over 320 species. Indeed, the Services' own proposed regulation (83 Fed. Reg. 35,174, 35,175) specifically cites this California law as an example of integrated partnerships. The proposals to repeal the USFWS "blanket rule," to expand the circumstances under which the Secretaries may decline to designate critical habitat, and to narrow the extent of habitat conservation threaten to undermine the federal-state partnership in landscape-scale conservation permitting under the NCCPA and ESA in California. These proposals are short sighted. As the fifth largest economy in the world, California's future requires this very kind of landscape-scale conservation permitting that the ESA already fosters.

California also has its endangered species law. The California Endangered Species Act (CESA) (Cal. Fish and Game Code § 2050 *et seq.*) largely parallels the federal Act, but differs in the higher level of protection afforded candidate and threatened species and the requirement to fully mitigate impacts to protected species. (Cal. Fish and Game

Code §§ 2080, 2085; and 2081, subd. (b)(2.) Currently, 307 species are listed under CESA. Of those, 172 are also listed under the federal ESA.

The Services' proposal would disrupt a key CESA permitting program that is grounded in federal partnership. Where the Services authorize take through Sections 7 or 10 of the Act, that authorization can be the basis for a Department "consistency determination" whereby no separate CESA take authorization is required. (Cal. Fish and Game Code § 2080.1.) Consistency determinations are efficient, avoid redundancy, accelerate permitting, and provide regulatory certainty. That is good government. The Department has issued 300 such determinations.

The Services' proposal would alter processes under Section 7 of the Act, which courts in California have called "the heart of the ESA." Specifically, the Services' proposal would narrow the scope of required analysis assessing the effects of proposed federal agency actions; limit the circumstances where the effects of a federal action on designated critical habitat will lead to a requirement to alter or mitigate for the action; and eliminate any requirement that the Services independently evaluate whether a federal action agency will actually implement measures to avoid, minimize, or offset effects to listed species and critical habitat. These changes would decrease the ability to deploy good government mechanisms like consistency determinations due to the fundamental disparity between the federal and state standards.

In addition, for the first time in the history of the Act, the Services propose to encourage the consideration of economic effects in the listing process, rather than preserving those determinations as an exclusive matter of biological science. In a circumstance where one sovereign makes listing decisions driven by economic considerations (USFWS and NMFS), while another in its own sovereign interest (the Department and Commission) lists species based solely on science and biology, disruption of the federal-state conservation partnership is bound to occur. This disruption would inevitably make things less certain and more burdensome for the regulated community. Nor will considering economics in listing decisions achieve the ultimate goal the Services embrace.

Climate Science Cannot be Ignored

Particularly troubling is the Services' apparent intent to foreclose consideration of accepted science and bedrock principles of species conservation. Specifically, the Services contend climate change has no bearing on and is not relevant to the federal designation of critical habitat. Melting glaciers, sea level rise, and reduced snow pack are not relevant, the Services claim, because the federal ESA cannot prevent these effects.

Even if true, this statement misses the point. That landscapes and ecosystems, and species abundance and distribution, are inherently dynamic over time is a matter of

indisputable science. Likewise, the consensus view of the international scientific community is that climate change is affecting and will continue at an escalating pace to affect landscapes, ecosystems, and species at a global, regional, and local level.

We cannot ignore the effects of climate change. A vulnerability assessment can be used to determine which species may be most vulnerable to climate change, and why. Many of these assessments have been conducted in California, and these studies provide crucial information for conservation and adaptation planning. The Department has completed or funded climate change vulnerability assessments for fish, wildlife, and plants, which can be found at https://www.wildlife.ca.gov/Conservation/Climate-Science/Resources/Vulnerability. The climate vulnerability ranks and associated maps provide a comprehensive view of climate vulnerability of species and habitats in California. Species that were identified as climate vulnerable were included in the 2015 California State Wildlife Action Plan as species of greatest conservation need. The continued existence and recovery of imperiled species requires consideration of climate change science in the context of implementing the federal ESA.

Conclusion

The Department and Commission appreciate the opportunity to comment on the Services' proposed regulatory amendments. We urge the Services to table the current proposal and instead continue a collaborative discussion on how best to implement the Act in California. Doing so will allow us to strengthen, not weaken, the federal-state partnership in species conservation. We stand ready to engage in that discussion at your earliest convenience.

Sincerely,

Charlton H. Bonham, Director
California Department of Fish and Wildlife

Eric Sklar, President
California Fish and Game Commission

COMMENTS OF THE ATTORNEYS GENERAL OF MASSACHUSETTS, CALIFORNIA, MARYLAND, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND THE DISTRICT OF COLUMBIA

September 24, 2018

By Electronic Submission to www.regulations.gov

Hon. Ryan K. Zinke, Secretary
U.S. Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

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

Re: Comments on Proposed Rules entitled:

Docket ID No. FWS-HQ-ES-2018-0006: Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35,193 (July 25, 2018)

Docket ID No. FWS-HQ-ES-2018-0009: Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. 35,178 (July 25, 2018)

Docket ID No FWS-HQ-ES-2018-0007: Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35,174 (July 25, 2018)

Dear Secretaries Zinke and Ross:

The undersigned ten State Attorneys General of the Commonwealths of Massachusetts and Pennsylvania, and the States of California, Maryland, New York, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia (together, the "States") respectfully submit the following comments on the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service's ("NMFS") (together, the "Services") proposed rules entitled *Revision of the Regulations for Listing Species and Designating Critical Habitat*, 83 Fed. Reg. 35,193 (July 25, 2018) (hereinafter the "Listing Rule"), and *Revision of Regulations for Interagency Cooperation*, 83 Fed. Reg. 35,178 (July 25, 2018) (hereinafter the "Interagency Consultation Rule"), and FWS's proposed rule entitled *Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants*, 83 Fed. Reg. 35,174 (July 25, 2018) (hereinafter the "4(d) Rule") (together, the "Proposed Rules"). The Proposed Rules are untethered to, and in clear violation of, the species-protective requirements and overriding conservation purpose of the Endangered Species Act ("ESA" or "Act") enacted by Congress in 1973. In plain disregard of established law, they

would wreak havoc on one of our nation's most successful conservation laws and harm the States' vital interests in species protection.

Among other troubling defects, the Proposed Rules would unlawfully allow the Services to weave economic cost considerations into, and discount scientific information throughout, their decision making; ignore grave threats to species' survival like climate change; reduce the number and extent of critical habitat designations for listed species; restrict the circumstances under which federal agencies must engage in interagency consultations and dramatically narrow the scope of such consultations; and leave threatened species unprotected from harm while the FWS works through its ever-present backlog of rulemaking obligations. Rather than promote the regulatory efficiency the agencies purportedly seek, the Proposed Rules, if finalized, would achieve precisely the opposite, burying the Services in paperwork, increasing the backlog of outstanding listing and designation decisions, and inviting litigation. The Proposed Rules also violate the plain language of the Act, its legislative history, and its overarching precautionary approach and, further, are arbitrary and capricious, lacking any reasoned basis. What is more, the Services altogether have failed to study the devastating environmental effects of the Proposed Rules, in violation of the National Environmental Policy Act ("NEPA").

We urge the Services to withdraw these misguided proposals and instead fulfill their longstanding statutory obligation to conserve the precious biological resources of our States and nation, the value of which "is, quite literally, incalculable." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 178-79 (1978).

INTRODUCTION AND EXECUTIVE SUMMARY

Congress enacted the ESA nearly forty-five years ago in a bipartisan effort "to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184; *see* 16 U.S.C. § 1531(a). As President Nixon explained in signing the Act, "[n]othing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed."[1] The ESA accordingly enshrines a national policy of "institutionalized caution" in recognition of the "overriding need to devote whatever effort and resources [are] necessary to avoid further diminution of national and worldwide wildlife resources." *Hill*, 437 U.S. at 177, 194 (internal quotation omitted).[2] That pervasive goal "is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id.* at 184.

The Act achieves its salutary purpose through multiple vital programs, each of which is undermined by the Proposed Rules. Section 4—the "cornerstone of effective implementation of the [ESA]," S. REP. No. 97-418, at 10 (1982)—provides for the listing of both endangered and threatened species based solely on the best scientific and commercial data about threats to the species, 16 U.S.C. § 1533(a)(1)-(2), (b)(1). Section 9 in turn prohibits "take" (*e.g.*, killing, injuring, or harming) of listed endangered fish and wildlife species, and section 4(d) authorizes extension of that prohibition to listed threatened species to ensure their conservation in line with

[1] President's Statement on Signing the Endangered Species Act of 1973, 374 PUB. PAPERS, 1027, 1027-1028 (Dec. 28, 1973).

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

the Act's overarching precautionary approach. *Id*. §§ 1533(d), 1538(a)(1)(G), (a)(2)(E). Section 4 of the Act also ensures the survival and recovery of listed species by requiring the Services, concurrently with species listing, to designate habitat essential to their conservation, termed critical habitat. *Id.* §§ 1532(5)(A), 1533(a)(3). Finally, section 7 reflects "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species," elevating concern for species protection "over the 'primary missions' of federal agencies.'" *Hill*, 437 U.S. at 185. Accordingly, section 7 mandates that all federal agencies, in consultation with the Services, must "insure" that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or adversely affect critical habitat. 16 U.S.C. § 1536(a)(2).[3]

The three Proposed Rules—admittedly developed to further a deregulatory agenda[4]—would fundamentally undercut these programs while purporting merely to increase clarity and encourage efficiency and transparency.

> ***First,* the Listing Rule** violates the ESA's express requirements for listing of endangered and threatened species and designating critical habitat without any cogent rationale for upending its longstanding listing and critical habitat designation processes. *See infra* Section II.A., pp.10-23. The proposal unlawfully and arbitrarily:
>
> - injects economic considerations and quantitative thresholds into the Act's science-driven, species-focused analyses;
> - limits the circumstances under which species can be listed as threatened;
> - eliminates consideration of species' recovery in the delisting process;
> - expands the Act's expressly and purposefully narrow exemptions for designation of critical habitat; and
> - limits the circumstances under which unoccupied critical habitat would be designated, particularly where climate change poses a threat to species habitat.

[3] *See also* 16 U.S.C. §§ 1531(b)-(c), 1532(3) (directing all federal agencies to conserve endangered and threatened species and to utilize their authorities in furtherance of Act's species-protective purposes).
[4] Listing Rule, 83 Fed. Reg. at 35,194 (citing Executive Order 13,777, "Enforcing the Regulatory Reform Agenda," as impetus for rulemaking); Interagency Consultation Rule, 83 Fed. Reg. at 35,179 (same); 4(d) Rule, 83 Fed. Reg. at 35,175-76 (same).

***Second,* the Interagency Consultation Rule** would upend the ESA's section 7 federal agency consultation process in violation of the plain language and purpose of the Act and without any reasoned basis. *See infra* Section II.B., pp.23-34. Among other unlawful changes, the Services' proposals would:

- limit the circumstances under which a federal agency action would be deemed to destroy or adversely modify designated critical habitat;
- limit the scope and extent of the analysis of the effects of a federal agency action;
- include several significant new exemptions from the consultation requirement;
- limit the instances where changed circumstances would require re-initiation of consultation on a federal agency action;
- Limit federal action agencies' duty to insure mitigation of the adverse effects of their proposals and give federal action agencies the ability to make biological determinations that the Services are required to make; and
- allow for broad-based "programmatic" and "expedited" consultations that give short shrift to site-specific and in-depth analysis of a proposed federal agency action.

***Third,* the 4(d) Rule** proposes to remove, going forward, the "blanket" extension to threatened species of all protections afforded to endangered plants and animals under the ESA, a radical departure from the longstanding, conservation-based agency policy and practice of providing default section 9 protections to all newly listed threatened plant and animal species. *See infra* Section II.C., pp.34-37.

- FWS's new proposal is contrary to the ESA's conservation purpose and precautionary approach because it inevitably would leave threatened species without protections necessary to promote recovery, either temporarily or permanently, and increase the risk that they will become endangered.
- The agency provides no sound reason for this abrupt policy change, which would strain already overburdened agency resources and generate litigation.

Finally, the Services have violated NEPA by altogether failing to assess the environmental impacts of the Proposed Rules or to circulate such analyses for public review and comment. *See infra* Section III., pp.37-40. Each of the Proposed Rules is without question a major federal action, each will significantly affect the human environment by eviscerating the ESA's important species protections, and none qualifies for the limited, largely procedural categorical exclusions from NEPA compliance available to the Services. The Services must now properly analyze the Proposed Rules' dire environmental consequences, and prepare an Environmental Impact Statement to enable meaningful public comment and ensure fully informed decision making in compliance with NEPA.

I. The States Are Uniquely Positioned To Demand that the Services Faithfully Implement the Endangered Species Act.

The States are uniquely qualified to evaluate, and demand withdrawal of, the Services' proposals to weaken the ESA: States have significant interests in the conservation of their natural heritage; States and their residents suffer when species conservation measures are curtailed and their biological diversity is threatened and in turn have benefitted from successful implementation of the Act; and States seeking to protect their natural resources would need to devote significant resources and institutional capacity to make up for the Services' failures to properly implement the Act, if the Proposed Rules are finalized.

First, States have a concrete interest in preventing harm to their natural resources, both in general and under the ESA in particular. States are harmed in their *parens patriae* capacity when their residents suffer due to environmental degradation. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 737-38 (1981). And, as the Supreme Court has recognized, States are entitled to special solicitude in seeking to remedy environmental harms. *See Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 519-22 (2007). These interests are particularly robust in the context of the ESA, which conserves the invaluable natural heritage within States' borders. Indeed, in many States, wildlife resources are held in trust by the States for the benefit of the people of the State.[5] Accordingly, the Act specifically directs the Services to "cooperate to the maximum extent practicable with the States" in implementing the Act and also gives States a special seat at the table in ensuring faithful and fully informed implementation of the Act's species-conservation mandates. 16 U.S.C. § 1535(a).[6] The States thus have an important voice in preventing and remedying harm to endangered and threatened species and their habitat.

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[5] *See* Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1488-93 App. A (2013) (summarizing state wildlife trust law); *Geer v. Connecticut*, 161 U.S. 519, 527-29 (1896), *overruled on other grounds by Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *see also, e.g.*, CAL. FISH & GAME CODE §§ 711.7(a), 1802 (State of California holds its fish and wildlife resources in trust for people of State); WASH. REV. CODE 77.75.070 ("Wildlife resources are managed in trust by the respective states for the benefit of all residents and visitors."); VT. STAT. ANN. tit. 10, § 4081(a)(1) ("[T]he fish and wildlife of Vermont are held in trust by the State for the benefit of the citizens of Vermont and shall not be reduced to private ownership. The State of Vermont, in its sovereign capacity as a trustee for the citizens of the State, shall have ownership, jurisdiction, and control of all the fish and wildlife of Vermont.").

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

Second, and relatedly, any efforts to weaken implementation of the ESA would put at risk the States' irreplaceable natural heritage and harm the States and their residents in numerous ways. The ESA recognizes that endangered and threatened "species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." *Id.* § 1531(a)(3). Reducing our wealth of wild species would damage each of these values and "diminish[] a natural resource that could otherwise be used for present and future commercial purposes." *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1053-53 (D.C. Cir. 1997); *see also San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011). And although the harms that would result from the loss of biological diversity are enormous, the nation cannot fully apprehend their scope because of the "*unknown* uses that endangered species might have and . . . the *unforeseeable* place such creatures may have in the chain of life on this planet." *Hill*, 437 U.S. at 178-79 (emphases in original).[7]

Over the last four decades, the States have seen significant benefits[8] and steps toward recovery of at-risk species from the Services' implementation of the ESA, including the recovery and delisting of our national bird, the bald eagle (*Haliaeetus leucocephalus*). Among other examples, populations of the Atlantic Coast piping plover (*Charadrius melodus*), which is listed as a threatened species along most of the East Coast, have more than doubled in the last twenty years thanks to FWS's conservation planning, federal enforcement, and cooperative efforts between federal, state, and local partners pursuant to the ESA.[9] Recovery efforts have been particularly successful in Massachusetts, where the East Coast's largest piping plover breeding population has rebounded from fewer than 150 pairs in 1990, to about 642 pairs in 2016,[10] increasing 500 percent since the species was listed in 1986.[11] Despite these gains, however, piping plovers' continued recovery is threatened by habitat loss from sea level rise caused by climate change.[12]

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[7] *See also National Ass'n of Home Builders*, 130 F.3d at 1052-53.

[8] Species recovery also benefits biodiversity in entire ecosystems. *See generally* William J. Ripple & Robert L. Beschta, *Trophic cascades in Yellowstone: The first 15 years after wolf reintroduction*, 145 Biological Conservation, 205, 206 (2012) (reintroduction of gray wolves to Yellowstone National Park restored a trophic cascade, resulting in rebounded plant growth, greater forage opportunities for several species, and increased beaver and bison populations), *available at* https://doi.org/10.1016/j.biocon.2011.11.005; Madhu Rao & Trond Larsen, *Ecological Consequences of Extinction*, 3 LESSONS IN CONSERVATION 25, 27-28 (2010) (studies demonstrate that species extinctions are likely to have far-reaching consequences, including cascading extinctions of other species and disruptions of ecosystem function), *available at* https://www.amnh.org/content/download/141367/2285419/file/LinC3_EcolCon.pdf.

[9] *See Piping Plover* (Charadrius melodus), FWS, https://www.fws.gov/northeast/pipingplover/index.html (last updated Apr. 5, 2018); *see also United States v. Town of Plymouth*, 6 F. Supp. 2d 81, 92-94 (D. Mass 1998) (federal enforcement example).

[10] MASS. DIV. OF FISHERIES & WILDLIFE, SUMMARY OF THE 2016 MASSACHUSETTS PIPING PLOVER CENSUS (updated 2018), *available at* http://www.mass.gov/eea/docs/dfg/nhesp/species-and-conservation/plover-census-report-mass-2016.pdf.

[11] *See Piping Plover*, *supra* note 9.

[12] *See* MASS. DIV. OF FISHERIES & WILDLIFE & ICF INT'L, HABITAT CONSERVATION PLAN FOR PIPING PLOVER 2-10 to 2-25, 5-21 to 5-22 (2016), *available at* https://www.fws.gov/newengland/pdfs/MADFW_HCP/MADFW%20Final%20Piping%20Plover%20HCP_June%202016.pdf.

The California condor (*Gymnogyps californianus*), the largest land bird in North America, has been listed as "endangered" since the Act's inception and was on the brink of extinction in 1982 with just twenty-three known individuals. By 1987, all remaining wild condors had been placed into a captive breeding program. Recovery efforts led by FWS, California state agencies, and other partners have increased the population to 463 birds as of 2017 and successfully reintroduced captive-bred condors to the wild. These efforts are now in their final phase, with a focus on creating self-sustaining populations and managing continued threats to the species, such as lead ammunition, trash, and habitat loss. [13]

The smallest rabbit in North America, the pygmy rabbit *(Brachylagus idahoensis*), was listed as an endangered species under Washington State law in 1993 and by 2001 was considered nearly extinct, with an estimated population of fewer than 50 individuals. In 2003, FWS also listed a distinct population segment of the species known as the Columbia Basin pygmy rabbit as an endangered species under the Federal ESA. Since that time, the species has begun to recover in Washington as a result of a cooperative effort by FWS, the Washington Department of Fish and Wildlife, researchers, and other state agencies. Thousands of rabbits have been reintroduced on state and private land, with promising evidence of a growing population. Recovery would not be possible without the mutually supporting protections of state and federal law.[14]

The shortnose sturgeon (*Acipenser brevirostrum*) is an anadromous fish found in rivers, estuaries, and coastal waters along the Atlantic Coast of North America.[15] Overfishing, river damming, and water pollution greatly reduced its numbers, and the shortnose sturgeon was listed as endangered in 1967. However, fishing prohibitions and habitat protection efforts led by NMFS and New York have allowed the shortnose sturgeon population to increase in New York's Hudson River from about 12,669 in 1979 to more than 60,000 today. [16]

The Delmarva fox squirrel, found primarily in Maryland and included on the original list of federally endangered species, has successfully recovered and was delisted by FWS in December 2015. At the time it was listed, the Delmarva fox squirrel had been limited to just 10 percent of its historic range due to forest clearing and overhunting and was found almost exclusively in three Maryland counties. Through concerted conservation efforts triggered by the ESA, the species' range now encompasses ten counties in three States—Maryland, Delaware, and Virginia—and, with an estimated population of 17,000-20,000, the species is no longer at

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[13] See *California Condor Recovery Program*, FWS, https://www.fws.gov/cno/es/CalCondor/Condor.cfm (last updated May 23, 2018).
[14] *See* Pygmy Rabbits in Washington, WASH. DEP'T FISH & WILDLIFE (June 2015), *available at* https://wdfw.wa.gov/conservation/pygmy_rabbit/; *Pygmy Rabbit (Columbia Basin DPS)*, FWS, https://www.fws.gov/wafwo/articles.cfm?id=149489590 (last visited Sept. 20, 2018).
[15] NOAA FISHERIES, ATLANTIC AND SHORTNOSE STURGEON, *available at* https://www.greateratlantic.fisheries.noaa.gov/protected/atlsturgeon/docs/sturgeonfactsheetfinal.pdf.
[16] *The Endangered Species Act: A Wild Success*, CTR. FOR BIOLOGICAL DIVERSITY, https://www.biologicaldiversity.org/campaigns/esa_wild_success/ (last visited Sept. 20, 2018).

risk of extinction.[17] These are but a few of the many examples of successful, robust, and cooperative implementation of the ESA by the Services and State partners, success stories that likely would not be possible under the Proposed Rules.

Third, the States have institutional and proprietary interests in the Services' full compliance with the Act's plain language and overriding conservation purpose, because States would have to attempt to fill the regulatory and enforcement void left by the Services' failure to adequately protect the nation's irreplaceable biological resources. Many States have laws and regulations that protect species within their borders to the same extent or greater than the federal ESA.[18] In such circumstances, the Services and the States take account of each other's efforts to conserve rare species and often work cooperatively to share the responsibility and workload required for their protection.[19]

If the Services finalize the Proposed Rules and thus weaken federal species protections, the responsibility for, and burden of, protecting imperiled species and habitats within State borders would fall primarily on the States. This would detract from State efforts and resources to carry out their more protective programs and impose significantly increased costs and burdens on the States. For example, under the proposed 4(d) Rule, species newly listed as threatened under both State and federal law would be subject to a "take" prohibition *only* under State law. *See, e.g.*, MASS. GEN. LAWS. ch. 131A, § 2; CAL. FISH & GAME CODE §§ 2080, 2085. In such circumstances, the States would have to shoulder the costs of conservation while FWS clears its

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[17] *See* FWS, DELMARVA PENINSULA FOX SQUIRREL (*SCIURUS NIGER CINEREUS*): QUESTIONS AND ANSWERS ABOUT REMOVAL FROM THE LIST OF THREATENED AND ENDANGERED SPECIES (Nov. 13, 2015), *available at* https://www.fws.gov/chesapeakebay/EndSppWeb/DFS/FAQs_DFSdelist_2015.pdf.

[18] *See* 16 U.S.C. § 1535; *see, e.g.*, MASS. GEN. LAWS. ch. 131A, §§ 1-7; 321 CODE MASS. REGS. §§ 10.00 *et seq*. (creating three classifications of protected species, "Endangered," "Threatened," and "Special Concern," and currently listing 427 species, including 401 species not listed under the federal ESA); California Endangered Species Act, CAL. FISH & GAME CODE §§ 2050 *et seq.*; California Natural Communities Conservation Planning Act, CAL. FISH & GAME CODE §§ 2800 *et seq.*; REV. CODE WASH. 77.12.020 (authorizing the classification of wildlife as "protected" or "endangered"); WASH. ADMIN. CODE § 220-610-110 (creating the protected subcategories of "sensitive" and "threatened," and establishing procedures for listing); VT. STAT. ANN. tit. 10, §§ 5401 *et seq.* (protecting endangered and threatened species and critical habitat, and currently listing 52 animal species, 44 of which are not listed under the federal ESA, and 163 plant species, 160 of which are not listed under the federal ESA); Maryland Endangered Species of Fish Conservation Act, MD. CODE ANN., NAT. RES. §§ 4-2A-01 *et seq.* (providing authority for listing and protection of fish species "[i]n addition to the species deemed to be endangered or threatened pursuant to the Endangered Species Act"); Maryland Nongame and Endangered Species Act, MD. CODE ANN., NAT. RES. §§ 10-2A-01 *et seq*. (providing authority for listing and protection of species of wildlife and plant "[i]n addition to the species deemed to be endangered or threatened pursuant to the Endangered Species Act").

[19] *See* 16 U.S.C. § 1533(b)(1)(A), (b)(1)(B)(ii). Under Washington State rules, for example, federal listing initiates state listing and development of a recovery plan. Consequently, federal and state protections operate synergistically, and the reduction of federal protections for threatened species will render state recovery plans less effective. *See* WASH. ADMIN. CODE § 220-610-110 (3.2); *see also* VT. STAT. ANN. tit. 10, §§ 5402(e)(2), 5402a(c)(2) (requiring that for listing or delisting species or designating critical habitat Agency of Natural Resources "notify and consult with appropriate officials in Canada, appropriate state and federal agencies, [and] other states having a common interest in the species," among others).

backlog and irons out the details of a species-specific rule (if it ever even does so), or else risk irreversible damage to the threatened species in the meantime. *See Air Alliance Hous. v. U.S. Envtl. Prot. Agency*, No. 17-1155, slip op. at 18-19 (D.C. Cir. Aug. 17, 2018) ("Monetary expenditures to mitigate and recover from harms that could have been prevented absent the [federal rule] are precisely the kind of 'pocketbook' injury that is incurred by the state itself." (citing *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 602)).[20] And, importantly, despite these resource-intensive efforts, the States would not be able to wholly fill the regulatory gap created by abrogation of the blanket 4(d) Rule and other proposed changes because some states with significant biodiversity do not adequately protect endangered or threatened species under state law.[21] In such cases, federal regulation is the only defense for resident at-risk species.

For all these reasons, the States have a special perspective on implementation of the ESA that demands the Services' attention here.

II. The Proposed Rules Violate the Text and Purpose of the Endangered Species Act and Lack Any Reasoned Basis.

The Proposed Rules violate several bedrock principles of administrative law. While agencies often have discretion to carry out statutory mandates, they may not regulate in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory . . . authority." 5 U.S.C. § 706(2)(A), (C). First, agencies altogether lack authority to adopt regulations that are "manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703 (1995). Second, in promulgating a regulation "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation and citation omitted). Agency regulation is arbitrary and capricious if the agency "relie[s] on factors which Congress has not intended it to consider" or "entirely fail[s] to consider an important aspect of the problem." *Id.* Finally, in promulgating regulations agencies must afford the public notice of the *specific*—not vaguely stated—regulatory changes and their reasoned basis to provide the public a meaningful opportunity for comment. *Home Box Office, Inc. v. Federal Commc'ns Comm'n*, 567 F.2d 9, 35-36 (D.C. Cir. 1977).[22]

These core principles apply equally to an agency's decision to change existing policy. *Federal Commc'ns Comm'n v. Fox Television Stations*, 556 U.S. 502, 513-15 (2009). While an

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[20] Federal enforcement has been instrumental in the ongoing recovery of the threatened piping plover in Massachusetts. *See, e.g., Town of Plymouth*, 6 F. Supp. 2d at 92-94. With delayed protection for newly listed threatened species, similar success stores would be possible only with ramped up state enforcement.

[21] For example, West Virginia is home to dozens of federally listed endangered and threatened species, but has no state legislation aimed at protecting threatened or endangered species. *See* W.VA. DIV. OF NAT. RESOURCES, FEDERALLY THREATENED AND ENDANGERED SPECIES IN WEST VIRGINIA (Mar. 28, 2018), *available at* http://www.wvdnr.gov/Wildlife/PDFFiles/TElist.pdf; *Rare, Threatened, and Endangered Species*, W.VA. DIV. OF NAT. RESOURCES, http://www.wvdnr.gov/wildlife/endangered.shtm (last visited Sept. 20, 2018).

[22] *See also Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002).

agency need not show that a new rule is "better" than the rule it replaced, it still must demonstrate that "it is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." *Id.* at 515 (emphases omitted). Further, an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when "its new policy rests upon factual findings that contradict those which underlay its prior policy." *Id.* Any "[u]nexplained inconsistency" between a rule and its repeal is "a reason for holding an [agency's] interpretation to be an arbitrary and capricious change." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

The Proposed Rules fail each of these requirements for lawful agency action and therefore must be withdrawn. The Listing Rule, Interagency Cooperation Rule, and 4(d) Rule violate the ESA's text, structure, and purpose, and exceed the scope of the Agencies' authority and discretion under the Act. In addition, the Services have failed to provide a reasoned justification for the proposed changes, relied on factors Congress did not intend for them to consider, or entirely overlooked important issues at the heart of their species-protection duties under the Act. The Services further have evaded their notice obligations under the Administrative Procedure Act by posing vague questions in the Federal Register notices about possible additional and damaging changes to the regulations without specific proposed regulatory text or explanation for the proposed changes. We address each rule and its legal flaws in turn below.

A. *Listing Rule*, 83 Fed. Reg. 35,193 (July 25, 2018)
Docket ID No. FWS-HQ-ES-2018-0006

i. Addition of Economic Impacts to Listing Analyses.

The Listing Rule proposes to remove the listing regulation's current restriction, embodied in section 4 of the ESA, that species listing, reclassification, and delisting decisions must be made "without reference to possible economic or other impacts of such determination." 50 C.F.R. § 424.11(b); *see* 83 Fed. Reg. at 35,194-95, 35,200. In removing that limitation, the Services aim to inject consideration of economic impacts into the species threshold listing, delisting, and reclassification determinations in clear violation of the Act's express terms and without any reasoned explanation.

First, the Services' economic-cost proposal violates the ESA's express terms, legislative intent, and case law. The ESA could not be clearer on this point: species listing decisions must be made "*solely* on the basis of the best scientific and commercial data available" about the status of the species. 16 U.S.C. § 1533(b)(1)(A) (emphasis added).[23] Whereas the ESA authorizes consideration of economic impacts in determining what areas to designate as critical habitat, *id.* § 1533(b)(2), it expressly requires that all listing decisions center exclusively on the biological threats to the species, such as habitat destruction, disease, and predation, without regard to the economic effects of listing, *id.* § 1533(a)(1), (b)(1)(A).

[23] The reference to "commercial data" in the statute's listing provisions is intended to allow the Services to consider data about trading of species and is "not intended, in any way, to authorize the use of economic considerations in the process of listing a species." H.R. REP. No. 97-567, at 20 (1982).

Legislative history and case law confirm that the term "solely" was meant to preclude economic analysis at the listing stage. "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, *whatever the cost*." *Hill*, 437 U.S. at 184 (emphasis added). As numerous courts have recognized,[24] Congress added the term "solely" to section 4's listing provisions in 1982 to emphasize that listing determinations were to be made "solely upon biological criteria and to prevent non-biological considerations from affecting such decisions." H.R. REP. No. 97-567, at 19 (1982); *see also id.* at 20.[25] This amendment was intended to "improve[] and expedite[]" the listing process and to divert "the balancing between science and economics" to "the [critical habitat] exemption process." *Id.* at 12.[26]

The Services' proposed elimination of the prohibition on referencing economic impacts thus is plainly unlawful and manifestly contrary to the statute, undermining Congress's goal of improving and expediting the listing process. 5 U.S.C. § 706(2)(A), (C); *Chevron*, 467 U.S. at 843; *Motor Vehicle Mfrs.*, 463 U.S. at 43. The proposal does not merely "more closely align [the regulation] with the statutory language," as the Services claim. 83 Fed. Reg. at 35,194. Although the Services contend that biological considerations will continue to be the basis for listing decisions, they themselves acknowledge that they may under their new proposal, actually "reference[] economic, or other, impacts"—a factor Congress expressly provided they *not* consider—in their listing decisions. 83 Fed. Reg. at 35,194; *see also id.* at 35,195. It is difficult to believe that the Services and commenters will not *consider* economic impact information even as the Services generate and "*reference*[]" it during the listing stage. *Id.* at 35,194 (emphasis added). And it is unclear what purpose it could serve for the Services to spend time and resources generating economic impact information if they were not going to consider the data.

In any event, that proposed process of compiling and presenting cost-benefit analyses itself runs counter to Congress's intent to "improv[e] and expedit[e]" the listing process, *even if* the Services counterintuitively intend to ignore it. H.R. REP. No. 97-567, at 12 (1982); S. REP. No. 97-418, at 4 (1982). The Services nowhere even acknowledge, let alone justify, the added burden, backlog, and delay these economic impact analyses will create for the Services, thus "fail[ing] to consider an important aspect of the problem."[27] *Motor Vehicle Mfrs.*, 463 U.S. at 43. Nor do the Services explain what "circumstances" would warrant "referenc[ing]" economic

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

[25] *See also* H.R. REP. No. 97-567, at 11-12 (1982); H.R. CONF. REP. No. 97-835, at 20 (1982) ("[E]conomic considerations have no relevance to determinations regarding the status of species."); S. REP. No. 97-418, at 4, 11 (1982).

[26] *See also* S. REP. No. 97-418, at 4 (1982) (1982 amendments "would ensure that . . . economic analysis . . . will not delay or affect decisions on listing"); *id.* at 11.

[27] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-304, ENVIRONMENTAL LITIGATION: INFORMATION ON ENDANGERED SPECIES ACT DEADLINE SUITS, pp.5-18 (Feb. 2017) (hereinafter "GAO Listing Deadline Litigation Report") (reporting that 141 lawsuits involving 1,441 species were filed from fiscal year 2005 through 2015 alleging that FWS and NMFS failed to take actions within deadlines mandated by ESA section 4, largely on petitions to list species), *available at* https://www.gao.gov/assets/690/683058.pdf; *see also In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704 F.3d 972, 975 (D.C. Cir. 2013) (describing backlog of listing decisions).

impacts or how they plan to quantify the potential costs and benefits of listing decisions, a particularly challenging task where they lack the requisite resources and expertise to do so and where, as discussed above, "[t]he value of [species and our] genetic heritage is, quite literally, incalculable." *Hill*, 437 U.S. at 178-79 (quoting H.R. REP. No. 93-412, at 4-5 (1973)); *cf. id.* at 187-88 ("Quite obviously, it would be difficult for a court to balance the loss of a sum certain—even $100 million—against a congressionally declared 'incalculable' value, even assuming we had the power to engage in such a weighing process, which we emphatically do not.").

Second, the Services do not, and cannot, offer any reasoned basis for their economic-impact proposal. The Services may not lawfully resort to their stated goal of informing the public about the potential costs and benefits of implementation in order to comply with Congress's unspecified "support for informing the public as to the impacts of regulations in subsequent amendments to statutes and executive orders." 83 Fed. Reg. at 35,195. Whatever the content of those vaguely referenced authorities, they do not authorize the Services to evade the ESA's specific prohibition on the inclusion of economic impacts in listing determinations. 16 U.S.C. § 1533(b)(1)(A); *cf. Am. Bicycle Ass'n v. United States*, 895 F.2d 1277, 1279-80 (9th Cir. 1990) (general grant of authority does not override "specific and unequivocal" proscription). In fact, as the Services themselves acknowledge, 83 Fed. Reg. at 35,194, Congress originally added the term "solely" to the ESA out of concern that those same types of authorities, like the Regulatory Flexibility Act and Paperwork Reduction Act, potentially could be used to introduce economic and other factors into listing determinations under the Act. *See, e.g.*, H.R. CONF. REP. No. 97-835, at 20 (1982) (explaining that "economic analysis requirements of Executive Order 12,291, and such statutes as the Regulatory Flexibility Act and the Paperwork Reduction Act, *will not apply* to any phase of the listing process" (emphasis added)). For these reasons, too, the Services' attempt to analogize listing determinations to the entirely distinct standard-setting processes under the federal Clean Air Act is simply inapt. 83 Fed. Reg. at 35,194-95. Because the Services' economic-impact proposal is thus both unlawful and unjustified, it should be withdrawn.

ii. Redefinition of Foreseeable Future.

The Listing Rule's second proposed change would narrow the definition of "threatened species" under the ESA, which includes a species "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). The proposal, if adopted, would for the first time embed quantitative probability into the term "foreseeable future," providing that the term would "extend[] only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction . . . are *probable*." 83 Fed. Reg. at 35,195, 35,201 (emphasis added). This approach would allow the Services in listing decisions to "explain the extent to which they can reasonably determine that both the future threats and the species' responses to those threats are *probable*" and to "tak[e] into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability" in that analysis. *Id.* at 35,195 (emphasis added). These proposed changes are not only contrary to the statutory language of the ESA, but they also improperly constrain the Services' consideration of future threats to a species' continued existence, including threats related to climate change, without any reasoned basis.

First, the Services' injection of these "probability" and "variability" criteria into the threatened species analysis violates the text and purposes of the ESA. The ESA requires the Services to make its listing determinations "solely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species," 16 U.S.C. § 1533(b)(1)(A), based on threats to the species, *id.* § 1533(a)(1). As the Services admit, this analysis must be done on a case-by-case basis and is "uniquely related to the particular species, the relevant threats, and the data available." 83 Fed. Reg. at 35,195 (citing *In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litig.*, 709 F.3d 1, 15-16 (D.C. Cir. 2013)). After that assessment, if the Services find it likely that a species will "become an endangered species within the foreseeable future throughout all or a significant portion of its range," they must list that species as threatened. 16 U.S.C. § 1532(20); *see id.* § 1533(b)(1)(B)(ii).

In enacting the ESA, Congress did not define "foreseeable future" or prescribe standards regarding the "likelihood" that a species would become endangered and thus require the Act's protection. The proposed rule's use of the word "probable," however, raises the specter that the Services may only consider threats that have a fifty percent or greater chance of occurring during a particular time period. It is difficult to imagine—and the Services have failed to explain—how they would reliably quantify the percentage likelihood of threats to species. And, even if quantification were possible, it would be unlawful and arbitrary to discount severe threats that may be, say, 40% likely but would be extremely dangerous. Such an approach also would be inappropriate for species that may be facing severe or multiple threats that may have a lower chance of occurring or for which the likelihood cannot be precisely calculated and is contrary to the Services' longstanding precautionary approach. *Cf.* 48 Fed. Reg. 43,098, 43,102-03 (Sept. 21, 1983) (FWS guidelines for reclassification from threatened to endangered status based on magnitude and immediacy of threats). Simply put, the Services' new, *ultra vires* requirements inject criteria for quantification and certainty that are not required by the Act and will most likely limit listing decisions, even where potential threats could be devastating. It is thus contrary to section 4 of the ESA, the overriding conservation purposes of the ESA, and the policy of "institutionalized caution" embedded in the Act. *See* 16 U.S.C. § 1531(b); *Hill*, 437 U.S. at 194.

Courts also have held that the ESA does not mandate that the Services base their decisions "on ironclad evidence when it determines that a species is likely to become endangered in the foreseeable future; it simply requires the agency to consider the best and most reliable scientific and commercial data and to identify the limits of that data when making a listing determination." *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 681 (9th Cir. 2016).[28] In *Pritzker*, for example, the Ninth Circuit upheld NMFS's decision to list the Pacific bearded seal (*Erignathus barbatus nauticus*) as a threatened species based on its determination, using several climate models, that the loss of sea ice over shallow waters in the Arctic would leave the species endangered by the year 2095. *Id.* at 674. The Court specifically rejected plaintiffs' contention that the climate models "cannot reliably predict the degree of global warming beyond 2050 or the effect of that warming on a subregion, such as the Arctic." *Id.* at 679. "The fact that climate projections for 2050 through 2100 may be volatile," the Court explained, "does not deprive those

[28] *See also Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 558-59 (9th Cir. 2016); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014); *In re Polar Bear Litig.*, 709 F.3d at 16.

projections of value in the rulemaking process" where the Services have used a reasonable methodology for addressing that volatility and explained its shortcomings. *Id.* at 680. Under the Services' proposed redefinition here, however, rather than making a reasoned determination based on the best scientific and commercial data available such as climate modeling, NMFS would have been required to show that "the future threats and the species' responses to those threats are probable," *e.g.*, more likely than not—a standard contrary to the precautionary Act and case law. *See* 83 Fed. Reg. at 35,201.

Thus, perhaps most problematically, the Services' proposed definition would give the Services carte blanche to ignore "an important aspect of the problem" of species extinction: the significant threats posed by climate change. *See Motor Vehicle Mfrs.*, 463 U.S. at 43. As noted above, in addition to its new *ultra vires* probability requirement, the Services, using code words for climate change, also direct that the foreseeable future analysis now should "account for any relevant environmental variability, such as hydrological cycles or oceanographic cycles, which may affect the reliability of projections" and "consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics." 83 Fed. Reg. at 35,195.

These new "probability" and "variability" criteria may have the perverse effect of enabling the Services to discount the potentially devastating effects of climate change. The fact that climate change is occurring and will have impacts on habitat is more than "probable;" it is certain. But the precise impact that climate change might have on particular areas at particular times may be uncertain as there might be several varying, perfectly plausible projections of effects that climate change might have on a particular habitat that could predict somewhat different impacts at different times. It may be that none of those specific projections reaches the fifty percent "probability" threshold because of uncertainty due to environmental variability, but each threat must nonetheless be considered in assessing the "likelihood" that a species will become endangered. Indeed, as the previous Director of FWS recently testified before Congress, the Earth's rapidly changing climate is one of the principal emerging threats to species nationwide—variability notwithstanding.[29] Scientific research confirms that climate change already is, and over the next several decades will increasingly become, a driver of species decline and biodiversity loss.[30] And the severity of this threat is already apparent to State

[29] *See* Testimony of Dan Ashe, Dir., FWS, Dep't of the Interior, Before the U.S. House of Reps., Comm. on Oversight and Gov. Reform, Subcomm. on Interior, Regarding Barriers to Recovery and Delisting of Listed Species Under the Endangered Species Act of 1973 (Apr. 21, 2016), *available at* https://www.doi.gov/ocl/esa-delisting; *see also, e.g.*, National Park Serv., "Climate Change Endangers Wildlife" (June 3, 2018) (noting "estimate[s] that 35% of animals and plants could become extinct in the wild by 2050 due to global climate change"), *available at* https://www.nps.gov/pore/learn/nature/climatechange_wildlife.htm.

[30] *See, e.g.*, Céline Bellard, *et al.*, *Impacts of Climate Change on the Future of Biodiversity*, 15 ECOLOGY LETTERS 365, 375 (2012) (most climate change impact models "indicate alarming consequences for biodiversity, with the worst-case scenarios leading to extinction rates that would qualify as the sixth mass extinction in the history of the earth"), *available at* https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1461-0248.2011.01736.x; Paul Leadley *et al.*, *Biodiversity Scenarios: Projections of 21st Century Change in Biodiversity and Associated Ecosystem Services*, CONVENTION ON BIOLOGICAL DIVERSITY TECHNICAL SERIES NO. 50 (2010); *see also* U.S. Dep't of the Interior, *9 Animals That are Feeling the Impacts of Climate Change* (Nov. 16, 2015) (climate

agencies studying climate impacts on biodiversity and species conservation[31] and planning for endangered and threatened species conservation.[32]

Thus, even in the face of evolving threats, the Services must still consider and act on the best available science in evaluating threats to a species. *See Center for Biological Diversity v. Zinke*, 900 F.3d 1053, 1072 (9th Cir. 2018) (FWS must explain why uncertainty of climate change favors not listing the arctic grayling given evidence of warming water temperatures and decreasing water flow); *Greater Yellowstone Coal. Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011) ("It is not enough for the [FWS] to simply invoke 'scientific uncertainty' to justify its action."). But far from considering, as it must, the threat of climate change, the Services under their proposed redefinition could arbitrarily cite climate change as a justification *to avoid* species protections altogether. *See Motor Vehicle Mfrs.*, 463 U.S. at 43.

What is more, the Services again fail to provide any reasoned explanation for this significant change. They attempt to justify the proposal solely by reference to a 2009 opinion from the Department of the Interior's Office of the Solicitor ("2009 Guidance"),[33] which they claim is "well-founded" and "has been widely applied by both Services." 83 Fed. Reg. at 35,195. But the 2009 Guidance does not even contain the word "probable." *See generally* 2009 Guidance. It simply recognizes the unremarkable proposition that the Services have discretion to make listing determinations based on "the facts applicable to the species being considered," provides direction to base such determinations on "reliable" predictions that are "sufficient to provide a reasonable degree of confidence in the prediction, in light of the conservation purposes of the Act," and acknowledges that "[s]ince the foreseeable future is uniquely related to population, status, trends, and threats for each species and since species often face multiple threats, the Secretary is likely to find varying degrees of foreseeability with respect to the various threats." *Id.* at 13. None of this guidance affords the Services discretion to ignore reasonably foreseeable threats to species based solely on uncertainty. To the contrary, and consistent with the case law, the 2009 Guidance recognizes that the Services must sometimes make listing decisions extrapolating from limited data, always mindful of the conservation purposes of the

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change threatens endangered and threatened species, including loggerhead and other sea turtles, polar bears, and piping plovers), *available at* https://www.doi.gov/blog/9-animals-are-feeling-impacts-climate-change.

[31] *See generally*, *e.g.*, CAL. BIODIVERSITY INITIATIVE: A ROADMAP FOR PROTECTING THE STATE'S NATURAL HERITAGE (Sept. 2018), *available at* http://opr.ca.gov/docs/20180907-CaliforniaBiodiversityActionPlan.pdf; MASS. DIV. OF FISHERIES & WILDLIFE AND MANOMET CTR. FOR CONSERVATION SCIENCES, 2 CLIMATE CHANGE AND MASSACHUSETTS FISH AND WILDLIFE: HABITAT AND SPECIES VULNERABILITY (updated Feb. 2018), *available at* https://www.cakex.org/documents/climate-change-and-massachusetts-fish-and-wildlife-volume-2-habitat-and-species; MICHELLE D. STAUDINGER, ET AL., DEP'T OF THE INTERIOR NORTHEAST CLIMATE SCI. CTR., INTEGRATING CLIMATE CHANGE INTO NORTHEAST AND MIDWEST STATE WILDLIFE ACTION PLANS (2015), *available at* http://necsc.umass.edu/biblio/integrating-climate-change-northeast-and-midwest-state-wildlife-action-plans.

[32] *See, e.g.*, HABITAT CONSERVATION PLAN FOR PIPING PLOVER, *supra* note 12, at 2-10 to 2-11 (continued recovery threatened by habitat loss from sea level rise caused by climate change).

[33] Memorandum from Solicitor, U.S. Dep't of the Interior, to Acting Director, FWS, No. M-37021 (Jan. 16, 2009), *available at* https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37021.pdf.

Act. *Id.* at 13, 15-16. The Listing Rule's proposed requirement that such threats be "probable" would unlawfully and arbitrarily foreclose that approach and should be withdrawn.

iii. Elimination of Recovery from Delisting.

The Listing Rule's third major proposed change would modify the language in 50 C.F.R. § 424.11(d) to provide that, when determining whether to delist species, the Services must apply the same five factors for listing species under ESA section 4(a)(1), 16 U.S.C. § 1533(a)(1); *see also* 50 C.F.R. § 424.11(c), eliminating current regulatory language that refers to species recovery as key basis for delisting, 83 Fed. Reg. at 35,196, 35,201; *see* 50 C.F.R. § 424.11(d)(2). Again, the Services' proposed changes are contrary to the Act and its legislative history and are arbitrary and capricious.

First, the proposed delisting changes violate the ESA and its intent. The Act plainly states that its species conservation measures are intended to "bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary." 16 U.S.C. § 1532(3). In other words, as the Ninth Circuit has explained, "the ESA was enacted not merely to forestall the extinction of species (*i.e.*, promote a species survival), but to allow a species to recover to the point where it may be delisted." *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004). Thus, the ESA specifically requires the Services to develop and implement recovery plans "for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless [they] find[] that such a plan will not promote the conservation of the species." 16 U.S.C. § 1533(f)(1). Among other things, those plans must include "to the maximum extent practicable . . . objective, measurable criteria which, when met, would result in a *determination*, in accordance with the provisions of this section, *that the species be removed from the list*." *Id.* § 1533(f)(1)(B)(ii) (emphases added).

The ESA's legislative history confirms its clear focus on species recovery. Congress added these procedures in 1988 to prioritize this important goal of the ESA and to remedy the Services' failures to prepare adequate recovery plans for listed species. *See* S. REP. No. 100-240, at 4, 9 (1987). The amendments were intended to ensure that each recovery plan "contain[s] objective, measurable criteria for removal of a species from the Act's lists and timeframes and cost estimates for intermediate steps toward that goal [to] . . . provide a means by which to judge the progress being made toward recovery." *Id.* at 9. The Act and its legislative history thus make plain that recovery must be the paramount concern in delisting decisions.

Elimination of recovery considerations in the delisting process would fail to ensure that listed species have become secure members of their ecosystems prior to removing the Act's protections. In particular, the proposed factors in ESA section 4(a)(1) do not discuss recovery and would not necessarily result in a determination whether threats to the species have been eliminated or controlled, or whether the population size is stable and trending in a positive direction. *See* 16 U.S.C. § 1533(4)(a)(1); 50 C.F.R. § 424.11(c). Consequently, the Services' proposal could result in the premature delisting of species that are not yet likely to recover, in direct violation of the conservation purposes of the Act.

Furthermore, the Services have failed to provide any reasoned explanation for this proposed change, which departs significantly from its longstanding practice. *See Fox*, 556 U.S. at 515. Even if recovery plans prepared under section 4(f) are not "binding" on the Services or do not require the Services to find that "*all* of the recovery plan criteria had been met before it could delist" a species, the Services cannot justify disregarding species recovery in the delisting process altogether. *See* 83 Fed. Reg. at 35,196 (emphasis added). In fact, even in the case referenced by the Services, *Friends of the Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012), FWS did consider recovery in its delisting decision for the West Virginia northern flying squirrel. *See id.* at 431 (discussing the Service's analysis of the recovery plan for the species and its consideration of data provided pursuant to the plan); 73 Fed. Reg. 50,226 (Aug. 26, 2008) (delisting "due to recovery"); 71 Fed. Reg. 75,924 (Dec. 19, 2006) (same). Consequently, proposal to eliminate species recovery as a factor in delisting decisions should be withdrawn, and the Services should retain the current regulatory language in 50 C.F.R. § 424.11(d)(2) regarding species recovery in the delisting process.

iv. Expanding the Limited "Not Prudent" Exception to Critical Habitat Designation.

The Listing Rule also proposes to expand the circumstances "in which the Services may find it is not prudent to designate critical habitat" for listed species, and thus elect not to do so, by replacing the existing two narrow circumstances in which designation would not be prudent with a non-exhaustive list of five such situations. 83 Fed. Reg. at 35,196, 35,201.[34] The Services' proposal would dramatically expand an expressly and intentionally narrow exception to the Act's important critical habitat designation requirements in violation of the Act and its purpose, and without any reasoned basis. It, too, should be withdrawn.

First, the Services' proposal to expand the so-called "not prudent exception" is contrary to the ESA, Congress's clear intent, and case law. The Act requires that the Services, when listing a species as threatened or endangered, also designate "*to the maximum extent* prudent and determinable" the habitat that "is then considered to be critical," 16 U.S.C. §§ 1533(a)(3)(A) (emphasis added), *i.e.*, "essential to the conservation of the species," *id.* § 1532(5)(A). Recognizing that "the greatest [threat to species] [is] destruction of natural habitats," *Hill*, 437 U.S. at 179, Congress intended that such designations be made concurrently with listing determinations, except in "rare circumstances" when designation "would not be beneficial to the species," H.R. REP. No. 95–1625 at 17 (1978).[35] Consistent with the Act's plain text and history, courts, in turn, have construed the "not prudent" exception as a "narrow statutory exception" to the general rule that critical habitat must be designated for imperiled species. *Natural Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997).[36]

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[34] *See* 50 C.F.R. § 424.12(a)(1).

[35] H.R. REP. No. 95–1625 at 17 (1978) ("The committee intends that in most situations the Secretary will, in fact, designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species.").

[36] *See also Conservation Council for Hawai'i v. Babbitt*, 2 F. Supp. 2d 1280, 1283 (D. Haw. 1998) (rejecting FWS's rationales for not designating critical habit for 245 listed plant species and noting that critical habitat should be designated "in all but rare cases").

In line with that authority, the Services' current regulations list only two situations in which a critical habitat designation is not prudent: where identifying critical habitat would risk harm to the species or where such designation would not benefit the species because, for example, habitat destruction is not a threat to the species. 50 C.F.R. § 424.12(a)(1). And courts have interpreted those two exceptions narrowly, rejecting unsubstantiated attempts to avoid designation. *See Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 443 (5th Cir. 2001) (condemning Services' practice of "invert[ing] [Congressional] intent, rendering critical habitat designation the exception and not the rule"); *Natural Res. Def. Council*, 113 F.3d at 1126. The Services' Listing Rule would undermine the ESA's critical habitat scheme and its court-confirmed purpose, creating a laundry list of new extra-statutory "not prudent" exceptions and paving the way for the Services to avoid designating critical habitat, as detailed below.

Second, the Services' unlawful new exceptions are each arbitrary and capricious, lacking any reasoned basis. *Motor Vehicle Mfrs.*, 463 U.S. at 43. Most problematically, *exception (v)* broadly authorizes invocation of the "not prudent" exception if "the Secretary otherwise determines that designation of critical habitat would not be prudent." 83 Fed. Reg. at 35, 201; *see also id.* at 35,197. The exception is an overbroad and vague "catchall" that would give unfettered discretion to the Services to evade the Act's core critical habitat requirements—an authority not contemplated by the ESA. *Motor Vehicle Mfrs.*, 463 U.S. at 43. The Services *nowhere* explain this proposed, substantial expansion of the exception, which would swallow the rule that the "not prudent" determinations should be extremely rare.[37]

Exception (ii) arbitrarily expands the "not prudent" exception to cover circumstances in which "threats to the species habitat stem solely from causes that cannot be addressed through management actions resulting from [section 7] consultations." 83 Fed. Reg. at 35, 201; *see also id.* at 35,197. This exception apparently aims directly at precluding critical habitat designations based on threats to a species from climate change—a "cause" that cannot be "addressed" solely through the management actions of the Services and the jurisdictions in which critical habitat lies, but rather requires concerted action at the local, state, federal, and international level. The proposal arbitrarily assumes, with virtually no explanation, that the value of a critical habitat designation depends on whether management actions identified through interagency consultations can address threats to a species' habitat. *Id.* at 35,197. But the ESA simply does not require that effective consultation actions be available for critical habitats to be designated; it separately requires *both* critical habitat designation *and* consultation. 16 U.S.C. §§ 1533(a)(3)(A), 1536; *cf. Natural Res. Def. Council*, 113 F.3d at 1126 (rejecting Services' rationale that designating critical habitat would not be prudent because the bulk of the species' habitat was located on private lands).

Additionally, there are significant substantive and procedural benefits that result from the designation of critical habitat outside of the consultation requirements, including educating the public and state and local governments about the importance of certain areas to listed species, assisting in species recovery planning efforts, identifying areas where agency consultation will be required, and "establish[ing] a uniform protection plan prior to consultation." *Conservation*

[37] *Fox*, 556 U.S. at 515 (agency must provide "good reasons" for policy change); *National Cable & Telecomms. Ass'n*, 545 U.S. at 981 ("unexplained inconsistency" is basis for invalidation).

Council for Hawai'i v. Babbitt, 2 F. Supp. 2d 1280, 1288 (D. Haw. 1998).[38] Indeed, the Services themselves acknowledge as much. 83 Fed. Reg. at 35,197. In light of these myriad benefits of critical habitat outside of the section 7 requirements, far from justifying an exception to critical habitat designations as the Services appear to claim, *id*., the threat of climate change casts in stark relief the importance of such designations to ensure robust understanding of and protections for the many species it threatens.

Exception (iii) allows areas within the United States to be excluded from critical habitat designations if they would provide "no more than negligible conservation value" to species "occurring primarily outside" the United States. *Id*. at 35,201; *see also id*. at 35,197. The Services fail to explain what they mean by "negligible conservation value" or how they would determine whether a species "occur[s] primarily" elsewhere, injecting more vague and subjective loopholes into the designation analysis and depriving the public of a meaningful opportunity to comment. *Home Box Office*, 567 F.2d at 35 (notice must "disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based," to afford meaningful opportunity for comment). Further, the exception fails to appreciate that a designation within the United States could still be beneficial and protect habitat that is important for the species' survival and recovery, particularly for migratory species.

The Services cannot save their *ultra vires* proposal based on their stated intention to "reduce the burden of regulation" or their passing assurance that "not-prudent determinations would continue to be rare." 83 Fed. Reg. at 35,197. The Listing Rule on its face adds several new and extremely broad exceptions to the ESA's critical habitat mandate and, in practice, would give the Services carte blanche to forego critical habitat designation, particularly where climate change threatens species' habitat. Accordingly, the Listing Rule's proposed exceptions must be abandoned.

v. Restricting Unoccupied Critical Habitat Designation.

The Listing Rule also proposes to "clarify" when areas not yet occupied by the endangered or threatened species ("unoccupied areas") are "essential for the conservation of the species" and thus warrant designation as critical habitat. *Id.* at 35,198, 35,201. The proposal is not a mere clarification; it torpedoes the ESA's critical habitat designation process by arbitrarily demoting unoccupied habitat without regard to the effects of climate change, delaying the time at which occupied areas are identified, and creating a laundry list of arbitrary new factors the Services can invoke to evade critical habitat designation, including at the behest of private landowners. *Id*. Like the other proposals, it must be withdrawn.

Prioritizing, and Delaying Determinations of, Occupied Critical Habitat. The proposed rule would restrict designation of unoccupied critical habitat by requiring the Services first to evaluate whether currently occupied areas are inadequate for species conservation—without explaining how the Services would make that determination—using occupation at the time of critical habitat designation (and not the listing decision) as the point of reference. *Id.* at 35,198, 35,201. As an initial matter, as the Services themselves recently concluded, there is no basis in

[38] *See also* 81 Fed. Reg. 7,414, 7,414-15 (Feb. 11, 2016) (Services' own statement describing "several ways" that critical habitat "can contribute to the conservation of listed species").

the statute or legislative history for the Services to evaluate occupied areas before considering unoccupied areas.[39] The ESA expressly requires the Services to consider *both* occupied and unoccupied habitat in designating critical habitat. 16 U.S.C. § 1532(5)(A). By arbitrarily elevating occupied critical habitat to the preferred and default designation option, this proposal would discount the importance of previously occupied habitat to species recovery. If a species has reached the point of becoming endangered or threatened, it is quite likely that it no longer occupies habitat that it once occupied. Indeed, the Act's critical habitat provisions are intended to address that reality. *See Hill*, 437 U.S. at 179. It thus would flout the Act's recovery purpose to look first at the narrowed range of habitat currently occupied by the species rather than areas within its historical range.

What is more, this proposal too would permit the Services to avoid addressing the effects of climate change, allowing the Services to ignore unoccupied areas that could provide important habitat in a changing climate. We are already seeing an unprecedented migration of plant and animal species into new areas as a result of climate change.[40] As the Services recently explained, "[a]s the effects of global climate change continue to influence distribution and migration patterns of species, the ability to designate areas that a species has not historically occupied is expected to become increasingly important" to ensure connectivity between habitats and protect movement corridors and emerging habitat for species experiencing range shifts in latitude or altitude. 81 Fed. Reg. at 7,435; *see also* 83 Fed. Reg. 42,362, 42,365 (Aug. 21, 2018) (designating unoccupied critical habitat for three plant species to allow for expansion of the species' range and the reintroduction of individuals into areas where the species historically occurred, and to provide areas for recovery); *cf. Conservation Council for Hawai'i*, 2 F. Supp. 2d at 1288. The Services' proposal does not at all contend with this important consideration. *See Motor Vehicle Mfrs*., 463 U.S. at 43.

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[39] 81 Fed. Reg. at 7,426-27 (emphasizing that "there is no suggestion in the legislative history that the Services were expected to exhaust occupied habitat before considering whether any unoccupied areas may be essential" and "no specific language in the Act that requires the Services to first prove that the inclusion of all occupied areas in a designation are insufficient to conserve the species before considering unoccupied areas").

[40] *See* Céline Bellard, *et al*., *Impacts of Climate Change on the Future of Biodiversity*, *supra* note 30, at 367 ("[R]ange shifts have . . . been observed [for] more than 1,000 species."); Robert A. Robinson, *et al*., *Travelling Through a Warming World: Climate Change and Migratory Species*, 7 ENDANGERED SPECIES RESEARCH 87, 95 (2009) (migrating species are responding to climate change by altering their ranges and "it will be important to protect areas that may be used in the future," at the edge or beyond current ranges); Thomas T. Moore, *Climate Change and Animal Migration*, 41 ENVTL. L. 393, 405 (2011) (climate change may cause migration corridors and destinations to shift out of protected areas). Among imperiled marine species with migration affected by climate change, the critically endangered North Atlantic right whale (*Eubalaena glacialis*) has been foraging farther north because of changed zooplankton distributions due to warming in the Gulf of Maine and, in winter, spending more time in Mid-Atlantic waters and less time in calving grounds off the southeastern U.S. coast. *See* Sean A. Hayes, et al., U.S. DEP'T OF COMMERCE, NOAA TECHNICAL MEMORANDUM NMS NE-247, NORTH ATLANTIC RIGHT WHALES – EVALUATING THEIR RECOVERY CHALLENGES IN 2018 (2018) (citing multiple studies). With fewer than 450 North Atlantic right whales left in existence, unmitigated climate impacts could drive the species to extinction.

Finally, the requirement that occupied habitat be assessed at the time of critical habitat designation conflicts with the ESA's directive that the Services designate critical habitats "to the maximum extent prudent and determinable . . . *concurrently* with making a [listing] determination." 16 U.S.C. § 1533(a)(3)(A) (emphasis added). In other words, the ESA makes clear that habitat assessments should occur at time of listing. But the Services often do not designate critical habitat on time, at the time of listing.[41] Thus, by prioritizing occupied habitat and assessing occupation at the most likely later point of critical habitat designation, the Services will likely designate even less habitat where species populations have already dwindled in the intervening time, again arbitrarily omitting previously occupied habitat for imperiled species. To comport with the ESA's approach of "institutionalized caution," the Services must instead base designations on data from *both* the time of listing *and* critical habitat designation, considering both occupied and unoccupied areas concurrently. *See Hill*, 437 U.S. at 194.

Definition of Unoccupied Critical Habitat. Second, the Services dramatically redefine and substantially narrow when unoccupied areas will be considered "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Specifically, the proposed rule would create a two-factor test that would allow designation of unoccupied critical habitat only if (1) the currently occupied area, as discussed above, is (a) "inadequate to ensure the conservation of the species" or (b) "result[s] in less-efficient conservation of the species," *and* (2) "there is a reasonable likelihood that the [unoccupied] area will contribute to the conservation of the species" as determined through three new "area-specific factors." 83 Fed. Reg. at 35,198, 35,201. To be sure, habitat should not be designated as critical unless it has some likelihood of contributing to the conservation of the species. But this proposal's sweeping two-step test would veer far beyond that threshold. Rather than promote "flexibility," *id*. at 35,198, it would upend the regulatory scheme and give the Services virtually unlimited discretion to refuse to designate unoccupied critical habitat based on almost any conceivable non-biological rationale, contrary to the conservation purpose of the Act in general and its critical habitat provisions in particular and to the great detriment of imperiled species.

The *first step* requires the Services to assess whether occupied areas are providing adequate and efficient conservation for the species. *Id.* at 35,198. Broadly speaking, as discussed above, there is no basis in the Act or in the legislative history for the Services to elevate occupied critical habitat as the default designation option. 16 U.S.C. § 1532(5)(A). Further, even if the Act allowed the Services to consider occupied areas before making an unoccupied critical habitat designation, the first step of this two-part test does not provide clear guidance for how occupied areas should be assessed. For instance, the Services state that "efficient conservation" "refers to situations where the conservation is effective, *societal conflicts* are minimized, and *resources expended* are commensurate with the benefit to the species." 83 Fed. Reg. at 35,198 (emphases added). But the Services fail to explain what the term "societal conflicts" means, and the proposal is therefore fatally vague, precluding meaningful opportunity for comment. *See Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994). Thus unexplained, the term "societal conflicts" also is overly broad, extending well beyond the economic impacts the ESA permits the Services to consider. 16

[41] *See, e.g.*, *Alabama-Tombigbee Rivers Coal.*, 477 F.3d at 1268 ("We are troubled by the Service's apparent practice of routinely delaying critical habitat designation until forced to act by court order.").

U.S.C. § 1533(b)(2).[42] Additionally, the alluded to "resource expenditure" analysis gives the Services unlawfully broad discretion to determine that the benefits of a critical habitat designation may not be worth the cost, with virtually no guidance. The proposal thus would significantly limit the circumstances under which the Services would designate an unoccupied critical habitat, contrary to the Act's equal concern for both occupied and unoccupied areas and the ESA's overarching species-recovery goals. 16 U.S.C. § 1532(5)(A).

The *second step* of the Listing Rule's two-part test—requiring a "reasonable likelihood that the [unoccupied] area will contribute to the conservation of the species"—is likewise unsupported by law and arbitrary. 83 Fed. Reg. at 35,198. The proposal adds three area-specific factors for the Services to consider when making a "reasonable likelihood" determination, two of which are plainly contrary to the ESA: (a) "whether the area is currently or is likely to become usable habitat for the species," and (b) whether any "federal agency actions are likely to be proposed with respect to the area" (*i.e.*, whether interagency consultation will be triggered). *Id.*

The first area-specific factor—whether unoccupied area is *usable* given the "current state of the area," the "extent to which extensive restoration would be needed," and whether this restoration is "likely" by current landowners or managers, *id.*—arbitrarily bases critical habitat designations on landowner whim in violation of the ESA and its purposes and ignores the many benefits of critical habitat designations, *see Conservation Council for Hawai'i*, 2 F. Supp. 2d at 1288. Critical habitat designations must be based on the "best scientific data available" and are not subject to a private-landowner exception. 16 U.S.C. § 1533(b)(2).

To be sure, the States recognize that the designation of private land as critical habitat can raise difficult issues. But this proposal is antithetical to the ESA's biological focus and conservation purpose. It would allow "private landowners [to] trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future." *Markle Interest, L.L.C. v. U.S. Fish and Wildlife Serv.*, 827 F.3d 452, 470 (5th Cir. 2016) (rejecting argument that ESA authorizes "private landowner exemption from unoccupied critical-habitat designations"), *cert. granted, Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 138 S. Ct. 924 (2018). Moreover, the suggestion that landowners can prevent critical habit designation simply by expressing hostility to the idea would diminish, rather than promote, landowner cooperation and participation in recovery efforts. We encourage the Services instead to identify ways to create incentives for landowners to participate in conservation and recovery.

The second area-specific factor—whether an unoccupied area will *trigger interagency consultation*, 83 Fed. Reg. at 35,198—arbitrarily and without explanation assumes that consultation is a prerequisite to the conservation value of species' habitat. Without any basis in the statute or fact, the Services claim that "the likelihood that an area will contribute to conservation is, in most cases, greater for public lands and lands for which . . . federal actions can be reasonably anticipated than for other types of land," admitting their intent largely to

[42] In addition, it is unclear whether the Services also intend to consider "societal conflicts" in evaluating whether *occupied* habitat is "essential to the conservation of the species" under 16 U.S.C. 1532(5)(A)(i). The Services should clarify that they *do not* intend to do so.

confine consultation to federal lands. *Id.* As discussed above, in Section II.A.iv., however, the Services' assumption is inconsistent with the mandate of the ESA, which does not require that effective consultation actions be available for an area of critical habitat to be designated, again unlawfully putting the consultation cart before the critical habitat designation horse. 16 U.S.C. §§ 1533(a)(3)(A), 1536. And it ignores the fact that there are a variety of reasons—like educating the public, planning species recovery, and identifying areas for consultation in the future—why an area should still be considered essential to the conservation of species and why designation of that critical habitat could further species' conservation, even if that land were not slated for a federal action that would prompt interagency consultation. For all the above reasons, the Services should withdraw the proposed Listing Rule.

B. *Interagency Cooperation Rule*, 83 Fed. Reg. 35,178 (July 25, 2018)
Docket ID No. FWS-HQ-ES-2018-0009

The Services' proposed amendments to the Interagency Cooperation Regulations implementing section 7 of the ESA would make numerous significant, and in some cases sweeping, changes to the definitions and requirements of those regulations. In summary, these proposed changes are designed to: (a) limit the circumstances under which a federal agency action would be deemed to destroy or adversely modify critical habitat; (b) limit analysis of the type and extent of effects of a federal agency action; (c) create significant new exemptions from the consultation requirement; (d) limit re-initiation of consultation on federal land and resource management plans; (e) allow federal action agencies to conduct biological analyses that should be conducted by the Services; (f) allow federal action agencies to adopt mitigation measures as part of the project description without committing to implementation of these measures; and (g) allow for broad-based "programmatic" and "expedited" consultations that give short shrift to site-specific and in-depth analysis of a proposed federal agency action. Collectively, these proposed changes would severely limit: the circumstances requiring consultation; the scope of consultations, including the effects analyzed and the reasonable and prudent alternatives considered and mitigation measures required; and the number of "jeopardy" and "adverse modification" findings. As such, these proposed rules fail to "insure" that federal actions will not jeopardize listed species or destroy or adversely modify critical habitat, or that reasonable and prudent alternatives and mitigation measures will be required for such actions, as required by section 7.

The proposed revisions are contrary to the plain language and purpose of section 7, the conservation purpose of and precautionary approach undergirding the ESA, and the controlling case law. The Services therefore lack the authority to adopt these changes. In addition, the Services have failed to articulate a reasoned basis for the proposed changes, many of which—contrary to the Services' repeated assertions—constitute major, unexplained departures from the Services' decades-long practice. The proposals thus are also arbitrary and capricious.

i. Revised Definitions.

"Destruction or Adverse Modification" of Critical Habitat. The proposed revisions would alter the definition of "destruction or adverse modification" in 50 C.F.R. § 402.02, one of the triggers for consultation under ESA section 7(a)(2), to require the destruction or adverse modification of the critical habitat "*as a whole*." 83 Fed. Reg. at 35,179-80, 35,191. The

proposal also would eliminate the definition's existing provision that "[s]uch 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." *Id.* Although the Services initially claim that these changes would simply clarify the definition, they later disclose their intent to require that the "final destruction or adverse modification determination [be] made *at the scale of the entire critical habitat designation*," not any "less extensive scale." *Id.* at 35,180-81. These changes would severely limit the circumstances under which agency action would be deemed to destroy or adversely modify critical habitat, and allow for piecemeal, cumulative adverse effects on such habitat, including effects on features essential to the species' conservation, contrary to section 7, the definition of critical habitat, and the conservation purpose of the ESA.

Section 7(a)(2) requires agencies to "insure" that their actions are "not likely to . . . result in the destruction or adverse modification of" critical habitat, nowhere specifying that such destruction or adverse modification must occur at the scale of the entire designated habitat. 16 U.S.C. § 1536(a)(2). In addition, the ESA defines "critical habitat" as both occupied and non-occupied areas that are "essential" to or for "the conservation of the species." *Id.* § 1532(5)(A). "Conservation" is essentially synonymous with full "recovery" of the species.[43] Thus, critical habitat is "adversely modified" by any actions impairing species' recovery, and species' full recovery must be considered when federal agencies evaluate the effect of their actions on critical habitat. *See Lubchenco*, 723 F.3d at 1054; *Native Ecosys.*, 509 F.3d at 1322.

By evaluating impacts only on a species' *entire* designated critical habitat, the proposal ignores the fact that impacts to a portion of a species' designated critical habitat, particularly for species that are highly endangered, may jeopardize a species' chances of recovery, or even its very survival. This proposed change also would allow agencies to ignore or minimize the importance of the adverse cumulative effects of individual federal actions on critical habitat at a site-specific level, or those that occur on a short-term basis.[44] The proposed changes ignore the reality that critical habitat is not destroyed or modified all at once or as a whole; habitat is lost site-by-site, and such smaller-scale destruction or modification accordingly must be addressed at the site-specific level. The proposal thus is contrary to the ESA's plain language and recovery purpose.

The Services also fail to explain or justify this proposed rule change.[45] In particular, they fail to explain the deletion of the existing language stating that destruction or adverse modification occurs when an action alters "the physical or biological features essential to the

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[43] *See* 16 U.S.C. §§ 1531(b), 1532(3); *see also, e.g.*, *Alaska v. Lubchenco*, 723 F.3d 1043, 1054 (9th Cir. 2013); *Center for Native Ecosys. v. Cable*, 509 F.3d 1310, 1322 (10th Cir. 2007).

[44] *See Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1270-71 (11th Cir. 2009); *National Wildlife Fed'n v. National Marine Fisheries Serv.*, 524 F.3d 917, 930, 934-35 (9th Cir. 2008); *Pacific Coast Fed'n of Fishermen's Ass'n v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1093 ("*Pacific Coast II*") (9th Cir. 2005); *Pacific Coast Fed'n of Fishermen's Ass'n v. National Marine Fisheries Serv.*, 265 F.3d 1028, 1036-37 (9th Cir. 2001) ("*Pacific Coast I*").

[45] *Fox*, 556 U.S. at 515 (agency must provide "good reasons" for policy change); *National Cable & Telecomms. Ass'n*, 545 U.S. at 981 ("unexplained inconsistency" is basis for invalidation of regulation or policy).

conservation of a species or that preclude or significantly delay development of such features." 50 C.F.R. § 402.02; *see* 83 Fed. Reg. at 35,179-80, 35,191. In 2016, the Services determined that addition of this text was necessary to ensure that federal agency actions do not destroy or adversely modify critical habitat essential for a species' recovery. 81 Fed. Reg. 7,214, 7,216-17 (Feb. 11, 2016); *see also id.* at 7,219-20. In an about-face, the Services now state that this language is being deleted because it purportedly has caused controversy and confusion and is unnecessary, but the Services do not explain why or how. 83 Fed. Reg. at 35,181. Nor do the Services explain how the new "streamline[d] and simplif[ied]" text will remedy that confusion or provide adequate guidance for when an action will destroy or adversely modify critical habitat. *Id*. Rather, the Services implausibly assure the public that they will continue to determine how alterations to critical habitat could affect species recovery. *Id*. But this assurance is refuted by the proposals' changes to the definition of adverse modification, and the Service's other, contradictory statements that the revisions will reduce the circumstances under which a federal action will be deemed to adversely modify critical habitat. *Id*.

"Effects of the Action." The Services also propose significantly to alter the existing definition of "effects of the action" in 50 C.F.R. § 402.02, limiting both the type and extent of effects of a proposed federal agency action that must be considered during the consultation process. The proposal would restrict evaluation of an action's effects during the consultation process, requiring that the proposed action be considered a "but for" cause of the effects or activities *and* that the effects or activities be "reasonably certain to occur" to be considered in evaluating the potential impacts of a federal agency action. 83 Fed. Reg. at 35,183, 35,191. Under the proposal, to be considered "reasonably certain to occur," an activity must not be speculative, based on: (a) consideration of "past relevant experiences," (b) "[a]ny existing relevant plans," and (c) "[a]ny remaining economic, administrative, and legal requirements necessary for the activity to go forward." *Id*. at 35,193. The proposed rules apply this concept of "reasonable certainty" to *all* effects of the proposed action, including direct and interrelated or interdependent effects, whereas previously the "reasonable certainty" standard applied only to indirect and cumulative effects of the proposed action. *Id*. at 35,183-84, 35,189.

These changes are inconsistent with the ESA and applicable case law. Section 7(a)(2) is "[t]he heart of the ESA," *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011), requiring federal agencies to "insure" that their actions are not likely to jeopardize listed species or result in the destruction or adverse modification of their habitat, 16 U.S.C. § 1536(a)(2). Section 7(b) requires action agencies to consult with the Services if any part of a proposed action "may affect any listed species or critical habitat." *Western Watersheds Project*, 632 F.3d at 495. The "may affect" trigger for consultation is a "relatively low threshold[,]" allowing an agency to "avoid the consultation requirement only if it determines that its action will have 'no effect' on a listed species or critical habitat." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012). For agency actions that "may affect" listed species or critical habitat, the Services must evaluate, in a comprehensive biological opinion, the effects of *all* aspects of that action, including short-term and long-term effects, and site-specific and cumulative effects, when combined with the adverse effects on the species and habitat that are already included as part of the environmental baseline.[46] The scope of that evaluation in a

[46] *See, e.g.*, *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 737-38 (9th Cir. 2017); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521-24 (9th Cir. 2010); *Miccosukee Tribe*, 566

biological opinion directly affects the determination of whether the action is likely to cause jeopardy or adverse modification of critical habitat, and whether "reasonable and prudent alternatives" to the action will be required, as well as the type and extent of "reasonable and prudent measures" that will be required to mitigate the adverse effects of the action. 16 U.S.C. § 1536(b)(3)(A), (b)(4); *see Wild Fish Conservancy*, 628 F.3d at 522 ("The delineation of the scope of an action can have a determinative effect on the ability of a biological opinion fully to describe the impact of the action on the viability of the threatened species . . . .").

Contrary to these statutory requirements, the proposed changes to the definition of "effects of the action" would arbitrarily limit the scope of the section 7 analysis to effects for which the federal agency action was a "but for" cause and those that are deemed "reasonably certain to occur" based on a variety of non-biological factors. For example, the numerous non-biological "reasonable certainty" factors and limitations in new section 402.17 would allow arbitrary exclusion of certain effects—that are admittedly caused by the proposed action—from the section 7 effects analysis, based on almost any conceivable rationale. *See* 83 Fed. Reg. at 35,189. In addition, these changes would allow federal action agencies and the Services to narrowly define the scope of the proposed action and its effects and to conduct a piecemeal, limited evaluation of the action's adverse effects on listed species and critical habitat, thus ignoring many of the action's true impacts, contrary to the ESA and governing case law.

These "reasonable certainty" factors also would give the Services leeway to ignore agency actions' contributions to climate change and resulting effects. As discussed *supra* in Section II.A.ii., it is certain that climate change will increasingly affect species conservation even though the precise extent of the impact may at times be difficult to predict with certainty. Thus, the proposed regulations, like the biological opinion invalidated in *National Wildlife Federation*, amount "to little more than an analytical slight [sic] of hand" that will enable federal action agencies and the Services to "manipulat[e] the variables to achieve a 'no jeopardy' finding." 524 F.3d at 933. Indeed, the proposal not only would enable such manipulation, but also would officially sanction it and render it common practice, contrary to the statutory commands of section 7. Moreover, the proposed "reasonable certainty" factors run counter to the ESA's requirement that the Services must use the "best available science" in conducting consultations. 16 U.S.C. § 1536(a)(2). The Services must make decisions based on the best scientific information available at the time the decision is made rather than defer analysis or decisions simply because either the information or outcome is not "reasonably certain." *See Conner*, 848 F.2d at 1453-54.

In addition, the Services have failed to adequately explain or justify these proposed changes. Once again, the Services provide only the empty excuse that these changes are intended to simplify the definition, "increase consistency and avoid confusion and speculation," and codify the existing practice in conducting section 7 consultations. 83 Fed. Reg. at 35,183. But the Services do not identify any inconsistency or confusion that needs to be resolved or explain how the proposed changes would resolve those problems. In fact, the proposed changes

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F.3d at 1270; *National Wildlife Fed'n* , 524 F.3d at 928-30, 934-35; *Pacific Coast II*, 426 F.3d at 1090-95; *Pacific Coast I*, 265 F.3d at 1036-38; *Conner v. Burford*, 848 F.2d 1441, 1453, 1457 (9th Cir. 1988).

are likely to lead to increased confusion, inconsistency, and uncertainty as to what effects can and cannot be considered during consultation.

Furthermore, the assertion that the "reasonable certainty" standard already was part of its existing practice in conducting section 7 consultations is plainly incorrect. *See* 83 Fed. Reg. 35,183-84 (citing 80 Fed. Reg. 26,832, 26,837 (May 15, 2015)). The cited discussion from the 2015 rule change does not pertain to the scope of analysis of the effects of a proposed federal action in a biological opinion. Rather, the discussion applies only to the determination whether *incidental take* is "reasonably certain to occur" and must be accounted for in an incidental-take statement accompanying the biological opinion under section 7(b)(4). *See* 80 Fed. Reg. at 26,836-37. In sum, rather than resolving uncertainty or codifying current practice, the proposed changes would severely limit the effects of federal action considered in the section 7 consultation process, contrary to the plain language and purposes of section 7 and the ESA as a whole.

"Environmental Baseline." The Services next propose to separate out the concept of the "environmental baseline" currently embedded in the definition of "effects of the action" into a separate definition in 50 C.F.R. § 402.02. While the Services are not now proposing any specific change to the "environmental baseline" concept, they request comment on possibly revising the definition of "environmental baseline" to mean "the state of the world absent the action under review," including "the past, present[,] and ongoing impacts of *all past and ongoing Federal, State, or private actions and other human activities* in the action area . . . ." . 83 Fed. Reg. at 35,184 (emphasis added). As discussed below, this suggested change raises the concern that the Services or federal action agencies will subsume ongoing actions or conditions into the baseline, thereby failing to account for the full extent of impacts of those actions and artificially inflating the baseline, thus inappropriately minimizing an action's adverse impacts on listed species and critical habitat, once again contrary to section 7.

The courts have made clear that section 7 of the ESA applies to federal agency actions over which an agency has discretionary involvement or control. *National Assn. of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 667-68 (2007). The courts have expressly held that "agency action" must be construed broadly and includes ongoing federal agency actions or actions over which the agency otherwise has discretionary involvement or control.[47] Indeed, the U.S. Supreme Court has held that "it is clear Congress foresaw that § 7 would, on occasion, require agencies to alter *ongoing projects* in order to fulfill the goals of the Act." *Hill*, 437 U.S. at 186 (emphasis added).

Courts also have expressly held that where there is a federal agency action that meets the section 7 consultation trigger, the Services cannot minimize the effects of that action by subsuming an ongoing federal agency action within the environmental baseline. For example, in *National Wildlife Federation*, NMFS incorporated ongoing impacts of dam operation into the environmental baseline in a biological opinion on the ground that ongoing operations were "non-

[47] *See, e.g., Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv*., 789 F.3d 1075, 1086-88 (9th Cir. 2015); *Karuk Tribe*, 681 F.3d at 1020; *Wild Fish Conservancy*, 628 F.3d at 521-22, 524; *Turtle Island Restoration Network v. National Marine Fisheries Serv*., 340 F.3d 969, 977 (9th Cir. 2003); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994); *Conner*, 848 F.2d at 1453.

discretionary." 524 F.3d at 928-33. The court invalidated the biological opinion, holding that the ESA does not permit agencies to "ignore potential jeopardy risks by labeling parts of an action non-discretionary." *Id*. at 928. Accordingly, NMFS may not sweep "so-called 'nondiscretionary' operations into the environmental baseline, thereby excluding them from the requisite ESA jeopardy analysis." *Id.* at 929; *accord San Luis & Delta Mendota Water Auth.*, 747 F.3d at 639-40. The D.C. Circuit recently followed suit, holding that the FWS "acted arbitrarily in establishing the environmental baseline without considering the degradation to the environment caused by" the ongoing operation of a hydropower project. *American Rivers v. FERC*, 895 F.3d 32, 46-47 (D.C. Cir. 2018).[48]

Against this weight of authority, the Services attempt to cite as support for their potential change "complexities" that they claim have arisen in consultations on ongoing agency actions, such as: "if an ongoing action is changed, is the incremental change in the ongoing action the only focus of the consultation or is the entire action or some other subset reviewed," and "is the effects analysis different if the ongoing action has never been the subject of consultation as compared to if there is a current biological opinion for the ongoing action," among other questions. 83 Fed. Reg. at 35,184. As discussed above, however, these questions have already been answered by controlling case law: the "effects of the action" include *all* effects of an ongoing federal agency action over which the agency has discretionary involvement or control—regardless of whether consultation was previously conducted on the action—added to the effects on the species and habitat already occurring as part of the environmental baseline but which are not in any way caused by the federal agency action, including its ongoing effects. In sum, the Services' proposed incorporation of ongoing federal agency actions into the "environmental baseline" runs afoul of established law.

ii. Exemptions from the Consultation Requirement.

Although not included in the proposed rules, the Services seek comment on revising 50 C.F.R. § 402.03 to eliminate the consultation requirement when the Federal agency does not anticipate take, and the action either: (1) will not affect listed species or critical habitat; (2) will have effects that are "manifested through global processes" and cannot be reliably predicted or measured, or would have "an extremely small and insignificant" or "remote" impact on species or critical habitat; or (3) will have impacts that "are either wholly beneficial or are not capable of being measured or detected in a manner that permits meaningful evaluation." 83 Fed. Reg. at 35,185. The Services again state that the purpose of this new suite of "no-consultation" criteria is "to increase efficiency in implementing section 7(a)(2) consultations," claiming that "such actions are far removed from any potential for jeopardy or destruction or adverse modification of critical habitat . . . ." *Id*. The Services also seek comment on whether the scope of consultation under section 7(a)(2) should be limited *solely* to the "activities, areas, and effects within the jurisdictional control and responsibility of the regulatory agency." *Id*.

[48] *See also Turtle Island Restoration Network*, 878 F.3d at 737-38 ("[B]aseline conditions must be factored into the jeopardy analysis, cumulatively with the entirety of agency actions. The relevant inquiry is therefore whether the 'action effects, when added to the underlying baseline conditions,' are such that they would cause jeopardy."); *Wild Fish Conservancy*, 628 F.3d at 522-29 (FWS required to analyze the effects of ongoing operation of a fish hatchery on the endangered bull trout, and had not adequately justified analyzing the ongoing action for only a five-year period).

The foregoing proposals are patently inconsistent with the ESA for multiple reasons. First, they would significantly limit the circumstances under which a federal agency would be required to consult with the Services on a proposed federal action, contrary to the plain language and intent of section 7. As already discussed, the "may affect" standard in section 7(b) establishes a "low threshold" for the consultation requirement and requires the Services to examine and account for all aspects of the federal agency action, including beneficial effects and effects that cannot be predicted with certainty. *Karuk Tribe*, 681 F3d. at 1027 (citing *California. ex rel. Lockyer v. U.S. Dep't of Agric*., 575 F.3d 999, 1018 (9th Cir. 2009)).[49] Accordingly, "[a]n agency may avoid the consultation requirement only if it determines that its action will have '*no effect*' on a listed species or critical habitat." *Karuk Tribe*, 681 F.3d at 1027 (emphasis added).

The Services have no authority to create by regulation new exemptions from federal agencies' mandatory duties under section 7. *Hill*, 437 U.S. at 173, 188 (section 7 "admits of no exception"); *Conner*, 848 F.2d at 1455 ("Appellants ask us, in essence, to carve out a judicial exception to ESA's clear mandate that a comprehensive biological opinion . . . be completed before initiation of the agency action . . . .We reject this invitation to amend the ESA. That is the role of Congress, not the courts."). What is more, in proposing to exempt from consultation proposed actions that will have effects "manifested through global processes," the Services again arbitrarily attempt to create a "climate change" exception to yet another bedrock program of the ESA, in this case when federal agencies are *contributing* to the problem. But, as already discussed, *see supra* Section II.A.ii., iv., and v., where climate change is a threat, it is even *more* important that the ESA's species protections be fully implemented and enforced to ensure species recovery and conservation.

Second, the Services cannot adequately justify or explain this proposed reversal of their longstanding interpretation of section 7. In promulgating the current version of the section 7 regulations in 1986, the Services explained that "[a]ny possible effect, whether beneficial, benign, adverse[,] or of an undetermined character," triggers the section 7 consultation requirement. 51 Fed. Reg. 19,926, 19,949 (June 3, 1986). The Services then stated that this "threshold for formal consultation *must be set sufficiently low* to allow Federal agencies to satisfy their duty to 'insure'" that their actions do not jeopardize listed species or adversely modify critical habitat as required under section 7. *Id.* (emphasis added). The Services' fail to explain how their new proposal could possibly achieve that fundamental objective.

Third, the Services do not have authority to limit consultations solely to effects within the jurisdiction and authority of the federal action agency. *See Native Ecosys. Council v. Dombeck*, 304 F.3d 886, 902 (9th Cir. 2002) (agency must consider all areas that actually would be affected by proposed action and may not arbitrarily restrict its selection of "action area" to be considered). Rather, as discussed, section 7 requires federal agencies to initiate consultation on any federal agency action over which they have discretionary involvement or control, and to broadly examine *all* effects of that action. *National Ass'n of Homebuilders*, 551 U.S. at 668-69;

[49] *See also Conner*, 848 F.2d at 1453-55 (having "incomplete information about post-leasing activities does not excuse the failure to comply with the statutory requirement of a comprehensive biological opinion using the best information available."); *accord Wild Fish Conservancy*, 628 F.3d at 525.

Conner, 848 F.2d at 1453-54, 1457-58. The Services' proposal thus would put federal agencies in the untenable position of either violating their section 7 obligations or demanding that the Services engage in consultation beyond that contemplated by their *ultra vires* regulations.

Finally, as discussed in connection with the proposed changes to 50 C.F.R. § 402.14(h) below, section 7 requires the Services to make independent biological determinations, based on their scientific and technical expertise, regarding the effects of proposed federal agency actions. *See Cal. ex rel. Lockyer*., 575 F.3d at 1018. However, the proposed revisions to 50 C.F.R. § 402.03 do not contain any requirement for federal agencies to obtain the Service's written concurrence in federal agency determinations of "no effect," "beneficial effect," "insignificant effect," or "immeasurable effect." In sum, because the Services' new "no consultation" criteria thus constitute an unlawful, arbitrary, and wholly unexplained reversal of their longstanding policy that is contrary to the ESA, they must be withdrawn. *Fox*, 556 U.S. at 515.

iii. Weakening of Mitigation Requirements.

The Services propose to add language to the end of the formal consultation provisions in 50 C.F.R. § 402.14(g)(8) stating that "[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 are considered like other portions of the action and do not require any additional demonstration of specific binding plans or a clear, definite commitment of resources." 83 Fed. Reg. at 35,187, 35,192. The Services admit that these proposed changes are designed to repudiate the Ninth Circuit's decision in *National Wildlife Federation*, 524 F.3d 917, asserting that "[t]his judicially created standard is not required by the Act or the existing regulations." 83 Fed. Reg. at 35,187. The Services claim that, rather, they must simply "assume that the [proposed federal] action will be implemented as proposed," and that they are not required "to independently evaluate whether the proposed measures to avoid, minimize, or offset adverse effects will be implemented." *Id*.

This proposed revision would contradict established case law, which clearly requires that federal agency mitigation commitments be incorporated into the proposed action *and* be binding and enforceable.[50] This requirement is necessary to ensure that the federal action agency satisfies its duties under section 7(a)(2) of the ESA. If the federal action agency does not ensure that proposed mitigation measures included within the project description will be implemented, then the Services' jeopardy and adverse modification findings and accompanying "reasonable and prudent alternatives" will be based on a project description that may or may not be accurate, making section 7 essentially aspirational. Whether mitigation measures will in fact be implemented also will affect the level of likely incidental take for purposes of the section 7 incidental take statement and its accompanying "reasonable and prudent measures." 16 U.S.C. § 1536(b)(4). Finally, enforceability of mitigation is important to establish measurable triggers for re-initiation of consultation and to ensure federal agency compliance with the terms and conditions of incidental take statements and other provisions of biological opinions. *See Center for Biological Diversity v. Bureau of Land Mgmt*., 698 F.3d 1101, 1115-16 (9th Cir. 2012).

[50] *See Center for Biological Diversity v. Bureau of Land Mgmt*., 698 F.3d 1101, 1117 (9th Cir. 2012); *Rock Creek All. v. FWS*, 663 F.3d 439, 444 (9th Cir. 2011); *National Wildlife Fed'n*, 524 F.3d at 935-36; *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 955-56 (9th Cir. 2003).

iv. Diminishing the Service's Role in Consultation.

The Services also propose to create a new consultation procedure in 50 C.F.R. § 402.14(h) that would allow the Services to adopt, as their own biological opinions, all or part of a federal action agency's biological analyses that are submitted upon its initiation of formal consultation. 83 Fed. Reg. at 35,187-88, 35,192. The Services state that the purpose of this alternative process "is to bring the information and expertise of both the Federal agency and the Service (and any applicant) into the resulting initiation package to facilitate a more efficient and effective consultation process." *Id.* at 35,188. These provisions are inappropriate and unlawful because only the Services, and not the federal action agency, have the requisite biological expertise, and the Services are statutorily required to perform the biological analysis of the effects of the action. 16 U.S.C. § 1536(b)(3)(A). As the courts have repeatedly stated, "[t]he purpose of the consultation procedure is to allow *either [NMFS] or the FWS to determine* whether the federal action is likely to jeopardize the survival of a protected species or result in the destruction of its critical habitat, and if so, to identify reasonable and prudent alternatives that will avoid the action's unfavorable impacts." *Turtle Island Restoration Network,* 340 F.3d at 974 (emphasis added).[51] Contrary to that purpose, the proposed revisions would enable the Services merely to "rubber stamp" an action agency's analysis as its own, without applying their expertise and performing the required independent, science-based analysis.[52]

v. Expansion of Programmatic Consultation and Addition of a New "Expedited Consultation" Procedure.

"Programmatic Consultations." The proposal also would add a new definition of "programmatic consultation" to 50 C.F.R. § 402.02 to provide for "a consultation addressing an agency's multiple actions on a program, region or other basis," including but not limited to: (1) "[m]ultiple, similar frequently occurring or routine actions expected to be implemented in particular geographic areas," and (2) "[a] proposed program, plan, policy, or regulation providing a framework for future actions." 83 Fed. Reg. at 35,191-92; *see also id*. at 35,184-85

Although programmatic consultation may be appropriate in some cases, the proposed changes would authorize such consultations in circumstances where it is not appropriate. For example, when used for multiple different projects occurring in the same region, the site-specific impacts of individual proposed federal agency actions on listed species and critical habitat would not be separately addressed or adequately considered. But section 7 requires that consultations on large-scale and programmatic actions may not ignore or minimize the site-specific and short-term effects of these actions, *see, e.g.*, *Pacific Coast II*, 426 F.3d at 1091-95; *Pacific Coast I*, 265

[51] *See also Center for Biological Diversity v. Environmental Prot. Agency*, 847 F.3d 1075, 1084 (9th Cir. 2017) ("Consultation allows agencies to draw on the expertise of wildlife agencies."); *Karuk Tribe*, 681 F.3d at 1020 ("[T]he purpose of consultation is to obtain the expert opinion of wildlife agencies . . . .").

[52] The proposal to allow the Services to adopt *their own* existing analysis in a permit issued pursuant to ESA section 10(a) could satisfy the Services' obligation under section 7, but only to the extent these prior analyses are relevant to the scope of section 7 consultation. For example, where the analysis in a 10(a) permit does not address the effect on a listed species, critical habitat, or listed plants that may be present in a permit area, it must be supplemented during consultation to fully assess those impacts as required by section 7.

F.3d at 1035-38, and programmatic biological opinions are permissible only when the analysis is "supplemented by later project-specific environmental analysis," *Gifford Pinchot Task Force*, 378 F.3d at 1068.

The Services also inappropriately state that programmatic consultation can be used in an informal consultation. It is difficult to conceive how a programmatic consultation analyzing the effects of multiple projects over a large area or a single large project occurring on a broad geographic scale could ever possibly meet the "not likely to adversely affect" requirement for informal consultation. *See* 50 C.F.R. § 402.13(a). As with other proposals, this proposed change ignores the significant direct, indirect, and cumulative effects of federal agency actions and the Services' and federal agencies' statutory duties to comprehensively analyze those effects.[53]

"Expedited Consultations." The proposed revisions further would add a new 50 C.F.R. § 402.14(*l*) authorizing "expedited consultations" as an "optional formal consultation process that a Federal agency and the Service may enter into upon mutual agreement." 83 Fed. Reg. at 35,192-93; *see also id.* at 35,188. According to the Services, the determination whether expedited consultation is appropriate will be based on "the nature, size[,] and scope of the action or its anticipated effects on listed species or critical habitat and other relevant factors." *Id*. at 35,193.

This expedited consultation procedure has many of the same flaws as excessive reliance on programmatic consultation. The proposed language affords the Services unduly broad discretion and does not ensure that expedited consultations will sufficiently and comprehensively evaluate the effects of federal actions, contrary to the requirements of section 7. The proposal also is vague and open-ended in identifying what actions may be subject to expedited consultation and offers no criteria or process to guide expedited consultation. The Services instead broadly state that "[t]his consultation process is proposed to provide an efficient means to complete formal consultation on projects ranging from those that have a minimal impact, to those projects with a potentially *broad range of effects* that are known and predictable, but that are unlikely to cause jeopardy or destruction or adverse modification." 83 Fed. Reg. at 35,188 (emphasis added). The Services provide no justification for their assumption that such projects are "unlikely to cause jeopardy or adverse modification" and also provide only one example of an action that might be subject to expedited consultation—conservation actions designed primarily to benefit the species—ignoring the fact that federal restoration and recovery actions already are subject to a streamlined consultation process.[54]

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[53] The problems with this proposal are compounded by the Services' statement that federal agencies and applicants can "propose measures to avoid, minimize, and/or offset effects to listed species and/or designated critical habitat as part of their proposed action" on a broad, programmatic scale. 83 Fed. Reg. at 35,184-85. But as discussed above, under the proposed amendments to 50 C.F.R. § 402.14(g)(8), these proposals would not need to be enforceable, thereby exponentially increasing the risks to listed species and critical habitat if such measures are not implemented and cannot be enforced on a programmatic level.

[54] *See* FWS, STREAMLINED CONSULTATION GUIDANCE FOR RESTORATION/RECOVERY PROJECTS (Nov. 16, 2016), *available at* https://www.fws.gov/endangered/esa-library/pdf/Final%20RRP%20Guidance%20w%20memo%2011012016.pdf.

Importantly, the Services admit that "expedited consultations are a new process and likely [will] involve proposed actions *that would otherwise go through the regular formal consultation process and require an incidental take statement*." 83 Fed. Reg. at 35,188 (emphasis added). In other words, expedited consultations would, under the Services' new proposal, be available for actions that are "likely to adversely affect" listed species or designated critical habitat *and* reasonably likely to result in incidental take. *See* 50 C.F.R. §§ 402.13(a), 402.14(a); 80 Fed. Reg. 26,832 (May 11, 2015). Thus, the Services' statement that actions subject to the new expedited consultation procedure will be "unlikely to cause jeopardy or destruction or adverse modification" is plainly insupportable and contradicted by their own statements. 83 Fed. Reg. at 35,188. Moreover, the Services' statements, and the vague criteria for when expedited consultation is appropriate, raise the suspicion that expedited consultation will become the norm rather than the exception, undermining the rigor and completeness of the normal consultation process.

In sum, the expedited consultation procedure allows for an end-run around some of the most important and fundamental requirements of the ESA: to comprehensively analyze and mitigate the effects of federal agency actions on listed species and their critical habitat. And whether a particular action is subject to the expedited consultation procedure will be based solely on an arbitrary determination by the Services and the federal action agency following no ascertainable criteria, without any public review and oversight. The unlawful and arbitrary proposal should be abandoned.

vi. Exemption from the Requirement to Reinitiate Consultation on Federal Land and Resource Management Plans.

The Services propose to add new 50 C.F.R. § 402.16(b), eliminating the requirement to reinitiate consultation on an approved Bureau of Land Management ("BLM") or U.S. Forest Service ("Forest Service") land and resource management plan ("management plan") upon the listing of a new species or designation of new critical habitat in the plan area, "provided that any authorized actions that may affect the newly listed species or designated critical habitat will be addressed through a separate action-specific consultation." 83 Fed. Reg. at 35,193; *see also id.* at 35,188-89. The Services claim that "[r]equiring reinitiation on these completed plans based on newly listed species or critical habitat often results in impractical and disruptive burdens," and "results in little benefit to the newly listed species or critical habitat . . . ." *Id.* at 35,189.

This proposed change would drive a large hole in existing reinitiation requirements, directly contrary to the case law rejecting this very concept. In *Pacific Rivers Council*, 30 F.3d at 1053, the Ninth Circuit expressly held that management plans "have an ongoing and long-lasting effect even after adoption . . . and represent ongoing agency action." The Court expressly rejected the Forest Service's argument, identical to the Services' contention in support of the proposed rule change here, that it was not required to reinitiate consultation on a management plan when a new species was listed in the plan area. *Id*. at 1055. Similarly, the Forest Service was required to reinitiate consultation on a management plan where the FWS subsequently had revised a previous critical habitat designation to include National Forest land. *Cottonwood Envtl. Law Ctr*., 789 F.3d at 1086-88 ("[R]equiring reinitiation in these circumstances comports with the ESA's statutory command that agencies consult to ensure the '*continued* existence' of

listed species." (emphasis in original)). The court held that the "new [critical habitat] protections triggered new obligations" and the Forest Service could not "evade its obligations by relying on an analysis it completed before the protections were put in place." *Id*. at 1088.

Moreover, as previously discussed, other cases likewise make clear that, in general, section 7 consultation is required for any action over which the federal agency retains discretionary involvement or control to protect listed species and habitat. *Turtle Island Restoration Network*, 340 F.3d at 974; *see National Wildlife Fed'n*, 524 F.3d at 926-29 (obligation to consider effects of ongoing operations of dam, where Congress specified broad goals, but agency retained significant discretion as to how to achieve those goals). The Services do not and cannot contend that the BLM and the Forest Service do not retain sufficient discretionary involvement, authority, or control over federal management plans to institute additional protections for species and habitat upon a new listing or critical habitat designation. Consequently, the Services' explanation of the rationale for this proposed change is contrary to law.

The Services also claim that reinitiation of consultation on federal management plans "does little to further" the overall goals of the ESA, but fail to explain why or provide any detail. In addition, the Services erroneously allege—without any justification—that management plans have "no immediate on-the-ground effects" and that consultation need only be conducted on individual federal agency actions proceeding under these plans. 83 Fed. Reg. at 35,189. This assertion is directly contrary to case law and common sense and ignores the widespread and cumulative effects of these broad-based federal agency actions. Management plans contain substantive criteria governing the nature and extent of permissible land uses and impacts to species and habitat on a large scale, on a programmatic and ongoing basis. *See Pacific Rivers Council*, 30 F.3d at 1051-53, 1055 (management plans "have an ongoing and long-lasting effect even after adoption" and set forth criteria for timber harvesting, grazing, road building, and other activities on federal lands); *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1158-59 (10th Cir. 2007) (approving of the statement in *Pacific Rivers Council* that management plans "may have 'an ongoing and long-lasting effect' on the forest"). Failing to revisit them when new imperiled species and their habitat are identified would render those plans outdated and risk species' recovery or survival.

In sum, this proposal fails to meet the Services' or federal action agencies' section 7 obligations and is also arbitrary and capricious because the Services have failed to offer any reasonable justification for the exemption.

C. *4(d) Rule*, 83 Fed. Reg. 35,174 (July 25, 2018)
Docket ID No FWS-HQ-ES-2018-0007

The 4(d) Rule proposes to remove, going forward, the "blanket" extension to threatened species of all protections afforded to endangered plants and animals under the ESA. *See* 16 U.S.C. § 1538(a)(1)-(2); 83 Fed. Reg. at 35,175, 35,177-78. The proposed rule abandons FWS's longstanding policy and practice of providing default protections to all newly listed threatened species, subject only to exceptions carved out by special rule as necessary on a species-by-

species basis.[55] Instead, FWS intends to issue species-specific rules only as it deems necessary to protect threatened species, and specifically preserves its discretion to delay promulgation of those protections for an indefinite period, "at any time after the final listing or reclassification determination." *Id.* at 35,175. The proposal is a dramatic departure from current FWS practice and contrary to the ESA's conservation purpose and precautionary policy approach because it inevitably will leave threatened species without protections necessary to promote recovery and survival, instead increasing the threat that they will become endangered. FWS provide no sound reason for this abrupt policy change, which would strain already overburdened agency resources and lead to litigation challenges.

First, the proposal contravenes the ESA's policy of "institutionalized caution" because it inevitably will result in FWS neglecting to provide adequate protections to threatened species. *Hill*, 437 U.S. at 178, 194. As the Supreme Court has emphasized, the ESA's core purpose is "to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184. Given the agency's history of listing backlogs,[56] and its increasingly limited budget,[57] FWS does not have the capacity or resources to promulgate species-specific 4(d) rules at the outset for individual threatened species at the level that would be necessary to match the protection that is currently in place with the blanket 4(d) rule.[58] Instead, it is highly likely that the FWS will rarely promulgate special rules extending the take prohibition or other protections to newly listed or reclassified threatened species. And even where species-specific rules are adopted, as FWS appears to anticipate, there will likely be a significant delay during which no protections would be in place. 83 Fed. Reg. at 35,175.

Without interim protections, newly listed or reclassified threatened species would face significant risk of harm, and parties that put threatened species in danger would be free from consequences and undeterred. Either circumstance thus would upend the precautionary approach enshrined in the ESA, which the FWS has implemented for decades by instituting default protections for threatened species to keep them from sliding toward endangerment and extinction

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[55] *See* 50 C.F.R. §§ 17.31, 17.71.

[56] *See* GAO Listing Deadline Litigation Report, *supra* note 27, at 5-18 (reporting that 141 lawsuits involving 1,441 species were filed from fiscal year 2005 through 2015 alleging that FWS and NMFS failed to take actions within deadlines mandated by ESA section 4, most of which involved missed deadlines to act on petitions to list species); Benjamin Jesup, *Endless War or End This War? The History of Deadline Litigation Under Section 4 of the Endangered Species Act and the Multi-District Litigation Settlements*, 14 VT. J. ENVTL. L. 327, 348-51 (2013).

[57] *See President Proposes $1.2 Billion FY 2019 Budget for U.S. Fish and Wildlife Service*, FWS press release, Feb. 12, 2018, *available at* https://www.fws.gov/news/ShowNews.cfm?ref=president-proposes-$1.2-billion-fy-2019-budget-for--u.s.-fish-and-w&_ID=36224. *Compare* FY 2018 INTERIOR BUDGET IN BRIEF, BUREAU HIGHLIGHTS, FWS, *available at* https://edit.doi.gov/sites/doi.gov/files/uploads/fy2018_bib_bh059.pdf, *with* FY 2019 INTERIOR BUDGET IN BRIEF, BUREAU HIGHLIGHTS, FWS, *available at* https://edit.doi.gov/sites/doi.gov/files/uploads/fy2019_bib_bh059.pdf (proposed fiscal year 2019 budget request of $1.2 Billion for FWS was nearly twenty percent less than fiscal year 2017 operating budget of $1.5 Billion).

[58] Indeed, as discussed *supra* in Section II.A.i., the Services' proposed introduction of economic impact analysis into species listing decisions, if adopted and finalized, would further burden limited FWS resources.

while details of specially tailored rules are worked out. *See Hill*, 437 U.S. at 178, 194; *Sweet Home*, 515 U.S. at 698-99. Against this clear statutory purpose, FWS cannot fall back on its unsupported claim that the proposed change will provide "meaning to the statutory distinction between 'endangered species' and 'threatened species.'" 83 Fed. Reg. at 35,175. Indeed, the D.C. Circuit already has rejected arguments that the blanket rule impermissibly blurs the statutory distinction between endangered and threated species. *See Sweet Home Chapter of Cmtys. for a Greater Oregon v. Babbitt*, 1 F.3d 1, 6-7 (D.C. Cir. 1993).

Second, the 4(d) Rule is arbitrary and capricious because FWS fails to analyze important aspects of the problem and provides no reasoned justification for its proposal. As an initial matter, the 4(d) Rule lacks any acknowledgement or discussion of FWS resource constraints or the increased workload and exacerbated delay that would be associated with conducting species-by-species assessments and promulgating special rules necessary to adequately protect all newly listed threatened animals or plants in the absence of the blanket take prohibition. The agency has thus "entirely failed to consider an important aspect of the problem"—one that will in all likelihood undermine the ESA's mission and result in harm to imperiled species. *Motor Vehicle Mfrs.*, 463 U.S. at 43. And where FWS declines to promulgate or delays special rules to protect newly listed threatened species, the agency inevitably will face lawsuits challenging the inaction or delay, further burdening agency resources.

For the same reason, FWS cannot resort to its stated intent to align FWS practices with that of NMFS, which does not by default extend endangered species protections to threatened species but instead only promulgates species-specific rules for threatened species. 83 Fed. Reg. at 35,175. The agency fails to appreciate or even acknowledge that there are many reasons why FWS should employ a different rule than its sister agency. NMFS has jurisdiction over, and manages fewer than, one hundred marine species listed as threatened or endangered in the U.S.[59] By contrast, FWS manages more than 1,660 ESA-listed species in the U.S.[60] And yet the resources available to NMFS for promulgating and implementing special rules for each threatened species vastly exceed those of FWS. For example, for the fiscal year 2017, NMFS's annual budget for managing 159 U.S. and foreign ESA-listed species was $182 million, compared to FWS's budget of $234 million to manage more than 2,100 U.S. and foreign ESA-listed species.[61] While NMFS may have the capacity and resources to promulgate species-specific rules at the outset, FWS indisputably does not.

Nor does FWS provide any reasoned explanation or justification for abandoning the section 4(d) blanket protections with special rules carving out exceptions, a policy FWS itself

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[59] *See Endangered Species Conservation*, NOAA FISHERIES https://www.fisheries.noaa.gov/topic/endangered-species-conservation (NMFS has jurisdiction over a total of 163 ESA-listed species, 66 of which are foreign species) (last visited Sept. 23, 2018).
[60] *Environmental Conservation Online System, Listed Species Summary*, FWS, https://ecos.fws.gov/ecp0/reports/box-score-report (FWS has jurisdiction over a total of 2,344 ESA-listed species, 683 of which are foreign species) (last visited Sept. 23, 2018).
[61] *See, e.g.*, Jason Huffman, *U.S. Lawmaker Rekindles Talk of Moving NOAA Endangered Species Power to Interior*, UNDERCURRENT NEWS: SEAFOOD BUSINESS NEWS (Apr. 13, 2018), *available at* https://www.undercurrentnews.com/2018/04/13/us-lawmaker-rekindles-talk-of-moving-noaa-endangered-species-power-to-interior/.

acknowledges not only is reasonable, but has also been effective and successful. *See* 83 Fed. Reg. at 35,175. Indeed, the 4(d) Rule notes FWS's years of experience developing species-specific special rules under its current policy and the many benefits provided by this flexible yet protective approach. *Id*.[62] The agency perversely attempts to invoke the benefits of species-specific rules to justify its wholesale elimination of the blanket take prohibition. *Id*. But those benefits simply have no bearing on the wisdom of abolishing protections for all newly listed species while those species-specific rules are being developed, nor do they provide a "good reason" for upending forty years of agency policy and practice. *Fox*, 556 U.S. at 515. The agency fails to explain how its proposal comports the ESA's mandates and purpose and adequately protects threatened species before species-specific rules are developed. *Id*.

For all the above reasons, FWS should withdraw the proposed 4(d) Rule. Should the agency proceed with this illegal and ill-advised revision, however, any final rule must include a mandatory deadline, no later than 180 days following any final listing or reclassification for FWS to promulgate all necessary protections in a species-specific special rule. Without a mandatory timeframe, FWS would have unfettered discretion to promulgate species-specific rules "at any time after the final listing or reclassification determination," 83 Fed. Reg. at 35,175, again departing from the ESA's purpose and clear directive that FWS use its resources and authority to conserve threatened species, *see* 16 U.S.C. §§ 1531(b), (c), 1533(d).[63]

III. The Proposed Rules Must Be Analyzed Under NEPA.

The Services have a duty under NEPA to analyze the significant effects of the Proposed Rules, and to circulate the analysis for public review and comment. But instead of performing the required analysis, the Services merely invite public comment on whether NEPA applies. *See* 83 Fed. Reg. at 35,177, 35,191, 35,200. As discussed below, the Proposed Rules constitute a major federal action significantly affecting the quality of the human environment and they are not subject to a categorical exclusion. As such, the Services were required to request comments on the appropriate scope of environmental review and then prepare, and notice for public comment, an Environmental Impact Statement ("EIS") analyzing the Proposed Rules' potential impacts before, or in tandem with, their publication. The Proposed Rules thus violate NEPA and must be withdrawn. At the very least, the Services must suspend rulemaking for the Proposed Rules, request NEPA scoping comments, and prepare an EIS.

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

The Agencies have failed to comply with their statutory duty to publish an EIS. NEPA is the "basic national charter for protection of the environment," 40 C.F.R. § 1500.1(a), enacted in recognition of "the profound impact of man's activity on the interrelations of all components of the natural environment," 42 U.S.C. § 4331(a). The fundamental purposes of the statute are to ensure that "environmental information is available to public officials and citizens before

[62] *See* FWS Region 6, ENDANGERED SPECIES ACT SPECIAL RULES, QUESTIONS AND ANSWERS (Feb. 2014) (describing value of developing species-specific rules), *available at* https://www.fws.gov/mountain-prairie/factsheets/ESA%20SpecialRules%20Factsheet_020714.pdf.
[63] *See also* 16 U.S.C. § 1533(b)(3)(A)-(B) (timeframes for FWS action on ESA listing petitions).

decisions are made and before actions are taken," and that "public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id*. § 1500.1(b)-(c). NEPA thus requires agencies to take a "hard look" at the environmental consequences of their actions before deciding whether and how to proceed. *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 37 (D.C. Cir. 2015). Agencies must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), including where "substantial questions are raised as to whether a project may cause significant environmental impacts," *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 946 (9th Cir. 2014).

The Services plainly violated their NEPA obligations here. As an initial matter, it is the *Services'* obligation to perform the required assessment of whether an EIS is required, and they cannot shirk that duty or delegate it to the public by requesting that stakeholders commenting on the Proposed Rules explain why they do, or do not, require an EIS. In any event, there can be no doubt that the Proposed Rules constitute a "major federal action" requiring the preparation of an EIS. The Council on Environmental Quality's NEPA regulations provide, and numerous courts have confirmed,[64] that a "major federal action" includes "new or revised agency rules [and] regulations[.]" 40 C.F.R. § 1508.18(a).

And it is likewise clear that the Proposed Rules will significantly affect the environment. NEPA regulations require that both the context and the intensity of an action be considered in determining whether an action may significantly affect the environment, including "[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973." 40 C.F.R. § 1508.27. The presence of just "one of these factors may be sufficient to require the preparation of an EIS in appropriate circumstances." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005).

As discussed above, the Proposed Rules, if adopted, are likely to cause numerous and profound harms to imperiled species. For example, the Proposed Rules would limit the designation of critical habitat; result in fewer listings of—and significantly less protection for—threatened species; increase the likelihood that species will be delisted; limit the scope of section 7 consultations; and limit the circumstances under which the Services impose measures to reduce the impacts of federal actions on listed species, among other adverse impacts on imperiled species and their habitat. Thus, the Services thus must prepare an EIS for the Proposed Rules.

What is more, the Services should already have done so. The NEPA regulations make clear that "[a]gencies shall integrate the NEPA process with other planning *at the earliest possible time* to insure [sic] that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R § 1501.2 (emphasis added). As the Supreme Court has explained, an EIS "is the outward sign that environmental

[64] *See, e.g., California ex rel. Lockyer v. U.S. Dep't of Agric*., 575 F.3d 999, 1012-18 (9th Cir. 2009) (agency repeal of roadless rule and replacement with new regulations required NEPA review); *Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 37-38 (D.D.C. 2007) (vacating federal rule requiring NEPA review); *Natural Res. Def. Council v. Duvall*, 777 F. Supp. 1533, 1536, 1542 (E.D. Cal. 1991) (setting aside federal rule due to failure to perform EIS).

values and consequences have been considered during the planning stage of agency actions. If environmental concerns are not interwoven into the fabric of agency planning, the 'action-forcing' characteristics of [NEPA] would be lost." *Andrus* v. *Sierra Club*, 442 U.S. 347, 350–51 (1979). Thus federal agencies must have evaluated the environmental consequences of an action when they propose to undertake a qualifying major federal action, *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 & n.15 (1976), and certainly "*prior* to commitment to any actions which might affect the quality of the human environment," *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphasis in original); *see also* 40 C.F.R. § 1502.5 (EIS must be prepared "as close as possible to the time the agency is developing . . . a proposal . . . so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal"); 1508.23 (defining "proposal" stage at which agency "is actively preparing to make a decision on one or more alternative means of accomplishing [its] goal").[65] "If any 'significant' environmental impacts might result from the proposed agency action then an EIS must be prepared *before* the action is taken." *Sierra Club*, 717 F.2d at 1415.

Here, the Services *should have* followed NEPA's requirements to prepare a draft EIS for the Proposed Rules well before—or at the latest, at the same time as—publishing the Proposed Rules on July 25, 2018, to weave thorough understanding of environmental consequences into the planning process. By failing to publish an EIS before the close of the comment period, the Services have unlawfully foreclosed the opportunity for the public to understand and provide important feedback on the Proposed Rules' environmental impacts. Because the Services published the Proposed Rules in violation of NEPA, they must be withdrawn. At the very least, the Services *must* suspend rulemaking on the Proposed Rules, request comments on the appropriate scope of environmental review under NEPA, and prepare and circulate a comprehensive draft EIS for comment to afford the public a meaningful opportunity to participate in the Services' development of any final rules.

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

The Proposed Rules are not eligible for a categorical exclusion under NEPA. Agencies may invoke a categorical exclusion only for "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of [NEPA] regulations[.]" 40 C.F.R. § 1508.4. No such circumstances are present here. FWS[66] and NMFS[67] have established categorical exclusions for policies and regulations of an administrative or procedural nature, none of which apply to the substantive, significant changes reflected in the

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[65] *See also Kleppe v. Sierra Club*, 427 U.S. 390, 405-06 (1976) (holding that, under § 102(2)(C) of NEPA, agency must have a final statement ready when it makes a recommendation or report on a proposal for federal action); *Sierra Club*, 803 F.3d at 37 (agencies must take a "hard look" at environmental consequences of their actions).

[66] U.S. Department of Interior, EXISTING CATEGORICAL EXCLUSIONS, at 6-9 (hereinafter "DOI Exclusions"), *available at* https://www.doi.gov/sites/doi.gov/files/uploads/doi_and_bureau_categorical_exclusions_feb2018.pdf.

[67] *See* NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK, Ver. 2.3 (May 2009), at. 22-29 (hereinafter "NOAA NEPA Handbook"), *available at* http://www.nepa.noaa.gov/NEPA_HANDBOOK.pdf.

Proposed Rules. Indeed, the Ninth Circuit rejected a similar attempt to evade NEPA requirements in the context of National Forest planning, finding that replacement of substantive protections with a less-protective regulatory regime—as the Services are currently attempting to do with the Proposed Rules—qualifies as a major federal action that is not exempt from NEPA review. *California ex rel. Lockyer*, 575 F.3d at 1013-15.

Even if the Proposed Rules could otherwise qualify for coverage under the Services' categorical exclusions (they do not), they would nonetheless present "extraordinary circumstances in which a normally excluded action may have a significant environmental effect," and thus be subject to NEPA's full requirements in any event. 40 C.F.R. § 1508.4. To that end, the Services exempt from categorical exclusions any actions that, among other things: may significantly impact species listed, or proposed to be listed, under the ESA; have uncertain or potentially significant environmental effects or have unique or unknown environmental risks; violate a federal, state, local, or tribal law imposed for protection of the environment; or may have controversial environmental effects. *See* NOAA NEPA Handbook at 22; DOI Exclusions at 2-3. While only one of these factors need apply to the Proposed Rules to remove them from consideration for a categorical exclusion, plainly several of them do, as the Proposed Rules would have significant negative impacts on, among other things, newly listed threatened species and on all listed species' critical habitat. Additionally, the Proposed Rules violate the ESA itself in numerous ways, as detailed above. Thus, no categorical exclusion may be applied to the Proposed Rules, and NEPA analysis is required.

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

CONCLUSION

The Services' proposed Rules each chip away at the ESA's most important species protections, and together upend the ESA's decades-long policy of "institutionalized caution" and risk significant harm to the precious species the Act serves to protect. The Listing Rule takes aim at the Services' foundational species-listing and critical habitat designation decisions, infecting the Services' decisions with expressly irrelevant economic impact information, and limiting the extent to which the Services can consider and respond to the most pressing threats to species extinction, like climate change. The Interagency Consultation Rule renders the Act's core agency consultation program a sham, decreasing its frequency and diminishing its value by gutting its key definitions and substantive requirements. And the 4(d) Rule, with no sound explanation, altogether eliminates the take prohibition for newly listed threatened species, risking their existence while the Services work through their ever-present backlog. Given the Services' disregard for these harms and failure to evaluate the Proposed Rules' environmental damage, their promulgation would at once violate the ESA, the Administrative Procedure Act, and NEPA. As entities uniquely qualified to evaluate efforts to protect our nation's natural resources, the States urge the Services to immediately abandon all three unlawful, arbitrary, and harmful Proposed Rules.

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY
Attorney General

MATTHEW IRELAND
TURNER SMITH
AMANDA MOREJON
Assistant Attorneys General
Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200
matthew.ireland@state.ma.us

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
Attorney General

GEORGE TORGUN
ERIN GANAHL
TARA MUELLER
Deputy Attorneys General
California Department of Justice
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
(510) 879-1002
george.torgun@doj.ca.gov

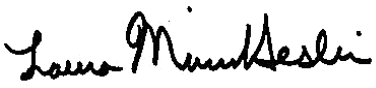
FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General

JOHN B. HOWARD, JR.
JOSHUA M. SEGAL
Assistant Attorneys General
Office of the Attorney General
200 Saint Paul Place
Baltimore, MD 21202
(410) 576-6300

FOR THE STATE OF NEW YORK

BARBARA D. UNDERWOOD
Attorney General



LAURA MIRMAN-HESLIN
Assistant Attorney General
Environmental Protection Bureau
New York State Office of the
Attorney General
28 Liberty Street
New York, NY 10005
(212) 416-6091

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General

PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
STEVE NOVICK
Special Assistant Attorney General
Oregon Department of Justice
1162 Court Street, N.E.
Salem, OR 97301
(503) 947-4520

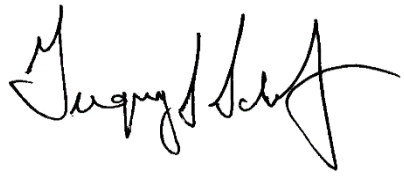
FOR THE COMMONWEALTH OF PENNSYLVANIA

JOSH SHAPIRO
Attorney General

MICHAEL J. FISHER
Chief Deputy Attorney General
AIMEE D. THOMSON
Deputy Attorney General
Office of Attorney General
Strawberry Square
Harrisburg, PA 17120
(215) 560-2171

FOR THE STATE OF RHODE ISLAND

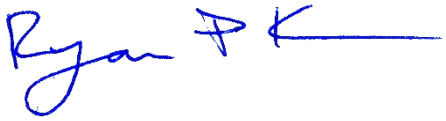
PETER F. KILMARTIN
Attorney General



GREGORY S. SCHULTZ
Special Assistant Attorney General
Department of the Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General



RYAN P. KANE
Assistant Attorney General
Office of the Attorney General
Environmental Protection Division
109 State Street
Montpelier, VT 05609
(802) 828-2153

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

WILLIAM R. SHERMAN
Assistant Attorney General
AURORA R. JANKE
Special Assistant Attorney General
Counsel for Environmental Protection
800 5th Avenue Suite 2000, TB-14
Seattle, WA 98104
(206) 442-4485

FOR THE DISTRICT OF COLUMBIA

KARL RACINE
Attorney General of the District of Columbia

SARAH KOGEL-SMUCKER
Special Assistant Attorney General
Office of the Attorney General for the District of Columbia
441 Fourth Street N.W.,
Suite 630 South
Washington, D.C. 20001
(202) 724-9727