

XAVIER BECERRA
Attorney General of California
DAVID A. ZONANA, State Bar No. 196029
DAVID G. ALDERSON, State Bar No. 231597
Supervising Deputy Attorneys General
GEORGE TORGUN, State Bar No. 222085
TARA MUELLER, State Bar No. 161536
ERIN GANAHL, State Bar No. 248472
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 879-1002
Fax: (510) 622-2270
E-mail: George.Torgun@doj.ca.gov

Attorneys for Plaintiff State of California

[Additional counsel listed on signature page]

MAURA HEALEY
Attorney General of Massachusetts
MATTHEW IRELAND (*pro hac vice*)
TURNER SMITH (*pro hac vice*)
Assistant Attorneys General
Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
Telephone: (617) 727-2200
Email: Matthew.Ireland@mass.gov
Email: Turner.Smith@mass.gov

Attorneys for Plaintiff Commonwealth of Massachusetts

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

Case No. 4:19-cv-06013-JST

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

No. 4:19-cv-06812-JST

**STATE PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
SUMMARY JUDGMENT;
MEMORANDUM IN SUPPORT**

Date: July 21, 2021
Time: 2:00 p.m.
Place: Courtroom 6, 2nd Floor
Judge: Hon. Jon S. Tigar

1 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**
2 **TO ALL PARTIES AND COUNSEL OF RECORD:**

3 PLEASE TAKE NOTICE that, on July 21, 2021, at 2:00 p.m., Plaintiffs State of
4 California, *et al.* (collectively, “State Plaintiffs”), by and through the undersigned counsel, will,
5 and hereby do, move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil
6 Procedure and Civil Local Rule 7. This motion will be made before the Honorable Jon S. Tigar,
7 United States District Judge, Oakland Courthouse, 1301 Clay Street, Oakland, CA 94612.

8 Pursuant to Rule 56 of the Federal Rules of Civil Procedure, State Plaintiffs hereby move
9 for summary judgment on the ground that there is no genuine dispute as to any material fact and
10 the movant is entitled to judgment as a matter of law. This motion is based on the accompanying
11 Memorandum of Points and Authorities, the Declarations of Chad Dibble, Everose N. Schluter,
12 Tucker Jones, and Drew Feldkirchner, and the administrative record.

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
Introduction	1
Statutory Background.....	1
Factual and Procedural Background	3
Standing	6
Standard of Review	6
Argument	8
I. The Final Rules Are Contrary to the ESA.	8
A. The Listing Rule Limits Species Listings and Critical Habitat Designations in Violation of the ESA.....	9
B. The Consultation Rule Undermines Federal Agencies’ Section 7 Duties and the Conservation Purposes of the ESA.	14
C. The 4(d) Rule Is Contrary to the Conservation Purposes of the ESA.....	21
II. The Final Rules Are Arbitrary and Capricious under the APA.	23
A. The Services Failed to Adequately Explain or Justify the Final Rules as a “Clarification” or “Streamlining” of Existing Procedures.....	23
B. The Services Failed to Adequately Evaluate or Justify Their Reasons for Each Individual Rule Change.	25
1. The Listing Rule Arbitrarily Constrains Listing Determinations and Limits Critical Habitat Designations.	25
2. The Services Failed to Consider Relevant Factors and Effects of the Consultation Rule, or to Provide Reasoned Explanations for Their Myriad Drastic Changes.	30
3. FWS Failed to Consider How the 4(d) Rule Will Place Species at Risk and Provided No Reasoned Explanation for the Abrupt Reversal of Its Decades-Long Policy.....	34
III. The Services Failed to Provide Notice and Comment on Aspects of the Final Rules that are not a “Logical Outgrowth” of the Proposed Rules.	35
IV. The Services Violated NEPA by Failing to Prepare an EIS on the Final Rules.....	37
A. The Final Rules Have a Significant Impact on the Environment and Therefore Required Preparation of an EIS.....	38
B. The Final Rules Are Not Eligible for a Categorical Exclusion.....	39
Conclusion	40

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

Alaska Oil & Gas Ass’n v. Pritzker
840 F.3d 671 (9th Cir. 2016).....27

Alaska v. Lubchenco
723 F.3d 1043 (9th Cir. 2013).....10

Altera Corp. & Subsid. v. Comm’r of Internal Revenue
926 F.3d 1061 (9th Cir. 2019).....7

Am. Fuel & Petrochem. Mfrs. v. EPA
937 F.3d 559 (D.C. Cir. 2019)18

Am. Rivers v. FERC
895 F.3d 32 (D.C. Cir. 2018)19

Anderson v. Evans
371 F.3d 475 (9th Cir. 2004).....39

Cal. ex rel. Lockyer v. USDA
575 F.3d 999 (9th Cir. 2009).....40

California v. Bernhardt
472 F. Supp. 3d 573 (N.D. Cal. 2020)7

California v. U.S. Dep’t of the Interior
381 F. Supp. 3d 1153 (N.D. Cal. 2019)40

Celotex Corp. v. Catrett
477 U.S. 317 (1986).....6

Chevron U.S.A., Inc. v. NRDC
467 U.S. 837 (1984).....7

Coal. of Concerned Citizens v. Fed. Transit Admin. of U.S. Dep’t of Transp.
843 F.3d 886 (10th Cir. 2016).....37

Conner v. Burford
848 F.2d 1441 (9th Cir. 1988).....16, 17

Conserv. Council for Haw. v. Babbitt
2 F. Supp. 2d 1280 (D. Haw. 1998)28, 30

Cooling Water Intake Structure Coal. v. EPA
905 F.3d 49 (2nd Cir. 2018).....19, 20

TABLE OF AUTHORITIES

(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Cottonwood Environmental Law Center v. U.S. Forest Service
789 F.3d 1075 (9th Cir. 2015).....20, 21

Crooks v. Harrelson
282 U.S. 55 (1930).....13

Ctr. for Biolog. Divers. v. Bernhardt
982 F.3d 723 (9th Cir. 2020).....20, 33

Ctr. for Biolog. Divers. v. BLM
698 F.3d 1101 (9th Cir. 2012).....19, 33

Ctr. for Biolog. Divers. v. Zinke
900 F.3d 1053 (9th Cir. 2018).....27

Ctr. for Native Ecosystems v. Cables
509 F.3d 1310 (10th Cir. 2007).....15

Dep’t of Com. v. New York
139 S. Ct. 2551 (2019).....8, 25

Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.
140 S. Ct. 1891 (2020).....7

Empire Health Found. for Valley Hosp. Ctr. v. Azar
958 F.3d 873 (9th Cir. 2020).....35, 36

Encino Motorcars, LLC v. Navarro
136 S. Ct. 2117 (2016).....7, 8, 33

Envtl. Integrity Project v. EPA
425 F.3d 992 (D.C. Cir. 2005)36, 37

FCC v. Fox Television Stations, Inc.
556 U.S. 502 (2009).....8, 25

Fertilizer Institute v. EPA
935 F.2d 1303 (D.C. Cir. 1991)37

Friends of Blackwater v. Salazar
691 F.3d 428 (D.C. Cir. 2012)11

Gifford Pinchot Task Force v. FWS
378 F.3d 1059 (9th Cir. 2004).....2, 10, 15

TABLE OF AUTHORITIES

(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Greater Yellowstone Coal. Inc. v. Servheen
665 F.3d 1015 (9th Cir. 2011).....27

Idaho Sporting Cong. v. Thomas
137 F.3d 1146 (9th Cir. 1998).....38

In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165
704 F.3d 972 (D.C. Cir. 2013)22

Karuk Tribe of Cal. v. U.S. Forest Serv.
681 F.3d 1006 (9th Cir. 2012).....16, 17, 20

League of Wilderness Defs. v. Connaughton
752 F.3d 755 (9th Cir. 2014).....38

Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.
463 U.S. 29 (1983).....7, 23, 25

Nat’l Wildlife Fed’n v. NMFS
524 F.3d 917 (9th Cir. 2008)..... *passim*

NRDC v. EPA
279 F.3d 1180 (9th Cir. 2002).....35, 37

NRDC v. U.S. Dep’t of Interior
113 F.3d 1121 (9th Cir. 1997).....12, 29

Occidental Eng’g Co. v. INS
753 F.2d 766 (9th Cir. 1985).....6, 7

Ocean Advocates v. U.S. Army Corps of Eng’rs
402 F.3d 846 (9th Cir. 2004).....38

Or. Nat. Desert Ass’n v. BLM
625 F.3d 1092 (9th Cir. 2010).....34

Organized Vill. of Kake v. USDA
795 F.3d 956 (9th Cir. 2015).....8

Pac. Coast Fed’n of Fishermen’s Ass’n v. NMFS
265 F.3d 1028 (9th Cir. 2001).....15, 16

Pac. Coast Fed’n of Fishermen’s Ass’n v. U.S. Bureau of Reclam.
426 F.3d 1082 (9th Cir. 2005).....16

TABLE OF AUTHORITIES

(continued)

	<u>Page</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

<i>Pac. Rivers Council v. Thomas</i> 30 F.3d 1050 (9th Cir. 1994).....	34
<i>Russello v. United States</i> 464 U.S. 16 (1983).....	9, 14
<i>San Luis & Delta Mendota Water Auth. v. Jewell</i> 747 F.3d 581 (9th Cir. 2014).....	19, 33
<i>San Luis & Delta-Mendota Water Auth. v. Locke</i> 776 F.3d 971 (9th Cir. 2014).....	23, 32
<i>Stewardship Council v. EPA</i> 806 F.3d 520 (9th Cir. 2015).....	40
<i>Sweet Home Chapter of Cmty. for a Greater Or. v. Babbitt</i> 1 F.3d 1 (D.C. Cir. 1993).....	23, 35
<i>Tenn. Valley Auth. v. Hill</i> 437 U.S. 153 (1978).....	<i>passim</i>
<i>Turtle Island Restor. Network v. NMFS</i> 340 F.3d 969 (9th Cir. 2003).....	20
<i>Turtle Island Restor. Network v. U.S. Dep’t of Commerce</i> 878 F.3d 725 (9th Cir. 2017).....	16
<i>W. Watersheds Project v. Kraayenbrink</i> 632 F.3d 472 (9th Cir. 2011).....	8, 16
<i>Weyerhaeuser Co. v. FWS</i> 139 S. Ct. 361 (2018).....	30
STATUTES	
5 U.S.C. § 706(2).....	40
5 U.S.C. § 706(2)(A).....	7, 35
5 U.S.C. § 706(2)(C).....	7
5 U.S.C. § 706(2)(D).....	7
16 U.S.C. § 1531(b).....	<i>passim</i>
16 U.S.C. § 1531(c)(1).....	<i>passim</i>

TABLE OF AUTHORITIES

(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

16 U.S.C. § 1532(3)2, 11, 28

16 U.S.C. § 1532(5)(A)..... *passim*

16 U.S.C. § 1532(6)2

16 U.S.C. § 1532(16)3

16 U.S.C. § 1532(19)3

16 U.S.C. § 1532(20)2, 10, 27

16 U.S.C. § 1533(a)(1).....2, 9, 25

16 U.S.C. § 1533(a)(2).....2

16 U.S.C. § 1533(a)(3).....2, 13

16 U.S.C. § 1533(a)(3)(A)11, 12

16 U.S.C. § 1533(b)(1)(A)2, 9, 10, 25, 26

16 U.S.C. § 1533(b)(2).....9

16 U.S.C. § 1533(d)3, 8, 22

16 U.S.C. § 1533(f)(1)(B)(ii)11, 28

16 U.S.C. § 1536(a)-(c).....16

16 U.S.C. § 1536(a)(1)..... *passim*

16 U.S.C. § 1536(a)(2).....3, 15, 17, 18, 19

16 U.S.C. § 1536(b)(3).....3

16 U.S.C. § 1536(b)(3)(A)3, 16, 18, 20

16 U.S.C. § 1536(b)(4).....3, 18, 19

16 U.S.C. § 1536(c)17

16 U.S.C. § 1536(c)(1).....3

16 U.S.C. § 1538(a)(1).....3

42 U.S.C. § 4332(2)(C)37, 38

TABLE OF AUTHORITIES

(continued)

Page

LEGISLATIVE HISTORY

H.R. REP. No. 95-1625 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453.....12, 28

H.R. REP. No. 97-567 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807.....9

H.R. CONF. REP. NO. 97-835 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860.....9, 12, 26

S. REP. No. 97-418 (1982)8, 9

S. REP. No. 100-240 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2700.....11

FEDERAL REGULATIONS

40 C.F.R. § 1500.1(a).....37

40 C.F.R. § 1508.440

40 C.F.R. § 1508.18(a).....37, 38

40 C.F.R. § 1508.27(b)(3).....39

40 C.F.R. § 1508.27(b)(4).....38, 39

40 C.F.R. § 1508.27(b)(5).....39

40 C.F.R. § 1508.27(b)(7).....39

40 C.F.R. § 1508.27(b)(9).....38

43 C.F.R. § 46.21040

43 C.F.R. § 46.21540

50 C.F.R. § 402.0214, 15, 18, 30, 31, 32

50 C.F.R. § 402.14(g)(8).....19, 33

50 C.F.R. § 402.14(h)(3).....20

50 C.F.R. § 402.14(l)6, 33

50 C.F.R. § 402.1620, 34

TABLE OF AUTHORITIES

(continued)

	<u>Page</u>
1	
2	
3	15, 31
4	9, 25
5	10, 26
6	10, 28
7	11, 28
8	12
9	13, 29
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

FEDERAL REGISTER NOTICES

40 Fed. Reg. 44,412 (Sept. 26, 1975).....	3
42 Fed. Reg. 32,374 (June 24, 1977)	3
43 Fed. Reg. 870 (Jan. 4, 1978)	16
45 Fed. Reg. 13,010 (Feb. 27, 1980).....	3
49 Fed. Reg. 38,900 (Oct. 1, 1984).....	3
51 Fed. Reg. 19,926 (June 3, 1986)	3
58 Fed. Reg. 51,735 (Oct. 4, 1993).....	24
71 Fed. Reg. 75,924 (Dec. 19, 2006)	11
73 Fed. Reg. 50,226 (Aug. 26, 2008).....	11
74 Fed. Reg. 20,421 (May 4, 2009)	32
80 Fed. Reg. 26,832 (May 11, 2015)	3
81 Fed. Reg. 7,214 (Feb. 11, 2016).....	3, 31
81 Fed. Reg. 7,414 (Feb. 11, 2016).....	3, 13, 28, 29, 30
82 Fed. Reg. 9,339 (Feb. 3, 2017).....	4
84 Fed. Reg. 44,753 (Aug. 27, 2019).....	5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

(continued)

Page

84 Fed. Reg. 44,976 (Aug. 27, 2019).....	5
84 Fed. Reg. 45,020 (Aug. 27, 2019).....	5
85 Fed. Reg. 43,304 (July 16, 2020)	37

COURT RULES

Fed. R. Civ. P. 56(a).....	6
----------------------------	---

INTRODUCTION

1
2 State Plaintiffs challenge the Trump Administration’s decision to promulgate three final
3 rules (“Final Rules”) that undermine key requirements of the federal Endangered Species Act
4 (“ESA” or “Act”), 16 U.S.C. §§ 1531 *et seq.* As the Supreme Court has recognized, the ESA was
5 designed to afford species the “highest of priorities” and “to halt and reverse the trend toward
6 species extinction, whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174, 184 (1978)
7 (“*Hill*”). But the Final Rules—pushed by the Administration to further its political, deregulatory
8 agenda at the expense of protected species—violate the ESA’s plain language, structure, and
9 conservation purposes by, among other infirmities, unlawfully injecting cost considerations into
10 listing decisions, removing species recovery as a requirement for delisting, restricting designation
11 of critical habitat for species survival and recovery, undermining the number, type, and scope of
12 interagency consultations on federal agency actions, and removing critical protections for
13 threatened species. In addition, Defendants Secretary of the Interior and Secretary of Commerce,
14 acting through the U.S. Fish & Wildlife Service (“FWS”) and the National Marine Fisheries
15 Service (“NMFS”) (collectively, “the Services”), have failed to provide any reasoned basis for
16 these rules or an opportunity to comment on new aspects of the Final Rules, in violation of the
17 Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 *et seq.* Finally, the Services violated the
18 National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, by categorically
19 excluding the Final Rules from environmental review, despite their significant impacts on
20 imperiled species and critical habitat. Consequently, the Court should grant State Plaintiffs’
21 motion for summary judgment and vacate the Final Rules.

STATUTORY BACKGROUND

22
23 Signed into law by President Richard Nixon, the ESA constitutes “the most comprehensive
24 legislation for the preservation of endangered species ever enacted by any nation.” *Hill*, 437 U.S.
25 at 180. The fundamental purposes of the ESA are to “provide a means whereby the ecosystems
26 upon which endangered ... and threatened species depend may be conserved” and “to provide a
27 program for” the conservation of such species. 16 U.S.C. § 1531(b). The ESA enshrines a
28 national policy of “institutionalized caution,” in recognition of the “overriding need to devote

1 whatever effort and resources [are] necessary to avoid further diminution of national and
 2 worldwide wildlife resources.” *Hill*, 437 U.S. at 177, 194 (internal quotation omitted).
 3 Accordingly, the ESA declares “the policy of Congress that all Federal departments and agencies
 4 shall seek to conserve endangered ... and threatened species and shall utilize their authorities in
 5 furtherance of the purposes of [the ESA].” 16 U.S.C. § 1531(c)(1) (emphasis added). The Act
 6 defines “conserve” broadly as “to use and the use of all methods and procedures which are
 7 necessary to bring any endangered ... or threatened species to the point at which the measures
 8 provided pursuant to this chapter are no longer necessary,” *i.e.*, to the point of full recovery. *Id.*
 9 § 1532(3); see *Gifford Pinchot Task Force v. FWS*, 378 F.3d 1059, 1070 (9th Cir. 2004) (“[T]he
 10 ESA was enacted not merely to forestall extinction of species ... but to allow a species to recover
 11 to the point where it may be delisted.”).

12 The ESA achieves its overriding conservation purpose through multiple vital programs, all
 13 of which are undermined by the Final Rules. Section 4 prescribes the process for the Services to
 14 list a species as “endangered” or “threatened” based solely on the best scientific and commercial
 15 data. 16 U.S.C. §§ 1533(a)(1)-(2), (b)(1).¹ Section 4 also directs the Services to designate, “to
 16 the maximum extent prudent and determinable,” specified “critical habitat” for each species
 17 concurrent with its listing, including areas both currently occupied and unoccupied by those
 18 species. *Id.* § 1533(a)(3). Specifically, the ESA defines critical habitat as:

19 (i) the specific areas *within* the geographical area occupied by the species, at the time it
 20 is listed in accordance with the [ESA], on which are found those physical or biological
 21 features (I) essential to the conservation of the species and (II) which may require
 22 special management considerations or protection; *and* (ii) specific areas *outside* the
 geographical area occupied by the species at the time it is listed ... upon a determination
 by the Secretary that such areas are essential for the conservation of the species.

23 *Id.* § 1532(5)(A) (emphases added).

24 Section 7, in turn, requires all federal agencies to “insure” that any action they propose to
 25 authorize, fund, or carry out “is not likely to jeopardize the continued existence of any
 26 endangered ... or threatened species or result in the destruction or adverse modification of” any

27 ¹ The ESA defines an “endangered species” as “any species which is in danger of extinction
 28 throughout all or a significant portion of its range,” and a “threatened species” is “any species
 which is likely to become an endangered species within the foreseeable future throughout all or a
 significant portion of its range.” *Id.* §§ 1532(6), (20).

1 designated critical habitat. 16 U.S.C. § 1536(a)(2). If a proposed federal agency action may
2 affect any listed species or critical habitat, the federal action agency must initiate consultation
3 with the relevant Service. *Id.* §§ 1536(b)(3), (c)(1). The Service must then prepare a biological
4 opinion to determine whether the action is likely to jeopardize any listed species or destroy or
5 adversely modify any designated critical habitat and, if so, to provide “reasonable and prudent
6 alternatives” to the agency action that would avoid jeopardy or adverse modification, as well as
7 “reasonable and prudent measures ... necessary or appropriate to minimize such impact,” and
8 specified “terms and conditions” for implementing those measures. *Id.* §§ 1536(b)(3)(A), (b)(4).

9 Finally, section 9 prohibits any person from “taking” (e.g., killing, injuring, harassing or
10 harming) any listed endangered fish or wildlife species and prohibits certain other actions with
11 respect to listed endangered plant species. 16 U.S.C. §§ 1532(19), 1538(a)(1)(B), (G). Section
12 4(d) authorizes the Services to extend by regulation any or all of these section 9 prohibitions to
13 threatened species, *id.* § 1533(d), which FWS has done since the 1970s, *see* 40 Fed. Reg. 44,412,
14 44,414 (Sept. 26, 1975) (fish and wildlife species); 42 Fed. Reg. 32,374 (June 24, 1977) (plants).

15 **FACTUAL AND PROCEDURAL BACKGROUND**

16 The Services share joint responsibility for implementing the ESA to protect and conserve
17 imperiled species and their habitats. *See* 16 U.S.C. § 1532(16).² Currently, the ESA protects
18 over 1,600 plant and animal species in the United States and its territories, and millions of acres
19 of land have been designated as critical habitat to allow for species conservation, including
20 recovery. *See* ECF No. 105, ¶ 105. The Services adopted joint regulations implementing sections
21 4 and 7 in the 1980s. *See, e.g.*, 45 Fed. Reg. 13,010 (Feb. 27, 1980) (section 4); 49 Fed. Reg.
22 38,900 (Oct. 1, 1984) (section 4); 51 Fed. Reg. 19,926 (June 3, 1986) (section 7). Since then, the
23 Services have not substantially amended these regulations,³ and ninety-nine percent of listed
24 species have escaped extinction. *See* ECF No. 105, ¶ 105.

25 In early 2017, however, the Trump Administration abruptly reversed course. On January
26

27 ² In general, FWS is responsible for terrestrial and inland aquatic fish, wildlife, and plant species,
while NMFS is responsible for marine and anadromous species.

28 ³ The Services adopted minor revisions in 2015 and 2016. *See* 80 Fed. Reg. 26,832 (May 11,
2015); 81 Fed. Reg. 7,214 (Feb. 11, 2016); 81 Fed. Reg. 7,414 (Feb. 11, 2016).

1 30, 2017, President Trump issued Executive Order 13,771 entitled, “Reducing Regulation and
 2 Controlling Regulatory Costs,” directing that “for every one new regulation issued, at least two
 3 prior regulations be identified for elimination,” and that any costs associated with new regulations
 4 shall be offset by eliminating costs associated with at least two prior regulations. 82 Fed. Reg.
 5 9,339 (Feb. 3, 2017). Defendants made a concerted effort from “day one” to implement this
 6 deregulatory agenda. *See* ESA2_127465; ESA2_127490 (defining “deregulatory” as an action
 7 “expected to have total costs less than zero”).⁴ The record reflects that high-level political
 8 appointees within the Department of the Interior and the White House—in particular, Defendant
 9 Secretary David Bernhardt, then Deputy Secretary of the Interior (*see, e.g.*, ESA2_3466;
 10 ESA2_7456; ESA2_15305; ESA2_17620);⁵ Todd Willens, Assistant Deputy Secretary and later
 11 Secretary Bernhardt’s Chief of Staff (*see, e.g.*, ESA2_2008, ESA2_35621); and Stuart
 12 Levenbach, a senior policy analyst at the White House Office of Information and Regulatory
 13 Affairs (“OIRA”)⁶ (*see, e.g.*, ESA2_2211-12; ESA2_21974)—rushed through proposals to
 14 weaken the Services’ listing, critical habitat designation, and consultation provisions without
 15 meaningful participation by career staff (*see, e.g.*, ESA2_10208 (“working under a very
 16 compressed time frame from DOI leadership”)). In fact, NMFS did not even learn of Secretary
 17 Bernhardt’s planned changes to the rules until OIRA sought to add them to its public agenda.
 18 *See, e.g.*, ESA2_1543; ESA2_2035-37; ESA2_2132; ESA2_4864. Meanwhile, the Services’
 19 career staff expressed repeated frustration regarding their inability to affect the rulemaking
 20 process. *See, e.g.*, ESA2_3417; ESA2_5189; ESA2_54918.

21 Under the direction of Secretary Bernhardt and other high-level political appointees, on
 22 July 25, 2018, the Services published three rules proposing to revise numerous key requirements
 23 of the ESA’s implementing regulations, ESA 206, 222, 227 (collectively, the “Proposed Rules”),
 24 including many changes adopted at the request of industry groups in connection with the Trump

25 _____
 26 ⁴ The administrative record is cited as “ESA [page number]” or “ESA2_[page number],” excluding
 leading zeros.

27 ⁵ Several months after initiating the rulemaking, Secretary Bernhardt belatedly sought an ethics
 clearance “to participate in the rulemaking process” for the Final Rules. ESA2_52202.

28 ⁶ In January 2018, Mr. Levenbach was appointed Chief of Staff at the National Oceanic and
 Atmospheric Administration, which oversees NMFS. *See* ESA2_20888-89.

1 Administration’s Regulatory Reform Task Force. *See, e.g.*, ESA 2204-10, 2214-27, 2230-32,
2 2369-73, 2425, 2572-73, 2656-58, 2668, 2713-15, 2847-54, 2869-71. The Services explicitly
3 characterized all three rules as “deregulatory action[s]” pursuant to Executive Order 13,771. ESA
4 218, 224, 233; *see* ESA2_127465; ESA2_17358; ESA2_31865; ESA2_31883; ESA2_50391.

5 State Plaintiffs submitted comments on the Proposed Rules on September 24, 2018, urging
6 the Services to withdraw the rules on the grounds that they would, if finalized, be unlawful and
7 contrary to the ESA, APA, and NEPA. ESA 91280. Despite overwhelming opposition to the
8 Proposed Rules—including from the State Plaintiffs, Plaintiffs in these related cases, and a
9 diverse array of other interest groups—the Services issued the Final Rules on August 27, 2019.
10 84 Fed. Reg. 44,753 (the “4(d) Rule”) (ESA 11); 84 Fed. Reg. 44,976 (the “Interagency
11 Consultation Rule”) (ESA 19); 84 Fed. Reg. 45,020 (the “Listing Rule”) (ESA 62). The Final
12 Rules enacted many damaging, illegal changes to key ESA programs.

13 The Listing Rule: (i) eliminated the requirement that listing decisions be made “without
14 reference to possible economic or other impacts”; (ii) added a requirement that, to list a species as
15 “threatened,” the threats and species’ responses thereto must be more likely than not to occur in
16 the “foreseeable future,” based on “environmental variability” and other factors; (iii) eliminated
17 species recovery as a basis for delisting; (iv) significantly expanded the circumstances in which
18 the Services may find that it is “not prudent” to designate critical habitat for listed species; and (v)
19 restricted the designation of currently unoccupied critical habitat by requiring the Services to first
20 determine that currently occupied areas are inadequate for species conservation, and then to find
21 with “reasonable certainty” that an area will contribute to the conservation of the species and
22 currently contains one or more features “essential to the conservation of the species.”

23 The Interagency Consultation Rule: (i) redefined the definition of “destruction or adverse
24 modification” of critical habitat triggering section 7 consultation, to require the critical habitat to
25 be appreciably diminished in conservation value “as a whole”; (ii) eliminated from the definition
26 of “destruction or adverse modification” any actions that alter “physical or biological features
27 essential to the conservation of a species”; (iii) changed the definition of “effects of the action” by
28 limiting both the type and extent of effects of a proposed federal agency action requiring analysis

1 in the section 7 consultation process; (iv) defined “environmental baseline” to include “ongoing
2 agency activities or existing agency facilities that are not within the agency’s discretion to
3 modify,” thereby exempting such ongoing actions from analysis as effects of a proposed agency
4 action under section 7; (v) weakened the requirement for action agencies to ensure that mitigation
5 measures for the adverse effects of their actions are actually implemented and enforceable; (vi)
6 created a new consultation procedure allowing the Services to adopt a non-expert federal action
7 agency’s biological analyses as their own biological opinions; (vii) authorized “expedited”
8 consultations in 50 C.F.R. § 402.14(l); and (viii) added an exemption from the requirement to
9 reinstate consultation on implementation of ongoing U.S. Bureau of Land Management (“BLM”)
10 land management plans when a new species is listed or new critical habitat is designated.

11 Finally, the 4(d) Rule removed the longstanding “blanket” regulatory extension of all
12 section 9 protections applicable to endangered species to all threatened species, putting newly-
13 listed threatened species at risk of extinction pending promulgation of species-specific rules.

14 Despite the Final Rules’ substantive breadth and significant environmental impacts, the
15 Services determined that they are categorically excluded from NEPA review because they are of a
16 legal, technical, or procedural nature. ESA 17, 58, 93.

17 **STANDING**

18 Pursuant to the Court’s Order Denying Motion to Dismiss (ECF No. 98) and the
19 Declarations of Chad Dibble, Everose N. Schluter, Tucker Jones, and Drew Feldkirchner,
20 submitted herewith, State Plaintiffs have standing to bring this action because the Final Rules
21 significantly weaken protections for listed species and their habitat—resources within, held in
22 trust, and regulated by State Plaintiffs—and vacatur will remedy those harms.

23 **STANDARD OF REVIEW**

24 Summary judgment should be granted when the record demonstrates that “there is no
25 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
26 Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In deciding whether to
27 grant summary judgment in an APA review of an administrative proceeding, the district court “is
28 not required to resolve any facts.” *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769 (9th Cir.

1 1985). Rather, the court “is to determine whether or not as a matter of law the evidence in the
2 administrative record permitted the agency to make the decision it did.” *Id.*; see *California v.*
3 *Bernhardt*, 472 F. Supp. 3d 573, 590-91 (N.D. Cal. 2020). “The APA sets forth the procedures
4 by which federal agencies are accountable to the public and their actions subject to review by the
5 courts.” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020)
6 (internal quotations and citation omitted). A “reviewing court shall ... hold unlawful and set
7 aside” agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in
8 accordance with law,” “in excess of statutory jurisdiction, authority or limitations,” or “without
9 observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (C), (D).

10 The promulgation of a final regulation is invalid as “not in accordance with law” and in
11 excess of its statutory jurisdiction and authority if the regulation is “manifestly contrary to the
12 statute.” *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984) (“*Chevron*”). In making that
13 determination, the Court first determines “whether Congress has directly spoken to the precise
14 question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as
15 well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at
16 842-43. In this analysis, the court examines “the legislative history, the statutory structure, and
17 other traditional aids of statutory interpretation in order to ascertain congressional intent.” *Altera*
18 *Corp. & Subsid. v. Comm’r of Internal Revenue*, 926 F.3d 1061, 1075 (9th Cir. 2019) (internal
19 quotations omitted). If, however, “the statute is silent or ambiguous with respect to the specific
20 issue, the question for the court is whether the agency’s answer is based on a permissible
21 construction of the statute.” *Chevron*, 467 U.S. at 843.

22 An agency action is invalid as arbitrary and capricious under the APA where the agency:
23 “has relied on factors which Congress has not intended it to consider, entirely failed to consider
24 an important aspect of the problem, offered an explanation for its decision that runs counter to the
25 evidence before the agency, or is so implausible that it could not be ascribed to a difference in
26 view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm*
27 *Mut. Auto. Ins. Co.* (“*State Farm*”), 463 U.S. 29, 43 (1983). An “agency changing its course ... is
28 obligated to supply a reasoned analysis for the change.” *Id.* at 42; see also *Encino Motorcars*,

1 *LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Thus, “even when reversing a policy after an
2 election, an agency may not simply discard prior factual findings without a reasoned
3 explanation.” *Organized Vill. of Kake v. USDA*, 795 F.3d 956, 968 (9th Cir. 2015); see *Dep’t of*
4 *Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019). Further, when an agency’s “new policy rests
5 upon factual findings that contradict those which underlay its prior policy,” an agency must
6 “provide a more detailed justification than what would suffice for a new policy created on a blank
7 slate.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). An “unexplained
8 inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and
9 capricious change.” *Encino*, 136 S. Ct. at 2126 (internal quotations omitted).

10 ARGUMENT

11 I. THE FINAL RULES ARE CONTRARY TO THE ESA.

12 Each of the Final Rules violates both the letter and purpose of ESA and collectively, they
13 wreak havoc on the national policy of “institutionalized caution” enshrined in the Act. See *Hill*,
14 437 U.S. at 177-78. Rather than “to halt and reverse the trend toward species extinction,
15 *whatever the cost[,]*” *id.* at 184 (emphasis added), the Final Rules expressly promote a
16 deregulatory agenda at the expense of protected species and their habitat, contrary to the Act’s
17 specific requirements and overarching conservation mandate. See 16 U.S.C. §§ 1531(b), (c)(1),
18 1536(a)(1). The Listing Rule guts both the species listing and critical habitat designation
19 provisions of section 4—the “cornerstone of effective implementation of the [ESA].” S. REP. NO.
20 97-418, at 10 (1982). The Consultation Rule undermines the “explicit congressional decision”
21 reflected in Section 7—the “heart of the ESA”—“to require agencies to afford *first priority* to the
22 declared national policy of saving endangered species.” *Hill*, 437 U.S. at 185 (emphasis added);
23 *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011). And the 4(d) Rule
24 eliminates default protections “necessary to provide for the conservation” of threatened species
25 protected by the Act. 16 U.S.C. §§ 1531(b), (c)(1), 1533(d). As detailed below, the Final Rules
26 are contrary to the plain language of the ESA and cannot stand. But even if the Court finds
27 ambiguity in a particular provision of the ESA, the Final Rules violate any permissible
28 construction of the statute.

1 **A. The Listing Rule Limits Species Listings and Critical Habitat Designations in**
 2 **Violation of the ESA.**

3 **“Presentation of Economic or Other Information” (50 C.F.R. § 424.11(b))**

4 The Final Rules violate the text and purpose of Section 4 by eliminating regulatory
 5 language in former section 424.11(b) requiring that listing decisions be made “without reference
 6 to possible economic or other impacts of such determination[s].” ESA 66, 94. As the Services
 7 admit, the ESA “does not expressly authorize compiling economic information,” ESA 67; indeed,
 8 the Act expressly prohibits it. The Act clearly states that listing decisions “*shall*” be made “*solely*
 9 on the basis of the best scientific and commercial data available” regarding the status of the
 10 species, such as habitat destruction, disease, and predation.⁷ 16 U.S.C. § 1533(b)(1)(A)
 11 (emphases added). While the ESA expressly authorizes consideration of economic impacts in
 12 designating critical habitat, 16 U.S.C. § 1533(b)(2), it requires listing decisions to center
 13 exclusively on biological threats to species, *id.* § 1533(a)(1), (b)(1)(A). *See Russello v. United*
 14 *States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a
 15 statute but omits it in another section of the same Act, it is generally presumed that Congress acts
 16 intentionally and purposely in the disparate inclusion or exclusion.”) (internal quotations and
 17 citation omitted).

18 The Act’s legislative history confirms what its text makes clear: Congress added the term
 19 “solely” to section 4’s listing provisions to emphasize that listing determinations were to be made
 20 “solely upon biological criteria[,] ... to prevent non-biological considerations from affecting such
 21 decisions,” H.R. REP. No. 97-567, at 12, 19 (1982);⁸ to “improve[] and expedite[]” the listing
 22 process; and to divert “the balancing between science and economics” to “the [critical habitat]
 23 exemption process,” *id.* at 12.⁹ The Services cannot save their unlawful action with the empty
 24 promise that they will only spend time and resources “compiling,” but not “considering,”

25 ⁷ The term “commercial data” refers to data about species trading and does “not ... authorize the
 26 use of economic considerations in the process of listing a species.” H.R. REP. No. 97-567, at 20
 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2820.

27 ⁸ *See also* H.R. CONF. REP. No. 97-835, at 20 (1982) (“[E]conomic considerations have no
 28 relevance to” listing determinations); S. REP. No. 97-418, at 4, 11 (1982).

⁹ *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.

1 economic impact data. ESA 66. Whether enabling the Services to consider—or even just to
2 gather—such information in the listing process, the Listing Rule violates section 4(b)(1)(A).

3 **“Foreseeable Future” (50 C.F.R. § 424.11(d))**

4 The Listing Rule unlawfully limits the circumstances under which the Services may list
5 species as threatened by defining the phrase “foreseeable future” in the statutory definition of
6 “threatened species” (16 U.S.C. § 1532(20)) to mean that “both future threats to a species and
7 species’ responses to those threats are likely” (*e.g.*, “more likely than not,” ESA 63), taking into
8 account species’ “life-history characteristics, threat-projection timeframes, and environmental
9 variability.” ESA 94. But, again, the Act requires that “the best scientific and commercial data
10 available” drive listing decisions and that such decisions be designed to achieve the Act’s
11 overriding goal of recovering such species and giving the benefit of the doubt to the species. 16
12 U.S.C. §§ 1531(b), (c)(1), 1533(b)(1)(A), 1536(a)(1); *Hill*, 437 U.S. at 194 (describing the ESA’s
13 overarching policy of “institutionalized caution”). The Act thus does not allow the application of
14 an arbitrary, “more likely than not” (greater than 51%), quantitative standard regarding whether a
15 species will become endangered in the “foreseeable future.” Nor does the ESA authorize the
16 Services to discount evidence of significant future threats to species—such as those posed by
17 climate change—and species’ anticipated responses to those threats. *See* 16 U.S.C. §§ 1532(20),
18 1533(b)(1)(A). The Listing Rule’s new, *ultra vires* requirements unlawfully permit the Services
19 to disregard evidence of severe threats that may be less than 50% likely but that would, if
20 realized, be 100% catastrophic to a species, in violation of section 4(b)(1)(A) as well as the Act’s
21 conservation purposes. *Id.* §§ 1531(b), (c)(1), 1536(a)(1).

22 **“Recovery in Delisting” (50 C.F.R. § 424.11(e))**

23 The Listing Rule also unlawfully removes species recovery as a factor to be considered in
24 whether a species should be delisted. ESA 63, 94-95. As the Ninth Circuit aptly recognized, “the
25 ESA was enacted ... to allow a species *to recover* to the point where it may be delisted.” *Gifford*
26 *Pinchot Task Force*, 378 F.3d at 1070 (emphasis added); *accord Alaska v. Lubchenco*, 723 F.3d
27 1043, 1054 (9th Cir. 2013). The Act is designed to bring endangered and threatened species “to
28 the point at which the measures provided pursuant to this [Act] are no longer necessary,” *i.e.*, to

1 the point of full recovery. 16 U.S.C. § 1532(3). And the ESA mandates that the Services
2 implement recovery plans “for the conservation and survival” of listed species which must
3 include “criteria which, *when met, would result in a determination* in accordance with the
4 provisions of this section, *that the species be removed from the list.*” *Id.* § 1533(f)(1)(B)(ii)
5 (emphases added). In other words, the Act makes recovery a prerequisite to any delisting
6 determination—a fact Congress confirmed when it added the recovery plan requirement in 1988.
7 *See, e.g.,* S. REP. No. 100-240, at 9 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2700, 2709 (recovery
8 plans to “contain *objective, measurable criteria for removal of a species from the Act’s lists*”)
9 (emphasis added). The Listing Rule’s removal of species recovery from the delisting analysis
10 thus violates sections 3(3) and 4(f).

11 The Services’ reliance on the D.C. Circuit’s decision in *Friends of Blackwater v. Salazar*,
12 691 F.3d 428 (D.C. Cir. 2012)—which is not binding on this Court—is unavailing. *See* ESA 76-
13 77, 230. Notably, in that case, FWS *did* in fact rely on the recovery of the West Virginia northern
14 flying squirrel as a basis for its delisting decision. *See Friends of Blackwater*, 691 F.3d at 431; 73
15 Fed. Reg. 50,226 (Aug. 26, 2008) (delisting “due to recovery”); 71 Fed. Reg. 75,924 (Dec. 19,
16 2006) (same). And, indeed, the court acknowledged that the Act’s recovery plan requirement
17 “can be read ... to place a binding constraint upon the Secretary’s delisting analysis” and
18 confirmed that the Act’s delisting “destination” turns on “recovery of the species.” *Friends of*
19 *Blackwater*, 691 F.3d at 433; *see id.* at 441-42 (Rogers, J., dissenting) (ESA is “exquisitely clear”
20 that recovery plans must be fulfilled prior to delisting). The decision thus does not, and—in light
21 of the Act’s plain text—could not, support removing recovery as a basis for delisting.

22 **“Not Prudent Determinations” (50 C.F.R. § 424.12(a))**

23 The Listing Rule unlawfully expands the limited statutorily authorized circumstances
24 allowing the Services to find that it is “not prudent” to designate critical habitat for listed species.
25 ESA 63, 95. The Act states that the Services, when listing a species, “shall” designate “*to the*
26 *maximum extent* prudent and determinable” the habitat that “is then considered to be critical,” 16
27 U.S.C. § 1533(a)(3)(A) (emphasis added), *i.e.*, “essential to the conservation of the species,” *id.* §
28 1532(5)(A). Recognizing that “the greatest [threat to species] [is] destruction of natural habitats,”

1 *Hill*, 437 U.S. at 179, Congress intended that superlative command to require designation of
2 critical habitat except in the “rare circumstances” when it “would not be beneficial to the
3 species.” H.R. REP. No. 95–1625, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467; *see*
4 *also NRDC v. U.S. Dep’t of Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997) (“*NRDC v. DOI*”)
5 (“The fact that Congress intended the imprudence exception to be a narrow one is clear”) (citing
6 cases).¹⁰ The Services’ prior regulations hewed to the narrow scope of the Act’s “not prudent”
7 exception, identifying only two appropriately narrow qualifying circumstances where the
8 exemption would apply. 50 C.F.R. § 424.12(a)(1) (2017) (where designation would risk harm to
9 species or would not benefit species).

10 The Listing Rule, however, turns the narrow statutory “not prudent” exception into the new
11 norm with an amorphous, unlawful list of circumstances under which critical habitat designation
12 can be deemed “not prudent.” For example, the new exception in section 424.12(a)(1)(ii)—where
13 “threats to the species’ habitat stem solely from causes that cannot be addressed through
14 management actions resulting from [section 7] consultation”—conflates the ESA’s distinct
15 requirements for critical habitat designation and interagency consultation, 16 U.S.C.
16 §§ 1532(5)(A), 1533(a)(3)(A), 1536(a)(1), and unlawfully authorizes the Services to evade their
17 designation duty based solely on the projected efficacy of later consultations—an authority
18 contemplated nowhere in the Act. Similarly, the new exception in section 424.12(a)(1)(iii) allows
19 the Services to evade the statute’s plain command by claiming critical habitat designation affords
20 only “negligible conservation value” to the species—*i.e.*, that it is not “beneficial enough”—
21 turning on its head Congress’s clear intent that designation occur except in “rare circumstances”
22 when designation “would *not be* beneficial to the species.” H.R. REP. No. 95-1625, at 17 (1978),
23 *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467 (emphasis added); *cf. NRDC v. DOI*, 113 F.3d at
24 1126 (“By expanding the imprudence exception to encompass all cases in which designation
25 would fail to control ‘the *majority* of land-use activities occurring within critical habitat,’ ... the
26 Service contravenes the clear congressional intent that the imprudence exception be a rare

27 _____
28 ¹⁰ *See also* H.R. CONF. REP. NO. 97-835, at 24 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2865
 (“limited” exemption applies only where “designation would identify the location of the species”).

1 exception”). And, perhaps most problematic, the new exception in section 424.12(a)(1)(v) gives
2 the Services vague and unfettered discretion to avoid critical habitat designation if “the Secretary
3 otherwise determines that designation of critical habitat would not be prudent.” The Services’
4 vast expansion of the Act’s intentionally narrow “not prudent” exception plainly violates section
5 4(a)(3)(A) and Congressional intent.

6 **“Unoccupied Critical Habitat” (50 C.F.R. § 424.12(b)(2))**

7 The Listing Rule unlawfully provides that the Services may only designate unoccupied
8 habitat after determining that occupied areas “would be inadequate to ensure the conservation of
9 the species.” ESA 63, 95. Section 3 of the ESA, however, expressly defines critical habitat to
10 include both “specific areas *within* the geographical area occupied by the species” at the time of
11 listing “*and* specific areas *outside* the geographical area occupied by the species.” 16 U.S.C.
12 § 1532(5)(A)(i)-(ii) (emphases added); *see Crooks v. Harrelson*, 282 U.S. 55, 58, (1930) (used in
13 its “ordinary sense,” conjunctive term “and” requires “not one or the other, but both”); 1A
14 Sutherland Statutory Construction § 21:14 (7th ed. 2013) (“Statutory phrases separated by the
15 word ‘and’ are usually interpreted in the conjunctive.”). As the Services themselves have
16 explained, there is “no specific language in the Act that requires the Services to first prove that
17 the inclusion of all occupied areas in a designation are insufficient to conserve the species before
18 considering unoccupied areas,” nor any “suggestion in the legislative history that the Services
19 were expected to exhaust occupied habitat before considering whether any unoccupied areas may
20 be essential.” 81 Fed. Reg. at 7,426-27. This new limitation on the designation of unoccupied
21 habitat allows the Services to contravene the Act’s core conservation purpose by forgoing
22 designation of habitat that species need to recover to prior population levels and ranges, or to
23 accommodate species migration spurred by, for example, climate change or other natural or
24 human-caused changes. *See infra* Part I.B.

25 The Listing Rule also unlawfully requires that, in order to designate unoccupied critical
26 habitat, the Services must first determine that that there is a “reasonable certainty both that the
27 area will contribute to the conservation of the species *and* that the area contains one or more of
28 those physical or biological features essential to the conservation of the species.” ESA 95

1 (emphasis added). But even the Services recognize that “the reference to ‘physical or biological
 2 features’ in the definition of ‘critical habitat’ only occurs in the [subsection] addressing occupied
 3 habitat.” ESA 64; *see* 16 U.S.C. § 1532(5)(A)(i). The subsection defining unoccupied critical
 4 habitat merely requires a determination that “such areas are essential for the conservation of the
 5 species.” *See* 16 U.S.C. § 1532(5)(A)(ii). “Had Congress intended to restrict” that subsection, “it
 6 presumably would have done so expressly as it did in the immediately [preceding] subsection.”
 7 *Russello*, 464 U.S. at 23. And, indeed, Congress’s deliberate omission in its unoccupied critical
 8 habitat provision makes sense, as areas currently unoccupied by a species need not currently
 9 contain features essential to species conservation; what matters is the area’s capacity to contribute
 10 to conservation when ultimately occupied. The Listing Rule’s addition of those deliberately
 11 omitted restrictions is therefore *ultra vires* and unlawful.

12 **B. The Consultation Rule Undermines Federal Agencies’ Section 7 Duties and the**
 13 **Conservation Purposes of the ESA.**

14 **“Destruction or Adverse Modification” of Critical Habitat (50 C.F.R. § 402.02)**

15 The Consultation Rule unlawfully revises the definition of “destruction or adverse
 16 modification” of critical habitat in section 7(a)(2)—the statutory trigger for consultation and its
 17 associated species and critical habitat protections—to add the requirement that the federal agency
 18 action must appreciably diminish the value of the critical habitat “as a whole.” ESA 59. Under
 19 this new standard, an action’s adverse effects now trigger consultation only if they “diminish the
 20 conservation value of the critical habitat in such a *considerable* way that the *overall value of the*
 21 *entire critical habitat designation to the conservation of the species is appreciably diminished.*”
 22 ESA 29 (emphases added); *see also* ESA 24 (adverse modification analysis to be performed “at
 23 the scale of the entire critical habitat designation”). Thus, now, “[i]t is only when adverse effects
 24 from a proposed action rise to this *considerable level* that the ultimate conclusion of ‘destruction
 25 or adverse modification’ of critical habitat can be reached.” ESA 29 (emphasis added).

26 The Services’ new “as a whole” approach to assessing impacts on critical habitat directly
 27 undercuts federal agencies’ and the Services’ section 7 duties to “insure” no destruction or
 28 adverse modification of critical habitat and to “utilize their authorities” to conserve listed species.

1 16 U.S.C. §§ 1531(b), (c)(1), 1532(5)(A), 1536(a)(1), (a)(2). This language undermines the very
 2 purpose of critical habitat by sanctioning destruction of portions or features of designated critical
 3 habitat, which may not necessarily affect the *entirety* of the critical habitat designation, but which
 4 are nonetheless “essential for” listed species’ conservation. *Id.* § 1532(5)(A); *see Ctr. for Native*
 5 *Ecosystems v. Cables*, 509 F.3d 1310, 1321-22 (10th Cir. 2007) (“critical habitat is impaired
 6 when features essential to its conservation are impaired” and “[i]t follows that critical habitat is
 7 adversely modified by actions that adversely affect species’ recovery”).

8 The “as a whole” language further allows a federal action agency and the Services to ignore
 9 site-specific, localized, and cumulative impacts on critical habitat, directly contrary to the Ninth
 10 Circuit’s repeated admonitions that federal agencies’ consideration of such impacts is critical to
 11 ensure that their section 7 duties are met. *See Pac. Coast Fed’n of Fishermen’s Ass’n v. NMFS*,
 12 265 F.3d 1028, 1036-37 (9th Cir. 2001) (“*Pacific Coast I*”) (NMFS was required to consider
 13 aggregate effect of multiple logging projects in making Section 7 determination); *Gifford Pinchot*,
 14 378 F.3d at 1075 (“Focusing solely on a vast scale can mask multiple site-specific impacts that,
 15 when aggregated, do pose a significant risk to a species.”); *Nat’l Wildlife Fed’n v. NMFS*, 524
 16 F.3d 917, 930-31, 934-35 (9th Cir. 2008) (“*NWF v. NMFS*”) (NMFS violated ESA by failing to
 17 consider short-term effects of dam operations on listed salmon species). Thus, the Services’
 18 amended definition of “destruction or adverse modification” is contrary to section 7, the
 19 definition of critical habitat, and the conservation purposes of the Act.

20 **“Effects of the Action” (50 C.F.R. §§ 402.02, 402.17)**

21 The Consultation Rule unlawfully restricts the definition of “effects of the action,” which
 22 determines the type and extent of effects that must be evaluated by both the federal action agency
 23 and the Services during the section 7 consultation process. The new definition requires that such
 24 effects satisfy a new two-prong test that they: (1) would not occur “but for” the proposed agency
 25 action; and (2) are “reasonably certain to occur” based on “clear and substantial information.”
 26 ESA 21, 59, 61. The rule applies the heightened “reasonably certain” standard to *all* effects of the
 27 proposed action, including direct, indirect, interrelated, and interdependent effects, ESA 20,
 28 whereas previously, the “reasonably certain” standard applied only to indirect and cumulative

1 effects of the proposed action, ESA2_ 15813 (former definitions of “effects of the action” and
2 “cumulative effects”). The Consultation Rule then pronounces that effects deemed to be
3 “geographically remote” or “remote in time” from the proposed action, or that are “only reached
4 through a lengthy causal chain,” do not satisfy the new “reasonably certain to occur” standard.
5 ESA 61. Furthermore, in considering whether an effect of a proposed action is “reasonably
6 certain to occur,” the action agency and the Services now may look to non-biological
7 considerations such as “past experiences,” “existing plans for the activity,” and applicable
8 “economic, administrative and legal requirements.” *Id.* Finally, the preamble sanctions
9 piecemeal consultations: “a request for consultation on one aspect of a Federal agency’s exercise
10 of discretion does not *de facto* pull in all of the possible discretionary actions or authorities of the
11 Federal agency.” ESA 21.

12 These significant new limitations on the analyses of the effects of a proposed agency action
13 violate both the letter and spirit of section 7 and the conservation purposes of the Act. 16 U.S.C.
14 §§ 1531(b), (c)(1), 1536(a)-(c). Section 7 requires action agencies to consult with the Services if
15 all or any part of a proposed action “may affect any listed species or critical habitat.” *W.*
16 *Watersheds*, 632 F.3d at 495; *see* 43 Fed. Reg. 870, 871 (Jan. 4, 1978) (“Section 7’s mandatory
17 directive is quite clear in requiring the initiation of consultation upon a determination that an
18 activity or program may affect a listed species or critical habitat.”). The “may affect” trigger for
19 consultation is a “relatively low threshold[,]” allowing an agency to “avoid the consultation
20 requirement only if it determines that its action will have ‘no effect’ on a listed species or critical
21 habitat.” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (*en banc*).
22 For agency actions that “may affect” listed species or critical habitat, the Services must evaluate,
23 in a comprehensive biological opinion, the effects of the entire agency action, including short-
24 term, long-term, site-specific, regional, and cumulative effects. 16 U.S.C. § 1536(b)(3)(A); *see*,
25 *e.g.*, *Turtle Island Restor. Network v. U.S. Dep’t of Commerce*, 878 F.3d 725, 737-38 (9th Cir.
26 2017); *NWF v. NMFS*, 524 F.3d at 934-35; *Pac. Coast Fed’n of Fishermen’s Ass’n v. U.S. Bureau*
27 *of Reclam.*, 426 F.3d 1082, 1090-95 (9th Cir. 2005) (“*Pacific Coast IP*”); *Pacific Coast I*, 265
28 F.3d at 1035-38; *Conner v. Burford*, 848 F.2d 1441, 1453-54, 1457 (9th Cir. 1988).

1 The Consultation Rule’s limit on section 7 analyses to effects that are both (1) a “but for”
2 result of the federal agency action, and (2) “reasonably certain to occur” based on a variety of
3 non-biological and unscientific factors, plainly violates section 7. In particular, the rule allows
4 federal action agencies and the Services to narrowly define the scope of the proposed action and
5 its effects and conduct a piecemeal, limited evaluation of the action’s adverse effects on listed
6 species and critical habitat, thus ignoring many of the action’s true impacts, contrary to the ESA
7 and governing case law.

8 For example, the “remote in time” and “geographically remote” language could be used to
9 limit Section 7 consultation in cases where there is an “effect” on a listed species that may not be
10 immediate but warrants consideration. For example, the operation of Federal dams on the west
11 coast produces impacts to migratory salmon populations. Salmon travel hundreds of miles over
12 time, and mortality may result from juvenile salmon encountering powerhouses or pumps during
13 their outmigration that might not manifest until after the salmon enter the ocean. Under the
14 Consultation Rule, Federal agencies might argue that this mortality would not count as “effects,”
15 even if likely to occur, as a result of such “remoteness.”

16 The “reasonably certain to occur” requirement—which is “a stricter standard than
17 ‘reasonably foreseeable,’” ESA 35—likewise flouts section 7 and the ESA’s overriding
18 conservation purpose, which call for a *low* threshold for adverse effects that is *maximally*
19 protective of species and habitat, 16 U.S.C. §§ 1531(b), (c)(1), 1536(a)(1); *see Karuk Tribe*, 681
20 F.3d at 1027 (“*Any possible effect ... triggers the [section 7] requirement.*”) (emphasis in
21 original). Moreover, the “reasonable certainty” factors give the Services unwarranted leeway to
22 ignore climate change and resulting effects. As discussed *infra* Part II, it is certain that climate
23 change will increasingly adversely affect listed species and habitat, although the *precise extent* of
24 these impacts is not necessarily possible to predict with certainty.¹¹

25 Significantly, the D.C. Circuit recently rejected an agency’s determination that is

26 ¹¹ The “reasonable certainty” criteria also run counter to the ESA’s requirement that the Services
27 must use the “best available science” in conducting consultations and cannot defer analysis or
28 decisions simply because the information or outcome is not “reasonably certain.” *See* 16 U.S.C.
§ 1536(a)(2), (c); *Conner*, 848 F.2d at 1454 (“incomplete information ... does not excuse the
failure to comply with the statutory requirement of a comprehensive biological opinion”).

1 rulemaking had “no effect” based on a “no reasonable certainty” standard. *Am. Fuel &*
2 *Petrochem. Mfrs. v. EPA*, 937 F.3d 559, 597-98 (D.C. Cir. 2019). The Court reasoned that the
3 agency’s statement that certain impacts could not be attributed:

4 with reasonable certainty [to promulgation of the rule at issue] are not a “no effect”
5 determination. The inability to attribute environmental harms “with reasonable
6 certainty” to the ... Rule, is not the same as a finding that the ... Rule “will not
7 affect” or “is not likely to adversely affect” listed species or critical habitat.

8 *Id.* at 598 (internal quotations and citations omitted). The Services’ revisions to the definition of
9 “effects of the action” are thus contrary to section 7 of the ESA, the statute’s conservation
10 purposes, and controlling case law.

11 **“Environmental Baseline” (50 C.F.R. § 402.02)**

12 Contrary to section 7, the ESA’s conservation mandate, and controlling case law, the
13 Consultation Rule allows agencies to include any “ongoing agency activities or existing agency
14 facilities that are not within the agency’s discretion to modify” as part of the “environmental
15 baseline.” ESA 59. The baseline describes the condition against which the effects of a proposed
16 agency action are measured in the section 7 consultation process. *Id.* This change likewise
17 unlawfully limits both the type and extent of effects that are required to be analyzed as part of the
18 proposed federal agency action. It thus also limits the type and extent of reasonable and prudent
19 alternatives and mitigation measures that must be included as part of the proposed action to avoid
20 jeopardy and adverse modification and reduce the project’s adverse effects on listed species and
21 critical habitat. 16 U.S.C. §§ 1536(a)(2), (b)(3)(A), (b)(4).

22 The Ninth Circuit has expressly rejected the very approach adopted by the Consultation
23 Rule, holding that the Services cannot minimize the effects of a federal agency action by
24 classifying portions of that action as “ongoing” and/or “non-discretionary” and subsuming them
25 within the environmental baseline. In *NWF v. NMFS*, for example, the Court invalidated a NMFS
26 biological opinion that incorporated the allegedly “non-discretionary,” ongoing impacts of dam
27 operations into the environmental baseline. 524 F.3d at 926, 928-29. The Court reasoned that the
28 ESA does not permit “agencies to ignore potential jeopardy risks by labeling parts of an action
non-discretionary,” and may not sweep “so-called ‘nondiscretionary’ operations into the

1 environmental baseline, thereby excluding them from the requisite ESA jeopardy analysis.” *Id.*;
2 *see also San Luis & Delta Mendota Water Auth. v. Jewell*, 747 F.3d 581, 639-40 (9th Cir. 2014).

3 The D.C. Circuit likewise has held that FWS may not “establish[] the environmental
4 baseline without considering the degradation to the environment caused by” the ongoing
5 operation of a hydropower project, and that “attributing ongoing project impacts to the ‘baseline’
6 and excluding those impacts from the jeopardy analysis” was inadequate under section 7. *Am.*
7 *Rivers v. FERC*, 895 F.3d 32, 47 (D.C. Cir. 2018); *see also Cooling Water Intake Structure Coal.*
8 *v. EPA*, 905 F.3d 49, 81 (2nd Cir. 2018) (noting that “[w]here the future operation of a regulated
9 facility depends upon the discretion of the acting agency, the continued operation of that facility
10 is not a ‘past’ or ‘present’ impact of a previous federal action” that is included in the
11 environmental baseline) (citing *NWF v. NMFS*, 524 F.3d at 930-31). The Services’ inclusion of
12 the effects of ongoing agency actions in the environmental baseline is thus contrary to settled law.

13 **Non-Binding Mitigation Measures (50 C.F.R. § 402.14(g)(8))**

14 The Consultation Rule adds a new unlawful provision to section 402.14(g)(8) providing that
15 “[m]easures included in the proposed action or a reasonable and prudent alternative that are
16 intended to avoid, minimize, or offset the effects of an action ... do not require any additional
17 demonstration of binding plans.” ESA 60. This limits the implementation and enforcement of
18 mitigation measures designed to reduce the adverse effects of a proposed agency action on listed
19 species and critical habitat, in violation of section 7 and the Act’s conservation purposes. 16
20 U.S.C. §§ 1531(b), (c)(1), 1536(a)(1), (a)(2), (b)(4). Contrary to the Services’ explanation for the
21 rule, ESA 22, 45-50, mitigation measures must be binding and enforceable to ensure that: (1)
22 federal action agencies actually satisfy their obligations under sections 7(a)(1) and 7(a)(2); (2) the
23 “reasonable and prudent measures” in the incidental take statement required under section 7(b)(4)
24 are actually implemented; and (3) there are measurable triggers for reinitiation of consultation if
25 the federal agency does not comply. *See Ctr. for Biolog. Divers. v. BLM*, 698 F.3d 1101, 1115-16
26 (9th Cir. 2012) (“*CBD v. BLM*”). Accordingly, the Ninth Circuit has recognized that federal
27 agency mitigation commitments must be incorporated into the proposed action and be binding
28 and enforceable. *See id.* at 1117; *NWF v. NMFS*, 524 F.3d at 935-36. The Ninth Circuit recently

1 reaffirmed that requirement in *Ctr. for Biolog. Divers. v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020)
2 (“*CBD v. Bernhardt*”), holding that vague, non-specific, and non-binding mitigation measures
3 “are generally unenforceable under the ESA and thus cannot be relied upon.” *Id.* at 744. Thus,
4 the mitigation provision is contrary to section 7.

5 **Adoption of Other Agencies’ Biological Analyses (50 C.F.R. § 402.14(h)(3))**

6 The Consultation Rule unlawfully amends section 402.14(h)(3)(i) to allow the Services to
7 adopt, as their own biological opinions, all or part of a federal action agency’s consultation
8 initiation package. ESA 60. Only the Services, however, and not the federal action agency, are
9 statutorily authorized to perform a biological analysis of the effects of the action and have the
10 requisite biological expertise to do so. 16 U.S.C. § 1536(b)(3)(A); *Karuk Tribe*, 681 F.3d at 1020
11 (“[T]he purpose of consultation is to obtain the expert opinion of wildlife agencies”); *accord*
12 *Turtle Island Restor. Network v. NMFS*, 340 F.3d 969, 974 (9th Cir. 2003). As the Second Circuit
13 has explained: “[t]he ESA requires the Services to *independently* evaluate the effects of agency
14 action on a species or critical habitat.” *Cooling Water Intake Structure Coal.*, 905 F.3d at 80
15 (emphasis added). The rule unlawfully permits the Services to abdicate their statutory
16 consultation duty to nonexpert agencies in violation of section 7(b)(3)(A).

17 **Reinitiation of Consultation Exemptions (50 C.F.R. § 402.16)**

18 Finally, the Consultation Rule adds a new, unlawful section 402.16(b), which exempts
19 BLM from having to reinitiate consultation on a land management plan when a new species is
20 listed or new critical habitat is designated in the plan area. ESA 60-61. The section 7
21 consultation requirement applies on an ongoing basis to *all* federal agency actions over which the
22 agency retains discretionary involvement or control. *Karuk Tribe*, 681 F.3d at 1024. In making
23 that determination, the key issue is not whether the action is “complete,” but whether the federal
24 agency has authority and discretion to modify its implementation of the action “for the benefit of
25 a protected species.” *Id.* at 1021; *accord Turtle Island*, 340 F.3d at 974, 977; *NWF v. NMFS*, 524
26 F.3d at 926-29 (obligation to consider effects of ongoing operations of dam, where Congress
27 specified broad goals but agency retained significant discretion as to how to achieve those goals).

28 Applying the Act’s plain terms, in *Cottonwood Environmental Law Center v. U.S. Forest*

1 *Service*, 789 F.3d 1075 (9th Cir. 2015), the Ninth Circuit held that a federal agency “has a
2 continuing obligation to follow the requirements of the ESA” where it has continuing regulatory
3 authority over the action. *Id.* at 1087. Thus, the Court held that the U.S. Forest Service was
4 required to reinitiate consultation on a management plan where FWS had revised a previous
5 critical habitat designation to include National Forest land. *Id.* at 1087-88. The Court reasoned
6 that “requiring reinitiation in these circumstances comports with the ESA’s statutory command
7 that agencies consult to ensure the ‘continued existence’ of listed species.” *Id.* (emphasis in
8 original). “[N]ew [critical habitat] protections triggered new obligations,” the Court explained,
9 and the Forest Service could not “evade its obligations by relying on an analysis it completed
10 before the protections were put in place.” *Id.* at 1088.

11 The Services do not—and indeed cannot—contend that the BLM does not retain sufficient
12 discretionary involvement, authority, or control over land management plans to implement
13 additional protections for species and habitat upon a new listing or critical habitat designation.
14 Instead, the Services plainly admit that this rule change was designed to overrule the Ninth
15 Circuit’s holding in *Cottonwood Environmental Law Center*, 789 F.3d 1075. ESA 52-53. But, as
16 explained above, *Cottonwood* merely applies the requirements of the ESA itself. Consequently,
17 the new rule limiting BLM’s obligations to reinitiate consultation is contrary to section 7’s
18 requirement to insure no jeopardy and no adverse modification of critical habitat, as well as the
19 ESA’s conservation mandate.

20 **C. The 4(d) Rule Is Contrary to the Conservation Purposes of the ESA.**

21 The 4(d) Rule abandons FWS’s decades-long policy of automatically extending section 9
22 protections to all newly listed threatened species, and instead leaves such species without any
23 section 9 protections unless and until FWS promulgates a species-specific section 4(d) rule. ESA
24 11, 16. FWS’s 4(d) Rule thereby contravenes the ESA’s conservation mandate and policy of
25 “institutionalized caution,” *Hill*, 437 U.S. at 178, because it inevitably will result in inadequate
26 ESA protections for newly-listed threatened species.

27 Section 4(d) provides that “[w]henver any species is listed as a threatened species . . . , the
28 Secretary *shall issue* such regulations as he deems necessary and advisable *to provide for the*

1 *conservation of such species,”* and may by regulation prohibit “with respect to any threatened
2 species” any act that is prohibited by ESA section 9 with respect to any endangered species. 16
3 U.S.C. § 1533(d) (emphases added). FWS asserts that it will satisfy the conservation purpose of
4 the ESA and section 4(d) by promulgating protective 4(d) rules for each individual threatened
5 species at the time of their listing. ESA 11, 13. But FWS simply does not have the capacity or
6 resources to promulgate species-specific 4(d) rules for each individual threatened species at the
7 time of listing. 16 U.S.C. § 1533(d). FWS’s stated intention to issue species-specific rules, which,
8 indeed, may or may not any include section 9 take prohibitions, ESA 16, is belied by given the
9 agency’s well-known history of significant listing decision backlogs,¹² and its increasingly limited
10 budget,¹³ now further constrained by the Listing Rule’s requirement to compile and present
11 economic information. *See supra* Part I.A.

12 Rather, it is far more likely that FWS will infrequently, if not rarely, promulgate special rules
13 extending the section 9 take prohibition or other protections to newly listed or reclassified
14 threatened species. In fact, to date, FWS has adopted species-specific rules for only about 4.5% of
15 threatened species under its jurisdiction. ESA 76511. And even where species-specific rules are
16 adopted, there will likely be a significant delay during which no section 9 protections are in place.
17 Without interim protections, newly listed or reclassified threatened species will face significant
18 risk of harm, and parties that put threatened species in danger would be free from any
19 consequences. Both circumstances would upend the conservation mandate and precautionary

20 _____
21 ¹² *See* ESA 91290 n.27 (GAO Listing Deadline Litigation Report at 5-18, reporting that 141
22 lawsuits involving 1,441 species were filed between fiscal year 2005 and 2015 alleging that the
23 Services failed to take actions within the ESA’s section 4 deadlines, most of which involved
24 missed deadlines to act on listing petitions); ESA 76507-10 (detailing history of listing backlog
and noting that, from 1983 to 2014, species have waited an average of 12 years to be listed under
the ESA); *see also In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704
F.3d 972, 975 (D.C. Cir. 2013) (describing listing backlog).

25 ¹³ FWS’s listing budget of just over \$11 million decreased by more than \$7.75 million in FY 2020.
26 *See* FY 2020 INTERIOR BUDGET IN BRIEF, BUREAU HIGHLIGHTS, FWS, Detail of Budget Changes, at
27 BH-67, 68, https://www.doi.gov/sites/doi.gov/files/uploads/2020_highlights_book.pdf. The entire
28 FWS budget decreased from \$3.37 billion in FY 2019 to \$2.93 billion in FY 2020, with only \$2.85
billion requested for FY 2021. *See id.*, Appendix A, Comparison of 2018, 2019, and 2020 Budget
Authority, FWS, p. A-5, <https://www.doi.gov/sites/doi.gov/files/uploads/fy2021-bib-a0001.pdf>.

1 principle enshrined in the ESA, which FWS has implemented for decades by instituting default
 2 protections for threatened species to keep them from sliding further toward endangerment and
 3 extinction while the details of specially tailored rules, if any, are developed. *See* 16 U.S.C.
 4 §§ 1531(b), (c)(1), 1536(a)(1); *Hill*, 437 U.S. at 178, 194.

5 FWS’s claim that the 4(d) Rule’s removal of section 9 protections is necessary to
 6 “meaningfully recogniz[e]” the statutory distinction between endangered and threatened species
 7 rings hollow. ESA 15. The D.C. Circuit already has rejected arguments that FWS’s prior 4(d)
 8 “blanket” regulatory extension of all section 9 protections to newly-listed threatened species
 9 impermissibly blurs the statutory distinction between endangered and threatened species. *See*
 10 *Sweet Home Chapter of Cmty. for a Greater Or. v. Babbitt*, 1 F.3d 1, 6-8 (D.C. Cir. 1993)
 11 (finding FWS’s former blanket rule was reasonable interpretation of the ESA).

12 **II. THE FINAL RULES ARE ARBITRARY AND CAPRICIOUS UNDER THE APA.**

13 In addition to violating the ESA’s statutory requirements, the Final Rules fail to meet the
 14 basic standards for lawful agency rulemaking under the APA. *See State Farm*, 463 U.S. at 42-43.
 15 The Services’ justifications lack evidentiary support and are belied by the administrative record,
 16 which demonstrates that the Final Rules were a rushed, politically-driven effort to reward industry
 17 groups and implement the Trump Administration’s nationwide deregulatory agenda, in deliberate
 18 disregard of impacts on species and habitat that Congress mandated the Services to consider.
 19 Accordingly, the Final Rules must be invalidated as arbitrary and capricious under the APA.

20 **A. The Services Failed to Adequately Explain or Justify the Final Rules as a** 21 **“Clarification” or “Streamlining” of Existing Procedures.**

22 As their overarching rationale, the Services repeatedly attempt, but utterly fail, to justify
 23 their significant, substantive changes to their longstanding implementing regulations as an effort to
 24 “clarify,” “streamline,” or “simplify” their procedures. *See, e.g.*, ESA 17, 19, 58, 62, 93. The
 25 Services have failed to support that purported rationale with any evidence identifying specific prior
 26 procedures in need of clarification or streamlining, or any specific alleged problems they were
 27 trying to solve. Nor have the Services provided evidence that the Final Rules will in fact make
 28 their procedures more streamlined or efficient. *See San Luis & Delta-Mendota Water Auth. v.*

1 *Locke*, 776 F.3d 971, 998 (9th Cir. 2014) (agency must “consider all relevant factors and offer an
 2 explanation for its conclusion that is grounded in the evidence”). Indeed, despite the fact that each
 3 of the Final Rules is “significant” under Executive Order 12,866, ESA 16, 57, 92,¹⁴ and despite
 4 OIRA’s repeated requests for a Regulatory Impact Analysis (“RIA”) required for significant
 5 rulemakings, ESA2_23317, ESA2_27641, ESA2_27655, ESA2_28962, the Services failed to
 6 prepare or release to the public any RIA or other cost-benefit assessment of the Final Rules.

7 Contrary to the Services’ proffered rationale, the record reflects that the Final Rules were
 8 rushed through by high-level political appointees within the Department of the Interior—including,
 9 in particular, Secretary Bernhardt¹⁵—solely to reduce the ESA’s alleged regulatory burdens at the
 10 behest of regulated industry. *See, e.g.*, ESA 2204-10, 2214-27, 2230-32, 2369-73, 2425, 2572-73,
 11 2656-58, 2668, 2713-15, 2847-54, 2869-71. The Services themselves admit that each of the Final
 12 Rules “is an Executive Order 13,771 deregulatory action.” ESA 16, 57, 92; *see also* ESA2 17358
 13 (identifying Listing Rule and Consultation Rule as “Upcoming EO 13771 Deregulatory” Actions).
 14 And the record further demonstrates that NMFS was not even aware that the Final Rules were
 15 being developed by Interior until OIRA sought to add the rules to its Unified Regulatory Agenda,¹⁶

16 ¹⁴ *See* Executive Order 12,866, §§ 3(f)(1), 6(a)(3)(C), 58 Fed. Reg. 51,735, 51,738, 51,741 (Oct. 4, 1993).

17 ¹⁵ *See, e.g.*, ESA2_10208 (“working under a very compressed time frame from DOI leadership”);
 18 ESA2_2120 (“DOI wants regs out in January which would mean we would all have to write these
 19 in December”); ESA2_2364-65 (“I have suggested that the Spring agenda would be the better
 20 option, but David [Bernhardt] and Todd [Willens] said DOI is adamant that it be listed in the Fall
 21 agenda. I suspect that is driven by Secretary Zinke”); ESA2_3466 (“High level folks at DOI to
 22 attend (Bernhardt) and from what I’ve heard they will direct staff as to what they want changed”);
 23 ESA2_4865 (regulatory drafting meeting agenda from David Bernhardt); ESA2_5153 (“fast
 24 tracking already happening”); ESA2_5239 (noting “very tight timeline”); ESA2_7456 (“So the
 25 push is coming from DOI (It is my understanding that this is coming from David Bernhardt)”);
 26 ESA2_15305 (“At the request of the DOI Deputy Secretary, the agencies are trying to prepare two
 27 proposed rules to submit to OMB by the end of January”); ESA2_21974 (“David and Stu
 28 discussed those comments this weekend, and the attached reflects their agreement on how to
 proceed with the 402 and 424 rules”).

¹⁶ *See, e.g.*, ESA2_1544 (“I’m truly confused about Stu’s behavior on this one. He knows these
 are joint regulations and that we are equal partners with DOI on implementing this work”);
 ESA2_1557 (“OIRA flagged that there are a couple of de-regs that FWS is planning for in regards
 to its consultation regulations and its listing/CH designation regs. I would guess that at least the
 latter is a joint regulation with NMFS? If so, have we heard about this yet?”); ESA2_2175 (noting
 “DOI’s desire to list (and have us list) proposed changes to ESA rules on the unified agenda,
 without discussing with us the substance of those changes”); ESA2_2132 (“Stu [Levenbach] - we

1 and that career staff expressed repeated frustration regarding their inability to affect the rushed
2 rulemaking process.¹⁷

3 Simply put, nothing in the record supports the Services' pretextual claim that the Final Rules
4 aimed at clarifying or streamlining existing procedures. *Cf. New York*, 139 S. Ct. at 2575
5 (rejecting Secretary of Commerce's "sole stated reason" for adding citizenship question to census
6 where "evidence tells a story that does not match the Secretary's explanation for his decision" and
7 Secretary's "sole stated reason . . . seems to have been contrived").

8 **B. The Services Failed to Adequately Evaluate or Justify Their Reasons for**
9 **Each Individual Rule Change.**

10 The Services also arbitrarily ignored many important consequences of each individual rule
11 change on listed species and their habitat, and failed to provide an adequate justification for each
12 change, let alone the "more detailed justification" required for contradicting their prior policies or
13 approach. *Fox*, 556 U.S. at 515.

14 **1. The Listing Rule Arbitrarily Constrains Listing Determinations and**
15 **Limits Critical Habitat Designation.**

16 **"Presentation of Economic or Other Information" (50 C.F.R. § 424.11(b))**

17 The Listing Rule arbitrarily adds economic impact analyses to the listing process without
18 any reasoned basis. ESA 66, 94. First, by injecting economic considerations into the biological-
19 based listing process, the Services relied on factors Congress did not intend for them to consider
20 and entirely "failed to consider important aspects of the problem" at issue—determining whether
21 a species is in fact biologically threatened based on the best available existing science. *See State*
22 *Farm*, 463 U.S. at 43; *see also* 16 U.S.C. §§ 1533(a)(1), (b)(1)(A). It defies reason that the
23 Services would go to significant efforts to compile—and then entirely ignore—economic
24 information, as they insist they will do to justify their evasion of the ESA's plain bar on
25 considering the economic impacts of listing, *supra* Part I.A. ESA 66-68. But, even taking the
26 _____
still have not received any materials from DOI on these rules so we are not exactly sure what
actions are being proposed").

27 ¹⁷ *See, e.g.*, ESA2_3417 (FWS "would likely have no ability to stop/modify any of this");
28 ESA2_54918 ("Given how the proposed regs played out, its unlikely internal comments will have
much influence in developing any final regulations").

1 Services at their word, they fail to consider how devoting substantial additional time and
2 resources to compile and present such information will not further delay their notoriously
3 backlogged listing decisions and consequently harm at-risk species. *See supra* note 12. Worse
4 still, the Services expressly decline to provide any “framework or guidelines” for assessing and
5 presenting economic impacts, ESA 68, thus not only failing to consider, but also affirmatively
6 obscuring, the true impact of their new process on the Act’s core requirements.

7 Second, the Services offer no reasoned basis for their drastic, unlawful change. The
8 ultimately futile effort of preparing and presenting economic impact information would plainly
9 undermine the Services’ proffered reason for promulgating the Listing Rule to “streamline” the
10 regulations, ESA 93, inevitably delaying listing decisions notwithstanding their purported, but
11 unsupported, “inten[t]” to comply with court-ordered listing deadlines, ESA 68. Nor can the
12 Services justify the change—over the objections of “most commenters,” ESA 65—on the basis of
13 an alleged interest in “increased transparency” from “some” unnamed members of Congress and
14 the public. ESA 67.¹⁸ Indeed, no such interest could authorize the Services to evade the ESA’s
15 specific prohibition on the inclusion of economic impacts in listing determinations, 16 U.S.C.
16 § 1533(b)(1)(A); *supra* Part I.A.

17 **“Foreseeable Future” (50 C.F.R. § 424.11(d))**

18 The Services failed to assess how their new interpretation of “foreseeable future” constrains
19 their ability to list and protect species from scientifically credible existential threats, again failing
20 to consider an important aspect of the listing process. ESA 94. Specifically, the Listing Rule’s
21 new requirement that both threats and species’ responses thereto must be “more likely than not”
22 allows the Services to discount potentially devastating threats that may fall below the Services’
23 arbitrary 50% threshold including, in particular, climate change. The fact that climate change will

24 _____
25 ¹⁸ Tellingly, in the Listing Rule, the Services pivoted to this last-gasp rationale from the rationale
26 offered in the proposed rule. *Compare* ESA 229 (relying on alleged “support” for transparency in
27 “statutes and executive orders governing the rulemaking process”), *with* ESA 68 (disclaiming
28 reliance on such authorities). And for good reason. *See* H.R. CONF. REP. No. 97-835, at 20 (1982)
(noting “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”).

1 have, and indeed is having, catastrophic impacts on species and their habitat is not in doubt; it is
2 certain. According to the National Park Service, 35% of species in the United States could
3 become extinct by 2050 due to global climate change. ESA 91293 n.29.¹⁹ Though there may be
4 several plausible projections of climate impacts predicting somewhat different effects on species
5 or habitat within different timeframes, such threats cannot be arbitrarily discounted or ignored in
6 assessing the overall “likelihood” that a species will become endangered in the “foreseeable
7 future.” 16 U.S.C. § 1532(20).

8 As the Ninth Circuit has explained, “[t]he fact that climate projections” or other modeling
9 “may be volatile does not deprive those projections of value in the rulemaking process” where the
10 Services have used a reasonable methodology for addressing that volatility and explained its
11 shortcomings. *Alaska Oil & Gas Ass’n v. Pritzker*, 840 F.3d 671, 680 (9th Cir. 2016); *see also*
12 *Ctr. for Biolog. Divers. v. Zinke*, 900 F.3d 1053, 1072 (9th Cir. 2018) (FWS must explain why
13 climate change uncertainty favors not listing arctic grayling given evidence of warming water
14 temperatures and decreasing water flows); *Greater Yellowstone Coal. Inc. v. Servheen*, 665 F.3d
15 1015, 1028 (9th Cir. 2011) (“It is not enough for the [FWS] to simply invoke ‘scientific
16 uncertainty’ to justify its action”). The Services’ conclusory statement they will still consider
17 available climate data is unavailing, as it fails to recognize that their new definition raises an
18 arbitrary, quantitative bar against doing so. ESA 74.

19 The Services also provide no reasoned basis for this damaging change. Again, rather than
20 “clarify” the listing process, ESA 93, the “foreseeable future” definition is replete with ambiguity
21 and affords them unfettered discretion to disregard profound threats. *See supra* Part I.A. Nor
22 does the Listing Rule merely codify a 2009 opinion from the Department of the Interior’s Office
23 of the Solicitor (“2009 Guidance”), as the Services claim. ESA 229. Unlike the Listing Rule, the
24 2009 Guidance recognizes that the Services must sometimes make listing decisions extrapolating
25 from limited data in line with the Act’s overarching conservation purpose. ESA 91294 n.33.

26
27
28 ¹⁹ *See also id.* (former FWS Director stating that rapidly changing climate is a principal emerging threat to species nationwide).

1 **“Recovery in Delisting” (50 C.F.R. § 424.11(e))**

2 The Services’ sole rationale for eliminating species recovery as a basis for delisting—that
3 the change would “more clearly align” the regulations with the Act—fails to provide the reasoned
4 basis required by the APA. ESA 230. As discussed *supra* Part I.A., the Service arbitrarily
5 ignores the ESA’s overarching conservation purpose and its specific provisions making recovery
6 a prerequisite to delisting. 16 U.S.C. §§ 1532(3), 1533(f)(1)(B)(ii).

7 **“Not Prudent Determinations” (50 C.F.R. § 424.12(a))**

8 In drastically expanding the “not prudent” exception to critical habitat designation, the
9 Services failed to consider important aspects of critical habitat designation and failed to provide
10 any reasoned explanation for their changed position. ESA 63, 95.

11 First, the Services failed to consider how their vastly expanded new exceptions to critical
12 habitat designation will reduce the number and extent of such designations and thereby harm
13 listed species and their habitat, contrary to the ESA. As Congress recognized long ago, “[t]he
14 loss of habitat for many species is universally cited as the major cause for the extinction of
15 species worldwide.” H.R. Rep. No. 95-1625, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453,
16 9455. But exception (ii) drives a gaping loophole in the Act’s critical habitat protections by
17 eliminating critical habitat designations where actions adopted during the section 7 consultation
18 process cannot *by themselves* mitigate threats to species and habitat—including, perhaps most
19 troublingly, climate change. *See* ESA 84 (explaining that this exception now covers “species
20 experiencing threats stemming from melting glaciers, sea level rise, or reduced snowpack but no
21 other habitat-related threats”). In making that change, the Services arbitrarily dismissed as
22 “incidental” the many benefits of critical habitat designation beyond the section 7 consultation
23 requirement, and failed to consider the vital roles of critical habitat designations in, among other
24 things, educating the public and State and local governments about the importance of certain
25 areas to listed species, assisting in species recovery planning efforts, and establishing pre-
26 consultation protection plans. *Id.*; *see Conserv. Council for Haw. v. Babbitt*, 2 F. Supp. 2d 1280,
27 1288 (D. Haw. 1998) (discussing “significant substantive and procedural protections” from
28 critical habitat designation); 81 Fed. Reg. at 7,414-15 (describing “several ways” critical habitat

1 “can contribute to [species] conservation”).

2 The Services also arbitrarily failed to consider the impact on listed species of their vague
3 new exception (iii) for critical habitat that provides “no more than negligible conservation value”
4 to species “occurring primarily outside” the United States, or their exceptionally broad catch-all
5 in exception (v), where the Services “otherwise determine[] that designation of critical habitat
6 would not be prudent.” ESA 95. As the Ninth Circuit has recognized, it is arbitrary and
7 capricious to expand “the narrow statutory exception for imprudent designations into a broad
8 exemption” for almost any reason. *NRDC v. DOI*, 113 F.3d at 1126.

9 And, certainly, the Services’ singular aim to “reduce the burden of regulation” cannot
10 supply the reasoned basis for unlawfully expanding the “not prudent” exception at the expense of
11 listed species and their habitat, in direct contravention of the ESA’s statutory purpose and
12 commands. ESA 84, 231. Nor can the Services rely on their passing, unconvincing assurance
13 that “not prudent” determinations will purportedly be “rare,” given the plain breadth of the new
14 exceptions. ESA 83, 231. Indeed, the Services made no effort to square that hollow claim with
15 their sweeping assertions that the regulation allows the Services to skip critical habitat
16 designation in a variety of circumstances, including whenever a federal action agency cannot
17 singlehandedly mitigate the impacts of climate change on a species’ habitat. ESA 84-85.

18 **“Unoccupied Critical Habitat” (50 C.F.R. § 424.12(b)(2))**

19 The Services wholly failed to consider the effects on listed species of their new, stringent
20 limitations on designating unoccupied critical habitat, which require the Services to first find that
21 currently occupied habitat is inadequate for species conservation and then additionally determine
22 that “there is a *reasonable certainty both* that the area will contribute to the conservation of the
23 species *and* that the area contains one or more of those physical or biological features essential to
24 the conservation of the species.” ESA 95 (emphasis added). In thus restricting designation of
25 such habitat, the Services failed to contend with the fact that, if a species has been listed, it is
26 virtually certain that it no longer occupies habitat that it once occupied, but that remains critical to
27 its recovery. *See* 81 Fed. Reg. at 7,435 (“The Services anticipate that critical habitat designations
28 in the future will likely increasingly use the authority to designate specific areas outside the

1 geographic area occupied by the species at the time of listing”). The Services also failed to
2 address the fact that essential, but currently unoccupied, degraded habitat may need to be restored
3 to enable a species to recover or even survive.

4 Additionally, with this change, the Services have again overlooked the dire effects of
5 climate change—perhaps the single largest threat to species and their habitat. The Services
6 explained in 2016 that “[a]s the effects of global climate change continue to influence distribution
7 and migration patterns of species, the ability to designate areas that a species has not historically
8 occupied is expected to become increasingly important” to ensure connectivity between habitats
9 and protect movement corridors and emerging habitat for species experiencing range shifts in
10 latitude or altitude. 81 Fed. Reg. at 7,435; *cf. Conserv. Council for Haw.*, 2 F. Supp. 2d at 1288;
11 *see also* ESA 91299 n.40 (describing habitat shifts wrought by climate change). But the Services
12 nowhere consider or explain how prioritizing occupied habitat and demanding a “reasonable
13 certainty” that unoccupied habitat *currently* contain essential features will promote, let alone not
14 actively hinder, conservation of species facing such catastrophic threats.

15 Further, the Services failed to provide any reasoned explanation for departing from their
16 prior approach to designating unoccupied critical habitat. ESA 65. Their primary rationale—the
17 Supreme Court’s decision in *Weyerhaeuser Co. v. FWS*, 139 S. Ct. 361 (2018)—provides no
18 support for devaluing unoccupied critical habitat. ESA 64. There, the Court held only that an
19 area of critical habitat (whether occupied or unoccupied) must first fall within the broader
20 category of “habitat” to qualify as “critical habitat.” *Weyerhaeuser*, 139 S. Ct. at 369. But the
21 court neither defined the term “habitat” nor rejected FWS’s previous contention in that case
22 (which was consistent with the ESA but is now directly contradicted by the Listing Rule) that
23 unoccupied habitat *need not* currently contain physical or biological features that are essential to
24 the conservation of the species in order to be designated as critical habitat. *Id.* at 368-69.

25 **2. The Services Failed to Consider Relevant Factors and Effects of the**
26 **Consultation Rule or to Provide Reasoned Explanations for Their**
27 **Myriad Drastic Changes.**

28 **“Destruction or Adverse Modification” of Critical Habitat (50 C.F.R. § 402.02)**

The Services failed to consider how revising the definition of “destruction or adverse

1 modification” to require that an action “appreciably diminishes the value of critical habitat *as a*
2 *whole*,” and to eliminate consideration of the alteration of “the physical or biological features
3 essential to the conservation of a species,” would unreasonably raise the bar for triggering the
4 important species and habitat protections afforded by the section 7 consultation process. ESA 25,
5 59 (emphasis added); *see supra* Part I.B. First, the Services failed to consider the impacts on
6 species of making “destruction or adverse modification” determinations “at the scale of the entire
7 critical habitat designation,” and not any “less extensive scale” under the new “as a whole”
8 standard. ESA 24, 209. The Services admits that, under their prior practice, “local impacts could
9 indeed be significant” and trigger section 7 consultation, yet they failed to explain this change of
10 position. ESA 26.

11 The Services likewise failed to offer any reasoned basis for the changes. Their conclusory
12 and incorrect assertion that the “as a whole” language simply “clarifies” pre-existing practice does
13 not assist them. The Services referenced the “as a whole” language only in the preamble to their
14 2016 rule to explain the importance of considering impacts on “all areas to be affected directly or
15 indirectly by the Federal action and not merely the immediate area involved in the action.” 81
16 Fed. Reg. at 7,221. But the Services did not sanction wholly *ignoring* potentially significant
17 localized impacts in the consultation process, as they now do. ESA 26. The Services also failed
18 to offer a reasoned explanation for eliminating the requirement to consider the alteration of “the
19 physical or biological features essential to the conservation of a species,” which they
20 determined—only four years ago—was necessary to “highlight certain types of alterations that
21 may not be as evident as direct alterations” and to “provides clarity and transparency to the
22 definition.” 81 Fed. Reg. at 7,219. The Services did not explain the nature of the purported
23 “controversy among the public and many stakeholders” they claim justifies the rule, how any
24 such controversy has affected implementation of the Act, or, most importantly, how deleting the
25 language quoted above will adversely affect listed species. *See* ESA 28.

26 **“Effects of the Action” (50 C.F.R. §§ 402.02, 402.17)**

27 The Services failed to consider the relevant factors or provide a reasoned explanation for
28 changes to the definition of “effects of the action,” which significantly limit both the type and

1 extent of effects considered during the consultation process. *See supra* Part I.B. First, the
2 Services altogether failed to evaluate how the changes will affect section 7 protections for listed
3 species and critical habitat going forward, ignoring or minimizing a wide variety of agency
4 impacts on listed species and critical habitat and associated mitigation measures.

5 Once again, the Services provided only the vague excuse that these changes are intended to
6 simplify the definition and “reduce confusion” regarding how the Services identify relevant
7 effects of a proposed action, because, they claim, the prior regulations “occasionally produced
8 determinations that were inconsistent or had the appearance of being too subjective.” ESA 19-20,
9 31. But the Services did not explain what the confusion was or how the changes would lessen it,
10 or offer any evidence or analysis demonstrating inconsistent application. In fact, the Services’
11 new requirements that all effects of a federal agency action must be a “but for” cause of the action
12 and be “reasonably certain to occur” based upon “clear and substantial information” actually
13 undermine their purported rationales because those changes only further confuse the section 7
14 effects analysis. Indeed, the Services admit that the expanded concept of reasonable certainty
15 (now requiring reasonable certainty not only for indirect and cumulative effects but also for direct
16 effects) is vague, and they fail to explain how expanding its use will reduce, and not exacerbate,
17 inconsistency and subjectivity in agencies’ section 7 determinations. ESA 20.²⁰

18 **“Environmental Baseline” (50 C.F.R. § 402.02)**

19 The Services also failed to consider how inclusion of “ongoing agency activities or existing
20 agency facilities” within the “environmental baseline,” and exclusion of such activities and
21 facilities from the section 7 effects analysis of the proposed agency action, will significantly
22 reduce protections for species and habitat afforded by the section 7 consultation process. *See*
23 *supra* Part I.B. While the Services again claim to be addressing unspecified “confusion” on this
24 issue, ESA 21, the Ninth Circuit has already made clear that the “effects of the action” must
25 include *all* effects of an ongoing federal action subject to section 7 consultation, and “non-
26 discretionary” activities cannot be subsumed into the environmental baseline. *See, e.g., San Luis*

27 ²⁰ The Services’ new definition appears to be nothing more than a reprisal of a 2008 definition,
28 also advocated by Secretary Bernhardt, which was ultimately rejected by Congress and withdrawn
by the Services. *See* 74 Fed. Reg. 20,421 (May 4, 2009).

1 & *Delta-Mendota Water Auth.*, 747 F.3d at 639-40. And FWS itself has refuted the Services’
2 rationale, explaining that the prior regulations contained “currently understood, and practiced
3 concepts” which “ha[ve] never created controversy or inconsistent findings.” ESA2_118019.

4 **Non-Binding Mitigation (50 C.F.R. § 402.14(g)(8))**

5 The Services failed to consider that eliminating requirements to ensure that any mitigation
6 measures are binding and enforceable will reduce implementation and enforceability of such
7 measures, to the detriment of listed species and critical habitat. That risk is precisely why the
8 Ninth Circuit has repeatedly rejected the Services’ reliance on non-binding measures and required
9 mitigation to include “specific and binding plans.” *See, e.g., NWF v. NMFS*, 524 F.3d at 935-36;
10 *CBD v. Bernhardt*, 982 F.3d at 743-44.

11 Nor, again, do any of the Services’ justifications hold up. The Services’ assertion that
12 consultation can be reinitiated if the federal action agency fails to carry out the mitigation
13 measures does not account for the lack of enforceability of such measures necessary to trigger
14 reinitiation. ESA 47-48; *see CBD v. BLM*, 698 F.3d at 1114-16 (explaining role of enforceable,
15 binding mitigation measures in providing triggers for reinitiation of consultation). Here, too, the
16 Services failed to explain how the regulation will “improve the availability and quality of
17 information” or “resolve confusion.” ESA 46-47.

18 **Expedited Consultations (50 C.F.R. § 402.14(l))**

19 The Services provided no evidence to support their claim that the new “expedited
20 consultation” process “will benefit species and habitats by promoting conservation ... through
21 improved efficiencies in the section 7 consultation process,” nor did they provide any explanation
22 as to how this expedited process “will still allow for the appropriate level of review.” ESA 51.
23 *See Encino*, 136 S. Ct. at 2126 (unexplained change is arbitrary and capricious). While claiming
24 that “many” projects that “have minimal adverse impacts” would qualify for the new expedited
25 consultation procedure, the Services identify just one such example and provide no qualifying
26 criteria for such projects. ESA 51. The lack of any appropriate guidelines on this process, such
27 as limiting it to projects where the primary purpose is the conservation of listed species with a
28 successful record of implementation, as exists in current FWS guidance, ESA2_2731-37, will

1 only lead to further confusion and arbitrary application of the regulation.

2 **Reinitiation of Consultation Exemptions (50 C.F.R. § 402.16)**

3 The Services also failed to consider how exempting BLM land management plans from the
 4 reinitiation of consultation requirements upon new species listings or critical habitat designations
 5 would adversely affect listed species and critical habitat, and failed to provide a reasoned
 6 explanation for this change. For example, the Services asserted that reinitiation of consultation on
 7 federal management plans “does little to further” the ESA’s conservation goals because such
 8 plans have “no immediate on-the-ground effects,” but the Services failed to explain or justify that
 9 statement. ESA 54. Contrary to this conclusory assertion, the effects of resource management
 10 plans can be “immediate and sweeping.” *Or. Nat. Desert Ass’n v. BLM*, 625 F.3d 1092, 1123 (9th
 11 Cir. 2010); *see also Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994)
 12 (management plans “have an ongoing and long-lasting effect even after adoption”). And the
 13 Services wholly fail to support their final claim that this new exemption “will enable an action
 14 agency to better synchronize its actions and programs with the conservation ... needs of listed and
 15 proposed species.” ESA 53. While the Services’ note that specific actions taken under these
 16 plans may be subject to later section 7 consultation, ESA 52, site-specific review is no substitute
 17 for programmatic consultation on an entire plan. *See Pac. Rivers*, 30 F.3d at 1053-56 (discussing
 18 importance of consultation on programmatic plans that guide future site-specific actions).

19 **3. FWS Failed to Consider How the 4(d) Rule Will Place Species at Risk**
 20 **and Provided No Reasoned Explanation for the Abrupt Reversal of Its**
 21 **Decades-Long Policy.**

22 FWS failed to consider the harm its removal of the longstanding blanket section 9
 23 protections will cause to threatened species. As discussed *supra* Part I.C., FWS’s notorious
 24 backlog of listing decisions, combined with its limited and diminished budget, do not provide it
 25 with the capacity or resources to reliably and timely promulgate species-specific 4(d) rules upon
 26 listing or reclassifying species as threatened. And, yet, the 4(d) Rule lacks any acknowledgement
 27 or discussion of FWS’s resource constraints or the increased workload and delay associated with
 28 conducting species-by-species assessments and promulgating special rules for all newly-listed
 threatened animals or plants as necessary to adequately protect such species in the absence of the

1 blanket take prohibition. FWS’s failure to consider that critical aspect of species listing
2 undermines the ESA’s overriding conservation purpose and will harm imperiled species.

3 Moreover, FWS’s only justifications for the 4(d) Rule—to “meaningfully recogniz[e]” the
4 statutory distinction between endangered and threatened species and to align FWS’s policy with
5 that of NMFS—are insufficient and unavailing. ESA 15; ESA2_51586. As discussed *supra* Part
6 I.C, the D.C. Circuit already has rejected that argument. *See Sweet Home*, 1 F.3d at 6-7. Nor does
7 FWS’s alleged intent to align its practice with that of NMFS provide sufficient justification.
8 NMFS has jurisdiction over, and manages fewer than, one hundred ESA-listed species in the
9 United States,²¹ with a 2019 budget of more than \$118.3 million for their protection and
10 management, including listing.²² By contrast, FWS manages 1,666 ESA-listed species in the
11 United States,²³ yet FWS’s 2019 budget for ESA-listed species resource management was just
12 \$247.8 million, of which only \$18.8 million was for listing.²⁴ Thus, while NMFS may have the
13 capacity and resources to promulgate species-specific rules with each new threatened species
14 listing, FWS simply does not. Indeed, to date, FWS has adopted specified-specific rules for only
15 about 4.5% of threatened species under its jurisdiction. ESA 76511. FWS failed to provide any
16 explanation for how it will overcome this budgetary hurdle and ensure protection of listed species.

17 **III. THE SERVICES FAILED TO PROVIDE NOTICE AND COMMENT ON ASPECTS OF THE FINAL**
18 **RULES THAT ARE NOT A “LOGICAL OUTGROWTH” OF THE PROPOSED RULES.**

19 The APA provides that an agency action undertaken without adequate notice and comment
20 is “arbitrary or an abuse of discretion.” 5 U.S.C. § 706(2)(A), *see also NRDC v. EPA*, 279 F.3d
21 1180, 1186 (9th Cir. 2002). As the Ninth Circuit has acknowledged, notice is insufficient under
22 the APA where the final rule is not a “logical outgrowth” of the proposal. *See, e.g., Empire*

23 ²¹ *See* NOAA Fisheries Endangered Species Conservation,
24 <https://www.fisheries.noaa.gov/topic/endangered-species-conservation> (NMFS has jurisdiction
25 over 165 endangered and threatened marine species, including 66 foreign species)
(last visited Dec. 21, 2020).

26 ²² *See* NOAA, 2020 Budget Summary,
27 <https://www.noaa.gov/sites/default/files/atoms/files/FY2020-BlueBook.pdf>, at p. 94.

28 ²³ FWS, *Environmental Conservation Online System, Listed Species Summary*,
<https://ecos.fws.gov/ecp/report/boxscore> (FWS has jurisdiction over a total of 2,360 ESA-listed
species, 694 of which are foreign species) (last visited Dec. 21, 2020).

²⁴ *See* FWS, 2020 Budget Overview,
https://www.doi.gov/sites/doi.gov/files/uploads/fy2020_bib_bh061.pdf, at p. BH-67.

1 *Health Found. for Valley Hosp. Ctr. v. Azar*, 958 F.3d 873, 882-83 (9th Cir. 2020). In evaluating
2 whether the final rule is a “logical outgrowth” of the proposed rule, courts evaluate “whether
3 interested parties could have anticipated the final rulemaking” or whether, instead, “a new round
4 of notice and comment would provide the first opportunity for interested parties to offer
5 comments that could persuade the agency to modify its rule.” *Id.* Here, at least two aspects of the
6 Final Rules could not have been anticipated from the proposed rules and, therefore, were
7 promulgated without adequate notice and comment in violation of the APA.

8 First, the Listing Rule’s definition of unoccupied critical habitat imposes several additional
9 requirements and restrictions that appeared nowhere in, and were not foreseeable from, the
10 proposed rule. The Services originally proposed that “for an unoccupied area to be considered
11 essential, the Secretary must determine that there is a reasonable likelihood that the area will
12 contribute to the conservation of the species,” ESA 235; set out a three-part test for meeting that
13 standard; and provided that an unoccupied area could be designated in lieu of occupied habitat if
14 doing so would lead to more “efficient” species conservation. ESA 232, 235.

15 The final Listing Rule, however, fundamentally raised the bar even higher for designating
16 unoccupied critical habitat by adopting a “reasonable certainty” standard in place of the
17 “reasonable likelihood” proposal, wholly removing the three-part test for meeting that standard,
18 and eliminating the proposal’s “efficient” conservation criterion. ESA 63. And the Listing Rule
19 added a new requirement that an unoccupied area must “contain[] one or more of those physical
20 or biological features essential to the conservation of the species,” *id.*—a complete reversal from
21 the Services’ long-held position, in line with the Act, that unoccupied critical habitat does *not*
22 have to include such features, ESA 65; *see* 16 U.S.C. § 1532(5)(A)(ii). Thus, the Listing Rule’s
23 unoccupied habitat provisions are not a “logical outgrowth” of the Service’s proposal, in violation
24 of the APA. *See Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 996-98 (D.C. Cir. 2005) (rule
25 violated logical outgrowth test when it altered agency’s previous interpretation without notice).

26 Second, the Consultation Rule raised the bar for determining that the effects of an action are
27 reasonably certain to occur by introducing—for the first time—the requirement that such a
28 conclusion be based upon “clear and substantial information.” ESA 20. The Services’ new,

1 higher evidentiary standard was an unforeseeable departure from the proposed rule. The
2 proposed rule relied upon the Service’s position in previous rulemakings that the “reasonably
3 certain to occur” standard does *not* require a guaranteed outcome, but merely required that the
4 effect be “more than a mere possibility,” and that the Services “establish a rational basis for [a]
5 finding.” ESA 212. And, contrary to the Services’ claim, ESA 35-36, an agency “cannot
6 bootstrap notice from a comment” requesting further specificity of the “reasonably certain to
7 occur” requirement. *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (citation
8 omitted). Rather, the agency itself bears the burden of “fairly appris[ing] interested persons of the
9 subjects and issues before the [a]gency,” *NRDC v. EPA*, 279 F.3d at 1186, particularly where, as
10 here, changes made in finalizing a rule represent a significant departure from past agency
11 practice. *Env’tl Integrity Project*, 425 F.3d at 996-98.

12 **IV. THE SERVICES VIOLATED NEPA BY FAILING TO PREPARE AN EIS ON THE FINAL RULES.**

13 The Services violated NEPA by disregarding their obligation to analyze and disclose the
14 significant environmental impacts of the Final Rules. NEPA is the “basic national charter for the
15 protection of the environment,” 40 C.F.R. § 1500.1(a),²⁵ and requires the preparation of a detailed
16 environmental impact statement (“EIS”) for any “major federal action significantly affecting the
17 quality of the human environment,” 42 U.S.C. § 4332(2)(C), including “new or revised agency
18 rules [and] regulations,” 40 C.F.R. § 1508.18(a). An agency may only avoid its statutory duty to
19 evaluate the environmental impact of its proposed action in “certain narrow instances” where that
20 action falls under a defined categorical exclusion (“CE”). *See Coal. of Concerned Citizens v.*
21 *Fed. Transit Admin. of U.S. Dep’t of Transp.*, 843 F.3d 886, 902 (10th Cir. 2016). Here, the Final
22 Rules are unquestionably major federal actions that require preparation of an EIS, and the
23 Services unlawfully and inexplicably relied on an inapplicable categorical exclusion for rules that
24 are of a legal, technical, or procedural nature. ESA 17 (4(d) Rule), 58 (Consultation Rule), and
25 93 (Listing Rule).

26 _____
27 ²⁵ On July 16, 2020, the Council on Environmental Quality (“CEQ”) finalized an update to its
28 1978 regulations implementing NEPA, which took effect on September 14, 2020. 85 Fed. Reg.
43,304 (July 16, 2020). Since the Final Rules were finalized under the prior 1978 regulations,
those regulations govern and are cited herein.

1 **A. The Final Rules Have a Significant Impact on the Environment and**
2 **Therefore Required Preparation of an EIS.**

3 The Services' Final Rules are unquestionably "major federal action[s]" within the meaning
4 of NEPA. *See* 40 C.F.R. § 1508.18(a) ("new or revised agency rules [and] regulations").
5 Likewise, the Final Rules, which govern the implementation of one of our nation's bedrock
6 environmental laws, "significantly affect the quality of the human environment." 42 U.S.C.
7 § 4332(2)(C). The "low standard" of a significant effect, *League of Wilderness Defs. v.*
8 *Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014), is met if "substantial questions are raised as to
9 whether a project ... may cause significant degradation of some human environmental factor,"
10 *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998). Such "substantial
11 questions" are raised when the action may adversely affect a listed species or designated critical
12 habitat or may have highly controversial effects. 40 C.F.R. § 1508.27(b)(4), (9). The presence of
13 any one of these factors may be sufficient to require preparation of an EIS. *Ocean Advocates v.*
14 *U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2004).

15 The Final Rules—which, as described above, fundamentally change the listing, delisting,
16 critical habitat designation, and consultation processes and eliminate section 9 protections for
17 newly-listed threatened species—indisputably meet NEPA's "low standard" for actions causing
18 significant effects on the environment. *League of Wilderness Defs.*, 752 F.3d at 760. First, the
19 Final Rules plainly "may adversely affect" listed species and critical habitat. 40 C.F.R.
20 § 1508.27(b)(9). For example, the Listing Rule, as discussed *supra* Part I.A, limits the
21 circumstances under which species can be listed as "threatened" in the future, and fundamentally
22 alters the Services' approach to designating critical habitat such that less habitat will likely be
23 designated for species recovery. The Consultation Rule, as discussed *supra* Part I.B, would
24 upend the ESA's section 7 federal agency consultation process by, for example, significantly
25 limiting the number, type, and scope of section 7 consultations and consequently limiting the
26 situations in which alternatives and mitigation measures will be imposed to avoid or reduce the
27 impacts of federal agency actions on listed species and critical habitat. And, as discussed *supra*
28 Part I.C, the 4(d) Rule would strip fundamental protections from newly-listed threatened species,
likely leaving them with fewer protections and with a greater likelihood of harm for extended

1 periods, if not indefinitely.

2 Second, there can be little doubt that impacts from the Final Rules “are likely to be highly
3 controversial.” 40 C.F.R. § 1508.27(b)(4). The impact of an action is “highly controversial”
4 when there is a substantial dispute “about [its] size, nature, or effect.” *Anderson v. Evans*, 371
5 F.3d 475, 489 (9th Cir. 2004) (citations and quotations emitted). Here, the Services have
6 admitted as much. *See* ESA2_16876 (“We are going to state that these regulations will likely be
7 controversial”); ESA_ 25908 (“This proposed rule is expected to be controversial”); ESA2_27076
8 (same); ESA2_29170 (same). And the Services predictably received over 200,000 public
9 comments on the Proposed Rules (ESA 3356-394071), including thousands of individual
10 concerned citizens, non-governmental organizations, municipal and regional agencies, industry
11 groups, twenty states, and numerous members of Congress, including a wide range of
12 stakeholders opposing the proposed rules and disputing the consideration of impacts.²⁶

13 Finally, other factors triggering preparation of an EIS also apply to the Final Rules, such as
14 their effects on “park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically
15 critical areas,” cumulative effects, and that fact that the rules involve “highly uncertain” or
16 “unique or unknown” risks. 40 C.F.R. § 1508.27(b)(3), (5), (7).

17 In sum, because the Final Rules will reduce protections for imperiled species and their
18 habitats and are highly controversial, the Services were required to prepare an EIS before
19 promulgating the Final Rules.

20 **B. The Final Rules Are Not Eligible for a Categorical Exclusion.**

21 The Services unlawfully concluded that the Final Rules were categorically excluded from
22 NEPA review because they “are of a legal, technical, or procedural nature.” ESA 17, 58, 93. But
23 this categorical exclusion only encompasses actions that are purely ministerial, non-substantive,
24 or otherwise do not have the potential for any significant environmental effect—such as personnel
25 actions, organizational changes, routine financial transactions, nondestructive data collection, and

26 _____
27 ²⁶ *See, e.g.*, ESA 545-53 (105 members of Congress), 706-07 (Ranking Members of the Senate
28 Committee on Environment and Public Works and House Committee on Natural Resources);
95767-96311 (thousands of scientists); 100639-100641 (East Bay Municipal Utility District);
194384-194386 (Association of Zoos and Aquariums).

1 other routine government business. *See generally* 43 C.F.R. § 46.210. The exclusion plainly
2 does not apply to the substantive, significant changes reflected in the Final Rules. *See Cal. ex rel.*
3 *Lockyer v. USDA*, 575 F.3d 999, 1013-14, 1017 (9th Cir. 2009) (rejecting reliance on analogous
4 categorical exclusion because replacing substantive environmental protections with less-
5 protective regulatory regime qualified “as ‘substantive’ action and would meet the relatively low
6 threshold to trigger some level of environmental analysis under [NEPA]”).

7 Moreover, even if the Final Rules otherwise qualified for coverage under the Services’ cited
8 exclusions, they nonetheless present “extraordinary circumstances in which a normally excluded
9 action may have a significant environmental effect,” and therefore still would require an EIS. 40
10 C.F.R. § 1508.4. “Extraordinary circumstances” preclude application of categorical exclusions
11 for actions that, among other things: have highly controversial, uncertain, or potentially
12 significant environmental effects; unique or unknown environmental risks; significant impacts on
13 ESA-listed species or critical habitat; or violate applicable environmental laws. *See* 43 C.F.R.
14 § 46.215. While only one of these factors need apply to render a proposed agency action
15 ineligible for exclusion, here, for the reasons explained above, every one of these factors applies.

16 In sum, in their zeal to effectuate the Trump Administration’s political, deregulatory
17 agenda, the Services have blatantly violated NEPA.

18 CONCLUSION

19 Declaratory relief and vacatur are the proper remedies “when a court concludes that an
20 agency’s conduct was illegal under the APA.” *California v. U.S. Dep’t of the Interior*, 381 F.
21 Supp. 3d 1153, 1178 (N.D. Cal. 2019) (citing *Stewardship Council v. EPA*, 806 F.3d 520, 532
22 (9th Cir. 2015)); *Lockyer*, 575 F.3d at 1020 (upholding vacatur of rule based on NEPA violation);
23 *see* 5 U.S.C. § 706(2) (“reviewing court shall ... hold unlawful and set aside” agency action that
24 violates the APA). Given the Services’ numerous violations of law in promulgating the Final
25 Rules, State Plaintiffs respectfully request that this Court grant their motion for summary
26 judgment, declare the Final Rules unlawful, and vacate the Final Rules.

Dated: January 18, 2021

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
DAVID A. ZONANA
DAVID G. ALDERSON
Supervising Deputy Attorneys General

MAURA HEALEY
Attorney General of Massachusetts

/s/ George Torgun
GEORGE TORGUN, State Bar No. 222085
TARA MUELLER, State Bar No. 161536
ERIN GANAHL, State Bar No. 248472
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 879-1002
Email: George.Torgun@doj.ca.gov

/s/ Matthew Ireland
MATTHEW IRELAND (*pro hac vice*)
TURNER SMITH (*pro hac vice*)
Assistant Attorneys General
Office of the Attorney General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
Telephone: (617) 727-2200
Email: Matthew.Ireland@mass.gov

Attorneys for Plaintiff State of California

*Attorneys for Plaintiff
Commonwealth of Massachusetts*

BRIAN E. FROSH
Attorney General of Maryland

PHILIP J. WEISER
Attorney General of Colorado

/s/ Steven J. Goldstein
STEVEN J. GOLDSTEIN (*pro hac vice*)
Special Assistant Attorney General
Office of the Attorney General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
Telephone: (410) 576-6414
Email: sgoldstein@oag.state.md.us

/s/ Eric R. Olson
ERIC R. OLSON (*pro hac vice*)
Solicitor General
1300 Broadway, 10th Floor
Denver, Colorado 80203
Telephone: (720) 508-6548
Email: Eric.Olson@coag.gov

Attorneys for Plaintiff State of Maryland

Attorneys for Plaintiff State of Colorado

WILLIAM TONG
Attorney General of Connecticut

KWAME RAOUL
Attorney General of Illinois

/s/ Matthew I. Levine
MATTHEW I. LEVINE*
DANIEL M. SALTON (*pro hac vice*)
Assistant Attorneys General
Office of the Attorney General
P.O. Box 120
55 Elm Street
Hartford, CT 06141-0120
Telephone: (860) 808-5250
Email: Daniel.Salton@ct.gov

/s/ Jason E. James
JASON E. JAMES (*pro hac vice*)
Assistant Attorney General
MATTHEW J. DUNN*
Chief, Environmental Enf./Asbestos Litig. Div.
Office of the Attorney General,
Environmental Bureau
69 W. Washington St., 18th Floor
Chicago, IL 60602
Telephone: (312) 814-0660
Email: jjames@atg.state.il.us

Attorneys for Plaintiff State of Connecticut

Attorneys for Plaintiff State of Illinois

FOR THE PEOPLE OF THE STATE OF MICHIGAN

KEITH M. ELLISON
Attorney General of Minnesota

1 /s/ Nathan A. Gambill
2 NATHAN A. GAMBILL (*pro hac vice*)
3 (Michigan Bar No. P75506)
4 Assistant Attorney General
5 Environment, Natural Resources,
6 and Agriculture Division
7 P.O. Box 30755
8 Lansing, MI 48909
9 Telephone: (517) 335-7664
10 Email: gambilln@michigan.gov

/s/ Peter N. Surdo
PETER N. SURDO (*pro hac vice*)
Special Assistant Attorney General
Minnesota Office of the Attorney General
445 Minnesota Street
St. Paul MN 55101
Telephone: (651) 757-1061
Email: peter.surdo@ag.state.mn.us

Attorney for Plaintiff State of Minnesota

Attorney for Plaintiff the People of the State of Michigan

GURBIR S. GREWAL
Attorney General of New Jersey

AARON D. FORD
Attorney General of Nevada

10 /s/ Lisa Morelli
11 LISA MORELLI, State Bar No. 137092
12 Deputy Attorney General
13 Environmental Enforcement &
14 Environmental Justice
15 R.J. Hughes Justice Complex
16 P.O. Box 093
17 Trenton, NJ 08625
18 Telephone: (609) 376-2708
19 Email: Lisa.Morelli@law.njoag.gov

/s/ Tori N. Sundheim
TORI N. SUNDHEIM, State Bar No. 294559
Deputy Attorney General
Office of the Attorney General
100 North Carson Street
4 Carson City, Nevada 89701-4717
Telephone: (775) 684-1219
Fax: (775) 684-1180
Email: tsundheim@ag.nv.gov

Attorneys for Plaintiff State of Nevada

Attorneys for Plaintiff State of New Jersey

17 LETITIA JAMES
Attorney General of New York

HECTOR BALDERAS
Attorney General of New Mexico

18 /s/ Laura Mirman-Heslin
19 LAURA MIRMAN-HESLIN*
20 Assistant Attorney General
21 TIMOTHY HOFFMAN*
22 Senior Counsel
23 JENNIFER NALBONE
24 Environmental Scientist
25 Office of the Attorney General
26 Environmental Protection Bureau
27 28 Liberty Street
28 New York, NY 10005
Telephone: (212) 416-6091
Email: Laura.Mirman-Heslin@ag.ny.gov

/s/ William Grantham
WILLIAM GRANTHAM (*pro hac vice*)
Assistant Attorney General
201 Third St. NW, Suite 300
Albuquerque, NM 87102
Telephone: (505) 717-3520
E-Mail: wgrantham@nmag.gov

Attorneys for Plaintiff State of New Mexico

Attorneys for Plaintiff State of New York

1 ELLEN F. ROSENBLUM
Attorney General of Oregon

2 /s/ Paul Garrahan
PAUL GARRAHAN (*pro hac vice*)
3 Attorney-in-Charge
STEVE NOVICK (*pro hac vice*)
4 Special Assistant Attorney General
Natural Resources Section
5 Oregon Department of Justice
1162 Court Street NE
6 Salem, OR 97301-4096
Telephone: (503) 947-4593
7 Email: Steve.Novick@doj.state.or.us

8 *Attorneys for Plaintiff State of Oregon*

9

10 PETER F. NERONHA
Attorney General of Rhode Island

11 /s/ Gregory S. Schultz
GREGORY S. SCHULTZ*
12 Special Assistant Attorney General
Office of the Attorney General
13 150 South Main Street
Providence, RI 02903
14 Telephone: (401) 274-4400
Email: gschultz@riag.ri.gov

15 *Attorneys for Plaintiff State of Rhode Island*

16

17

18 ROBERT W. FERGUSON
Attorney General of Washington

19 /s/ Aurora Janke
AURORA JANKE (*pro hac vice*)
20 Assistant Attorney General
Washington Attorney General's Office Counsel
21 for Environmental Protection
800 5th Ave Ste. 2000 TB-14
22 Seattle, Washington 98104-3188
Telephone: (206) 233-3391
23 Email: Aurora.Janke@atg.wa.gov

24 *Attorney for Plaintiff State of Washington*

25

26

27

28

JOSHUA H. STEIN
Attorney General of North Carolina

/s/ Amy L. Bircher
AMY L. BIRCHER (*pro hac vice*)
Special Deputy Attorney General
SCOTT A. CONKLIN*
Assistant Attorney General
North Carolina Department of Justice
114 W. Edenton Street
Raleigh, NC 27603
Telephone: (919) 716-6400
Email: abircher@ncdoj.gov
Email: sconklin@ncdoj.gov

Attorneys for Plaintiff State of North Carolina

JOSH SHAPIRO
Attorney General of Pennsylvania

/s/ Aimee D. Thomson
AIMEE D. THOMSON (*pro hac vice*)
Deputy Attorney General
ANN R. JOHNSTON
Senior Deputy Attorney General
Office of Attorney General
1600 Arch Street, Suite 300
Philadelphia, PA 19103
Telephone: (267) 940-6696
Email: athomson@attorneygeneral.gov

Attorneys for Plaintiff Commonwealth of Pennsylvania

THOMAS J. DONOVAN, JR.
Attorney General of Vermont

/s/ Ryan P. Kane
RYAN P. KANE (*pro hac vice*)
Office of the Attorney General
109 State Street
Montpelier, VT 05602
Telephone: (802) 828-3171
Email: ryan.kane@vermont.gov

Attorneys for Plaintiff State of Vermont

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOSHUA L. KAUL
Attorney General of Wisconsin

/s/ Gabe Johnson-Karp
GABE JOHNSON-KARP (*pro hac vice*)
Assistant Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707
Telephone: (608) 267-8904
Fax: (608) 267-2223
Email: johnsonkarp@doj.state.wi.us

Attorneys for Plaintiff State of Wisconsin

KARL A. RACINE
Attorney General of the
District of Columbia

/s/ David Hoffmann
DAVID HOFFMANN*
Assistant Attorney General
Public Advocacy Division
Office of the Attorney General
441 4th Street, N.W., Suite 630 South
Washington, D.C. 20001
Telephone: (202) 724-9727
Email: david.hoffmann@dc.gov

Attorneys for Plaintiff District of Columbia

JAMES E. JOHNSON
Corporation Counsel
for the City of New York

/s/ Antonia Pereira
ANTONIA PEREIRA (*pro hac vice*)
Assistant Corporation Counsel
New York City Law Department
Environmental Law Division
100 Church Street, Room 6-140
New York, New York 10007
Telephone: (212) 356-2309
Email: anpereir@law.nyc.gov

Attorneys for Plaintiff City of New York

**Application for admission pro hac vice
forthcoming*