



July 21, 2026

BY FEDERAL EXPRESS

Douglas Burgum, Secretary
U.S. Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Brian Nesvik, Director
U.S. Fish & Wildlife Service
1849 C Street N.W.
Washington, D.C. 20240

Re: Notice of Violations of the Endangered Species Act: New Regulation
Implementing Endangered Species Act Section 4(b)(2)

Greetings:

On behalf of Center for Biological Diversity, Conservation Council for Hawai'i, Defenders of Wildlife, National Parks Conservation Association, Sierra Club, and WildEarth Guardians,¹ we ask that you take immediate action to remedy ongoing violations of the Endangered Species Act ("ESA" or "the Act") by the Department of the Interior and U.S. Fish and Wildlife Service ("FWS") in issuing a final rule, promulgated July 21, 2026 and codified at 50 C.F.R. § 17.90, that changes how FWS implements ESA Section 4(b)(2). Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 91 Fed. Reg. 45662 (July 21, 2026) ("Critical Habitat Exclusion Rule").

FWS is violating Section 7(a)(2) of the ESA by engaging in action that "may affect" ESA-listed species without having first engaged in consultation under the ESA. 50 C.F.R. § 402.14(a); *see also* 16 U.S.C. § 1536(a)(2) (requiring consultation). Moreover, implementation of the revised regulation during consultation or prior to initiation of consultation constitutes a violation of Section 7(d) of the Act, which prohibits the "irretrievable commitment of resources" pending completion of consultation. 16 U.S.C. § 1536(d). For the Agency's failure to consult, this letter constitutes notice in accordance with Section 11(g) of the ESA, 16 U.S.C. § 1540(g).

FWS is also violating ESA Section 4 by adopting a regulation that is manifestly contrary to the text and purpose of the Act and arbitrary, capricious, and not in accordance with the law.

¹ A list of these organizations' business addresses is appended.

While a challenge to the Agency’s adoption of this regulation arises under the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, out of an abundance of caution, we are also noticing those violations in this 60-day notice letter prior to bringing legal claims.

I. BACKGROUND

On July 21, 2026, the FWS issued a final regulation changing how the agency implements ESA Section 4(b)(2) (16 U.S.C. § 1533(b)(2)), concerning exclusions of specific areas from designation as critical habitat for listed species. *See* 91 Fed. Reg. 45662.

The final regulation replaces a long-standing regulation jointly promulgated by FWS and the National Marine Fisheries Service (“NMFS”) (collectively, the “Services”). *See* 91 Fed. Reg. at 45678 (citing 50 C.F.R. § 424.19). The new rule also reverses a portion of a policy jointly promulgated by the Services in 2016, 81 Fed. Reg. 7226 (Feb. 11, 2016), memorializing the Services’ practice of prioritizing designation of critical habitat on federal lands. *See* 91 Fed. Reg. at 45673. NMFS did not join FWS in promulgating the new Critical Habitat Exclusion Rule.

The new rule changes the way FWS weighs the alleged impacts of critical habitat designation, making it easier for critical habitat opponents to force FWS to exclude areas that the best available science indicates are essential to the conservation of listed species. The new rule also imposes a blanket requirement, applicable to all future designation decisions, requiring FWS to automatically exclude an area from critical habitat if it deems the benefits of exclusion to outweigh the benefits of inclusion, regardless of circumstances.² Finally, the new rule makes it easier to strip protection from essential habitat located on federal lands, where critical habitat designation confers the greatest conservation benefits.

These significant changes threaten to harm currently listed and future threatened and endangered species and undermine the fundamental purpose of the ESA to conserve threatened species and “to provide a means whereby the ecosystems upon which . . . threatened species depend may be conserved...” 16 U.S.C. § 1531(b). Nevertheless, FWS did not engage in consultation prior to promulgating the Critical Habitat Exclusion Rule.

II. FWS VIOLATED THE ESA BY FAILING TO CONSULT ON THE CRITICAL HABITAT EXCLUSION RULE.

A. Legal Framework

Under ESA Section 7(a)(2), “[e]ach federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued

² The only exception to this blanket rule—an exception that is mandated by statute—is that FWS may not exclude an area if “the failure to designate that area as critical habitat will result in the extinction of the species concerned.” 50 C.F.R. § 17.90(e); *see also* 16 U.S.C. § 1533(b)(2) (same).

existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2). This obligation to “insure” against a likelihood of jeopardy or adverse modification places the burden of risk and uncertainty on the proposed action, and not on listed species and their critical habitat. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). The substantive duty imposed by Section 7(a)(2) is constant, relieved only by an exemption from the Endangered Species Committee. 16 U.S.C. § 1536(h); *Conner v. Burford*, 848 F.2d 1441, 1452 n.26 (9th Cir. 1988).

Procedurally, Section 7 establishes an interagency consultation process to assist federal agencies in complying with their substantive duty to ensure against jeopardy to listed species or destruction or adverse modification of critical habitat. An agency must initiate consultation with NMFS or FWS under Section 7 whenever it takes an action that “may affect” a listed species. *See* 50 C.F.R. § 402.14(a). Agency actions subject to consultation include actions taken by the Services themselves. *See* FWS and NMFS, Endangered Species Act Consultation Handbook 1-5 to 1-6, App. E (1998) (describing Intra-Service Section 7 Consultation requirements), *available at* <https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf>. Different offices within the Services have consulted with the Endangered Species office of FWS or the NMFS Office of Protected Resources when the Services’ own actions “may affect” a listed species or critical habitat.

Regulations implementing Section 7 broadly define the scope of agency actions subject to consultation and include “promulgation of regulations.” 50 C.F.R. § 402.02 (definition of action). The Ninth Circuit Court of Appeals has construed the term “action” broadly. *See Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054-55 (9th Cir. 1994); *Conner*, 848 F.2d at 1453; *see also Nat’l Wildlife Fed’n v. FEMA*, 345 F. Supp. 2d 1151, 1169 (W.D. Wash. 2004).

As a result of consultation, the federal agency will obtain either a written concurrence letter from NMFS or FWS that the proposed action is “not likely to adversely affect” listed species or their habitat, 50 C.F.R. §§ 402.13, 402.14(b)(1), or a biological opinion evaluating the effects of the federal action on listed species and their critical habitat. 50 C.F.R. § 402.14; *see generally Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985). If NMFS or FWS concludes that a proposed action is likely to jeopardize a listed species or result in adverse modification of its critical habitat, NMFS or FWS must propose a reasonable and prudent alternative, if available, that will mitigate the proposed action so as to avoid jeopardy and/or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3)(A).

Section 7(a)(2) also requires agencies to use the best available science in discharging their Section 7 duties: “In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2).

Separately, ESA Section 7(d) prohibits federal agencies, after the initiation of consultation under ESA Section 7(a)(2), from making any irreversible or irretrievable commitment of resources if doing so would foreclose the implementation of reasonable and

prudent alternatives. 16 U.S.C. § 1536(d); *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1128 & n.6 (9th Cir. 1998) (Section 7(d) violated where Bureau of Reclamation executed water service contracts prior to completion of formal consultation); *Marsh*, 816 F.2d at 1389 (construction of highway outside species habitat barred by Section 7(d) pending completion of consultation). This prohibition is not an exception to the requirements of Section 7(a)(2); it is in addition to the requirements of Section 7(a)(2), and it ensures that Section 7(a)(2)'s substantive mandate is met. *See, e.g., Pac. Rivers Council*, 30 F.3d at 1056-57; *Def. of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 113 (D.D.C. 2011).

B. FWS's Failure to Consult on the Critical Habitat Exclusion Rule, which "May Affect" Threatened and Endangered Species and Adversely Modify Their Designated Critical Habitat, Violates Section 7(a)(2).

FWS violated Section 7(a)(2) in issuing the Critical Habitat Exclusion Rule without completing consultation. The threshold for a "may affect" determination and required ESA Section 7 consultation is low. *See* 51 Fed. Reg. 19926, 19949 (June 3, 1986) ("Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement."); *see also Ctr. for Biological Diversity v. U.S. Env't Prot. Agency*, 168 F.4th 1164, 1181 (9th Cir. 2026) ("As we have repeatedly explained, 'may affect' is a relatively low threshold for triggering consultation, such that any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the requirement. An agency may avoid the consultation requirement only if it determines that its action will have 'no effect' on a listed species or critical habitat.") (cleaned up). Promulgation and implementation of the Critical Habitat Exclusion Rule unquestionably "may affect" threatened and endangered species and their designated critical habitat. *See Nat'l Wildlife Fed'n*, 345 F. Supp. 2d at 1176 (responding to FEMA argument that the flood insurance program itself did not affect salmon by noting "[t]he regulations implementing Section 7(a)(2) of the ESA require an action agency to consider 'the effects of the action as a whole'" (quoting 50 C.F.R. § 402.14(c)).

Among other things, the Critical Habitat Exclusion Rule: (1) changes both the information FWS will rely on when analyzing the economic impacts of a critical habitat designation and the way FWS weighs the impacts of critical habitat designation, making it easier for critical habitat opponents to force FWS to exclude areas that the best available science indicates are essential to the conservation of listed species; (2) imposes a blanket requirement, applicable to all future designation decisions, requiring FWS to automatically exclude an area from critical habitat if the Agency deems the benefits of exclusion to outweigh the benefits of inclusion, regardless of circumstances; and (3) reverses agency policy prioritizing designation of critical habitat on federal lands, where designation confers the greatest conservation benefits because of the federal nexus for interagency consultation procedures under ESA Section 7. These changes fundamentally alter FWS's practices and procedures for designating critical habitat, turning what Congress intended as a procedural requirement for FWS to gather information about potential impacts of designation before making a final decision into a

mechanism for critical habitat opponents to prevent needed critical habitat designation in areas targeted for development and exploitation, including on federal lands.

By skewing the critical habitat designation process in favor of stripping protection from areas that are essential to the conservation of listed species, the new regulation undermines substantive protections that Congress enacted to ensure both the continued survival and the eventual recovery of listed species. Despite this harmful impact to endangered and threatened species, FWS did not consult under ESA § 7(a)(2) on the issuance or implementation of the critical habitat exclusion rule. *See* FWS and NMFS, Endangered Species Act Consultation Handbook 1-5 to 1-6, App. E (describing Intra-Service Section 7 Consultation requirements). This failure to consult on an action that undeniably “may affect” listed species violates ESA Section 7(a)(2).

C. FWS’s Violation of ESA Section 7(d)

Acting in reliance on the Critical Habitat Exclusion Rule prior to the completion of consultation violates ESA Section 7(d)’s prohibition on the irreversible or irretrievable commitment of resources. *Id.* § 1536(d). FWS may not use the revised regulation until the agency completes consultation, using the best available science, and ensures the revised regulation will not jeopardize species or harm critical habitat.

III. THE CRITICAL HABITAT EXCLUSION RULE VIOLATES THE ESA AND THE APA.

In addition to violating Section 7(a)(2) and 7(d), the Critical Habitat Exclusion Rule violates ESA Section 4’s requirements for critical habitat designation.

A. Legal Framework

Congress enacted the ESA “to provide a program for the conservation of . . . endangered species and threatened species” and “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). The ESA’s goal is recovery of listed species to the point where they no longer need ESA protection. *See Id.* §§ 1531(b)–(c), 1532(3). An “examination of the language, history, and structure [of the ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

As the first step in the protection of these species, Section 4 of the ESA requires the Secretary to list species as endangered or threatened when they meet the statutory listing criteria. 16 U.S.C. § 1533. A species is “endangered” when it “is in danger of extinction throughout all or a significant portion of its range,” and it is “threatened” when it is likely to become endangered within the foreseeable future. *Id.* § 1532(6), (20). The Secretaries of the Interior (for most terrestrial and freshwater species) and Commerce (for most marine species) are charged with listing a species as threatened or endangered whenever listing is warranted based on any one, or

combination, of five enumerated statutory factors, *Id.* § 1533(a)(1)(A)–(E), using the “best scientific and commercial data available.” *Id.* § 1533(b).

Once a species is listed as endangered or threatened, it receives numerous protections. Relevant here, the Services must designate and protect critical habitat for the species concurrent with its listing. 16 U.S.C. § 1533(a)(3). As part of that process, Section 4(b)(2) requires the Secretary to undertake an impacts analysis that uses “the best scientific data available” and takes “into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.” *Id.* § 1533(b)(2). The Secretary then has discretion to exclude limited areas from the designation: “The Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.” *Id.* (emphasis added).

B. FWS’s Promulgation of the Critical Habitat Exclusion Rule

In 1980, FWS and NMFS promulgated joint regulations to implement the ESA’s critical habitat provisions, including section 4(b)(2)’s mandatory impacts analysis and discretionary exclusion analysis. *See* 50 C.F.R. § 424.12 (1980); 45 Fed. Reg. 13010 (Feb. 27, 1980). The 1980 regulation stated in relevant part that the Services “shall consider the reasonably probable economic and other impacts of the designation upon such activities.” 50 C.F.R. § 424.12(c) (1980); 45 Fed. Reg. at 13023. Tracking the statutory language, the regulation also provided that the Services “*may* exclude any such area from the Critical Habitat if [FWS or NMFS] determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the Critical Habitat.” 50 C.F.R. § 424.12(c) (1980) (emphasis added); *see also* 45 Fed. Reg. at 13023. The Agencies amended the regulations relating to critical habitat in both 1984 and 2013 but did not substantively alter the language implementing ESA Section 4(b)(2)’s impacts analysis or exclusion analysis requirements. *See* 49 Fed. Reg. 38900 (Oct. 1, 1984), 78 Fed. Reg. 53058 (Aug. 28, 2013).

In 2016, FWS and NMFS jointly published a policy to further explain how the Services conduct exclusion analyses (the “2016 Policy”). *See* 81 Fed. Reg. 7226 (Feb. 11, 2016). Among other things, the 2016 Policy provided that the Services would prioritize designation of critical habitat on federal lands, and “focus our exclusions on non-Federal lands.” *Id.* at 7232. The policy recognized the high conservation value of designating federal lands because of the affirmative duty ESA Section 7 places on federal agencies to “utilize their authorities in furtherance of the purposes” of the Act and to “insure” that any actions authorized, funded, or carried out by a federal agency do not destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(1), (2); *see* 81 Fed. Reg. at 7231.

In 2020, FWS promulgated a rule modifying the section 4(b)(2) exclusion analysis to reduce FWS’s discretion and tip the scales—contrary to the intent of the statute—toward exclusions from critical habitat. 85 Fed. Reg. 82376 (Dec. 18, 2020). This rule was functionally identical to the current Critical Habitat Exclusion Rule. A broad coalition of environmental organizations brought suit challenging the 2020 4(b)(2) Rule. *See Ctr. for Biological Diversity v. Haaland*, No. 1:21-cv-00041 (D. Haw. 2021). In 2022, prior to resolution of the litigation, FWS rescinded the 2020 4(b)(2) Rule, reverting to its long-standing approach to addressing potential exclusions from critical habitat. 87 Fed. Reg. 43433 (July 21, 2022). When it did so, FWS “determined that the Final Rule is problematic because it unduly constrains the Service’s discretion in administering the Act, potentially limiting or undermining the Service’s role as the expert agency and its ability to further the conservation of endangered and threatened species through designation of their critical habitats.” *Id.* at 43434.

FWS has now reinstated its 2020 section 4(b)(2) regulations through the Critical Habitat Exclusion Rule. 91 Fed. Reg. 45662. The Rule changes how FWS implements ESA Section 4(b)(2), skewing the exclusion process in favor of stripping vital protections from areas that imperiled species need for their continued survival and eventual recovery. In particular, the Rule: (1) restricts the Service’s discretion over when to undertake an exclusion analysis by *requiring* it do so whenever an exclusion proponent submits “credible information” of economic or other benefits from excluding a particular area, 50 C.F.R. § 17.90(c)(2); (2) places a thumb on the outcome of the analysis by requiring the FWS to “give weight” to claims of exclusion proponents when they allege benefits in a range of areas “outside the scope of the Service’s expertise,” *id.* at § 17.90(d)(1); (3) makes it easier to strip protection from essential habitat located on federal lands, where critical habitat designation confers the greatest conservation benefits, by reversing the 2016 policy against excluding Federal lands from designations of critical habitat, *see* 91 Fed. Reg. at 45673; and (4) *requires* that FWS exclude areas from critical habitat whenever the benefits of exclusion outweigh the benefits of inclusion, stripping FWS of its statutorily conferred discretion to tailor its decision-making to an imperiled species’ unique circumstances on a case-by-case basis and to designate particular areas as critical habitat regardless of the impacts of designation, 50 C.F.R. § 17.90(e).

C. The Critical Habitat Exclusion Rule Is Contrary to the ESA

FWS’s revised approach to critical habitat designation under the Critical Habitat Exclusion Rule violates the ESA. The FWS asserts that the Critical Habitat Exclusion Rule is supported by the “traditional tools of statutory interpretation.” 91 Fed. Reg. at 45663. To the contrary, the “traditional tools” of statutory interpretation—the text, context, legislative intent, and agency interpretations proffered close in time to enactment of the statute—all demonstrate that the Critical Habitat Exclusion Rule is manifestly contrary to the text and purpose of the ESA.

When Congress enacted the ESA in 1973, it understood that habitat protection was key to saving species from extinction and allowing for their eventual recovery:

Man can threaten the existence of species of plants and animals in any of a number of ways. ... The most significant of those has proven also to be the most difficult to control: the destruction of critical habitat. ... There are certain areas which are critical which can and should be set aside. It is the intent and purpose of this legislation to see that our ability to do so, at least within this country, is maintained.

H.R. Rep. No. 93-412, at 5 (1973). Consistent with that understanding, Congress identified as the first of the ESA's purposes "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Further evidencing Congress's understanding of habitat's vital role in species conservation, the first listing criterion is "the present or threatened destruction, modification, or curtailment of [the species'] habitat or range." *Id.* § 1533(a)(1)(A).

Section 4(b)(2) effectuates Congress's concern with the fundamental importance to the Act of preserving habitat, ensuring the Service makes well-supported, individualized designations. Section 4(b)(2) mandates that FWS make critical habitat designations "on the basis of the best scientific data available . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The command that FWS must consider the costs and benefits "of specifying *any particular area* as critical habitat" reflects congressional intent that FWS make individualized designation decisions, based on the specific facts relevant to the species under consideration. *Id.* § 1533(b)(2) (emphasis added). And Congress's deliberate choice of "may" rather than "shall" with regard to exclusion decisions makes clear that Congress intended for the Secretary to retain the discretion to designate a "particular area as critical habitat" for an imperiled species, even where the evidence before the Secretary at the time of designation indicates that the costs of designating that "particular area" outweigh the benefits. *Id.*

The FWS's long-standing interpretation of section 4(b)(2), which courts afford "great weight," also undercuts the Service's newly-minted interpretation. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 388 (2024). Indeed, aside from the short-lived 2020 Rule, FWS has always interpreted section 4(b)(2) to afford the Agency discretion over exclusions from the designation of critical habitat.

Defying the text and intent of the ESA and FWS's own long-standing interpretations, the Critical Habitat Exclusion Rule rewrites the statute, replacing "may exclude" with "shall exclude." *See* 50 C.F.R. § 17.90(e). In place of the individualized determinations that Congress mandated regarding whether "any particular area" should be designated as critical habitat for the specific species under consideration, 16 U.S.C. § 1533(b)(2), FWS substitutes a blanket rule—applicable to all future designation

decisions—that requires FWS to automatically exclude an area from critical habitat if it deems the benefits of exclusion to outweigh the benefits of inclusion, regardless of circumstances. The Rule thus plainly violates the ESA and the APA.

D. The Critical Habitat Exclusion Rule Illegally Delegates FWS’s Statutory Duties

The Critical Habitat Exclusion Rule also unlawfully delegates key administrative determinations to nonfederal entities. In general, “subdelegations” of authority that Congress vests in an agency “to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.” *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004). The Critical Habitat Exclusion Rule illegally delegates to outside, nonfederal parties the authority to determine (1) when FWS must conduct an exclusion analysis, *see* 50 C.F.R. § 17.90(c)(2)(i), as well as (2) the “weight” FWS must give to “the benefits of including or excluding any particular area” whenever alleged impacts involve a broad range of “areas that are outside the scope of [FWS’s] expertise.” *Id.* at § 17.90(d)(1).

E. The Critical Habitat Exclusion Rule Arbitrarily Reverses the Joint Implementing Regulations and the 2016 Policy Regarding Federal Lands

Finally, the Critical Habitat Exclusion Rule reflects fundamentally arbitrary agency action. The touchstone of arbitrary-and-capricious review is whether an agency “engage[d] in reasoned decisionmaking.” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020). Agency action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider”; “entirely failed to consider an important aspect of the problem”; “offered an explanation for its decision that runs counter to the evidence before [it]”; or “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). When an agency changes position on a matter, it must also “display awareness that it is changing position” and offer “good reasons” for doing so. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Agencies must provide “a more detailed justification” if the new position “rests upon factual findings that contradict those which underlay its prior policy” or undermines “serious reliance interest.” *Id.* Failing to do so renders a decision arbitrary and capricious. *Id.*

Here, FWS failed to justify its decision to reverse its longstanding Section 4(b)(2) regulations with a rule that skews FWS’s implementation of the ESA’s critical habitat provisions in favor of stripping away much of the Service’s discretion over the exclusion process. FWS makes passing reference to providing clarity and transparency, *see, e.g.*, 91 Fed. Reg. at 45665, but makes no real effort to demonstrate its prior policy was unclear or lacked transparency. And FWS fails to reconcile its new rule with the plain language of the Act or its own prior statement that the Critical Habitat Exclusion Rule “is problematic because it unduly constrains the Service’s discretion in administering the Act, potentially limiting or undermining the Service’s role as the expert agency and its ability to further the conservation of endangered and threatened

species through designation of their critical habitats.” 87 Fed. Reg. at 43434. FWS also fails to provide any rational basis for reversing the 2016 Policy’s position that the Agency generally does not exclude Federal lands from critical habitat designations. The FWS noted that “section 4(b)(2) of the Act does not provide for a different standard for exclusions on Federal lands relative to other lands.” 91 Fed. Reg. at 45673. But this rationale does not address the Service’s prior conclusion that there is high conservation value in designating critical habitat on federal lands because of the affirmative duty ESA Section 7 places on federal agencies to “utilize their authorities in furtherance of the purposes” of the Act and to “insure” that any actions authorized, funded, or carried out by a federal agency do not destroy or adversely modify critical habitat. 81 Fed. Reg. at 7231.

FWS’s failure to articulate a rational connection between the facts found and the choices made in the Critical Habitat Exclusion Rule, or to provide an adequate and detailed justification for reversing its long-standing regulations and policy in that Rule, renders FWS’s decision arbitrary, capricious, an abuse of discretion, and not in accordance with law, within the meaning of the APA, 5 U.S.C. § 706(2).

IV. CONCLUSION

FWS has violated and remains in ongoing violation of the ESA and its implementing regulations. If FWS fails to cure these violations within 60 days of receiving this letter, the named organizations intend to file legal claims for declaratory and injunctive relief. *See* 16 U.S.C. § 1540(g).

If you believe any of the foregoing is in error, have any questions, or would like to discuss this matter, please do not hesitate to contact me.

Sincerely,



ELIZABETH B. FORSYTH

eforsyth@earthjustice.org

KRISTEN L. BOYLES

kboyles@earthjustice.org

EARTHJUSTICE

810 3rd Ave #610

Seattle, WA 98104

Tel: (206) 343-7340

BARCLAY T. SAMFORD

csamford@earthjustice.org

EARTHJUSTICE

633 17th Street, Suite 1600
Denver, CO 80202
Tel: (303) 623-9466

DAVID L. HENKIN
dhenkin@earthjustice.org
EARTHJUSTICE
850 Richards Street, Suite 400
Honolulu, Hawai'i 96813
Tel: (808) 599-2436

*Attorneys for Conservation Council for
Hawai'i, National Parks Conservation
Association, Sierra Club,
and WildEarth Guardians*

/s/ Ryan Adair Shannon
Ryan Adair Shannon
Defenders of Wildlife
2009 NE Alberta, Ste. 207
Portland, OR 97211
(503) 899-0663
rshannon@defenders.org

/s/ Joseph M. Manning
Joseph M. Manning
Defenders of Wildlife
1130 17th St. NW
Washington, DC 20036
(202) 579-5097
jmanning@defenders.org

Attorneys for Defenders of Wildlife

/s/ Brian P. Segee
Brian P. Segee
Center for Biological Diversity
226 W. Ojai Ave., Suite 101-442
Ojai, CA 93023-3278
(805) 750-8852
bsegee@biologicaldiversity.org

Attorney for Center for Biological Diversity

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Business Addresses for Named Organizations:

CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway, St. #800
Oakland, CA 94612

CONSERVATION COUNCIL FOR HAWAI'I
850 Richards St STE 505
Honolulu, HI 96813

DEFENDERS OF WILDLIFE
1130 17th Street, NW
Washington DC 20036

NATIONAL PARKS CONSERVATION ASSOCIATION
National Parks Conservation Association
777 Sixth St. N.W.
Washington, DC

SIERRA CLUB
2101 Webster St., Suite 1300
Oakland, CA 94612

WILDEARTH GUARDIANS
301 N. Guadalupe St.
Suite 201
Santa Fe, NM 87501