EARTHJUSTICE

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Dockets:
FWS-HQ-ES-2021-0107 (ESA § 4)[1]
FWS-HQ-ES-2023-0018 (ESA § 4(d))[2]
FWS-HQ-ES-2021-0104 (ESA § 7)[3]

Re: Comments Regarding Proposed Changes to Endangered Species Act §§ 4, 4(d), and 7 Regulations: 88 Fed. Reg. 40,742; 88 Fed. Reg. 40,753; 88 Fed. Reg. 40,764 (June 22, 2023)

Dear Secretary Haaland and Secretary Raimondo:

These comments are filed by Earthjustice on behalf of Center for Biological Diversity, The Humane Society of the United States, National Parks Conservation Association, Natural Resources Defense Council, Sierra Club, and WildEarth Guardians, ("the undersigned Organizations"). The Organizations each work to protect and restore the environment, including the preservation of threatened and endangered species and their designated critical habitat. We submit these comments in order to ensure the continued effectiveness of the Endangered Species Act ("ESA") and continued protections to species and habitat long-afforded by the ESA.

On June 22, 2023, in three separate Federal Register notices, the National Marine Fisheries Service ("NMFS") and Fish and Wildlife Service ("FWS"), collectively, the "Services," proposed changes to regulations governing (1) species' listing and delisting and designation of critical habitat under ESA § 4; (2) removal of default protections given to threatened species under ESA § 4(d); and (3) interagency cooperation and consultation under ESA § 7. These proposed revisions came from the Services' internal review of ESA regulations promulgated in 2019 that were challenged in federal court litigation in the Northern District of California. These comments are submitted in response to those proposed changes.

I. BACKGROUND

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

[1] *Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat,* 88 Fed. Reg. 40,764 (June 22, 2023).
[2] *Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants,* 88 Fed. Reg. 40,742 (June 22, 2023).
[3] *Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation*, 88 Fed. Reg. 40,753 (June 22, 2023).

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endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). 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. *Id*. § 1533.

The Act defines species to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). A species is "endangered" when it "is in danger of extinction throughout all or a significant portion of its range," *id*. § 1532(6), and it is "threatened" when it is likely to become endangered within the foreseeable future. *Id.* § 1532(20).

The Secretaries of Interior (for most terrestrial and freshwater species) and Commerce (for most marine species) are charged with listing species as threatened or endangered based "solely on the basis of the best scientific and commercial data available," 16 U.S.C. § 1533(b)(1)(A), and whenever listing is warranted based on any one of the following five listing factors:

> (A) the present or threatened destruction, modification, curtailment of its habitat or range;
> (B) overutilization for commercial, recreational, scientific, or educational purposes;
> (C) disease or predation;
> (D) the inadequacy of existing regulatory mechanisms; or
> (E) other natural or manmade factors affecting its continued existence.

Id. § 1533(a)(1).

Section 4 also directs the Services to designate, "to the maximum extent prudent and determinable," specified "critical habitat" for each species concurrent with its listing, including areas both currently occupied and unoccupied by those species. 16 U.S.C. § 1533(a)(3). Specifically, the ESA defines critical habitat as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the [ESA], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require 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.

Id. § 1532(5)(A).

The ESA's ultimate goal is recovery of listed species to the point where they no longer need ESA protection, 16 U.S.C. §§ 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). Section 7 of the ESA prohibits agency actions that may jeopardize the survival and recovery of a listed species or adversely modify its critical habitat:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary...to be critical...

Id. § 1536(a)(2). "Action" is defined broadly to encompass "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," 50 C.F.R. § 402.02, and it extends to ongoing actions over which the agency retains authority or discretionary control. *Klamath Water Users Protective Ass'n v. Patterson,* 204 F.3d 1206, 1213 (9th Cir. 1999).

Section 7 establishes an interagency consultation process to assist federal agencies in complying with their duty to avoid jeopardy to listed species or destruction or adverse modification of critical habitat. For actions that may adversely affect a listed species or critical habitat, a formal consultation is required with the expert fish and wildlife agency that culminates in a biological opinion assessing the effects of the action, determining whether the action is likely to jeopardize the continued existence of the species, and, if so, offering a reasonable and prudent alternative that will avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h).

Federal agencies additionally must ensure that such actions will not "result in the destruction or adverse modification" of designated critical habitat." 16 U.S.C. § 1536(a)(2). Since critical habitat must be designated outside of a species' current inhabited range under certain circumstances, the "adverse modification" analysis provides habitat protection even in situations where the "jeopardy" analysis does not apply. *See Sierra Club v. U.S. Fish and Wildlife Serv.,* 245 F.3d 434, 441 (5th Cir. 2001).

Congress expressly recognized the independent value of protecting critical habitat when it enacted the ESA:

> 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 of this legislation to see that our ability to do so, at least within this country, is maintained.

H.R. Rep. No. 412, 93d Cong., 1st Sess. 5 (1973). Congress advanced this intent, in part, by adding the prohibition on adverse modification of critical habitat, a radical expansion of prior endangered species laws. *Compare* Pub. L. 93-205, 87 Stat. 884 (Endangered Species Act of 1973) *with* Pub. L. 89-669, 80 Stat. 926 (Endangered Species Preservation Act of 1966) *and* Pub. L. 91-135, 83 Stat. 275 (Endangered Species Conservation Act of 1969).

In 1976, Congress reiterated the distinct importance of critical habitat and the prohibition on adverse modification:

> It is the Committee's view that classifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species' continued existence. Once a habitat is so designated, the Act requires that proposed federal actions not adversely affect the habitat. If the protection of endangered and threatened species depends in large measure on the preservation of the species' habitat, then the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.

H.R. Rep. No. 887, 94th Cong., 2d Sess. 3 (1976).

The Services adopted joint regulations implementing Sections 4 and 7 in the 1970s and 1980s. *See, e.g.*, 43 Fed. Reg. 870 (Jan. 4, 1978) (Sec. 7); 45 Fed. Reg. 13,010 (Feb. 27, 1980) (Section 4); 49 Fed. Reg. 38,900 (Oct. 1, 1984) (Section 4); 51 Fed. Reg. 19,926 (June 3, 1986) (Section 7). The Services made targeted revisions in 2015 and 2016, but the regulations as originally conceived otherwise remained intact for decades.[4]

In 2019, however, the Services issued three final rules that drastically altered the regulations that implement Sections 4, 4(d), and 7. 16 U.S.C. §§ 1533, 1533(d), 1536. The Section 4 amendments addressed listing, delisting, and designation of critical habitat. 84 Fed. Reg. 45,020 (August 27, 2019). The Section 4(d) amendments repealed the longstanding FWS regulation that automatically extended certain protections to threatened animals and plants upon listing. 84 Fed. Reg. 44,753 (August 27, 2019). Finally, the Section 7 amendments made changes to the regulations governing the inter-agency consultations. 84 Fed. Reg. 44,976 (August 27, 2019).

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[4] *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). The 2016 regulations were challenged in court by a coalition of states led by Alabama, but the parties reached a settlement in 2018.

Shortly after the rules were finalized, seven conservation organizations, a group of states and cities, and an animal rights group each filed suit in the Northern District of California; the cases were consolidated. The Services vigorously defended the 2019 ESA rules for over a year, but asked for a series of stays of litigation starting in January 2021. The parties initially agreed to the stay requests, but after months of delay, the plaintiffs opposed further stays, filed summary judgment motions and opening briefs, and opposed the Services' motion to remand the challenged rules without vacatur. In July 2022, the District Court remanded and vacated the 2019 rules. *Ctr. for Biological Diversity v. Haaland*, 609 F. Supp. 3d 1058 (N.D. Cal. 2022). It did so, however, without making a determination as to the merits of the plaintiffs' claims. The Ninth Circuit subsequently stayed the vacatur for the failure to consider the rules' legal validity, and the district court responded in November 2022 by granting the Services' motion for remand and denying the plaintiffs' request to vacate. *Ctr. for Biological Diversity v. Haaland*, 2022 WL 19975245, at *3 (N.D. Cal. Nov. 16, 2022). In June of this year, the Services published their proposals in the Federal Register. 88 Fed. Reg. 40,742; 88 Fed. Reg. 40,753; 88 Fed. Reg. 40,764 (June 22, 2023).

II. REVISIONS TO ESA SECTION 4 REGULATIONS

A. The Services Should Clarify the Definition of "Foreseeable Future" to Project Effects as Far as Can Be Credibly Determined (50 C.F.R. § 424.11(d))

As noted, the Act requires a species to be listed as "threatened" when it is likely to become endangered within the "foreseeable future." 16 U.S.C. § 1532(20). The statute does not define the term "foreseeable future," and until 2019 neither did the Services' regulations. In 2009, however, the Department of the Interior's Office of the Solicitor devoted a memo to its interpretation. Department of the Interior, Office of the Solicitor (M–37021, January 16, 2009) ("M-Opinion"). The 2019 revisions to the ESA regulations purported to follow the M-Opinion, but in fact deviated both from its approach as well as the Services' longstanding practice.

We appreciate the Services intent to remove the phrase "only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely." We echo the belief that the current regulatory language does not accurately reflect the requisite degree of flexibility when making predictions about the future nor does it clearly confine the role of the term to "simply set[ting] the time period" for considering the status of a species, as intended by the Act. 88 Fed. Reg. at 40,766; *cf*. M-Opinion at 4 (recognizing that Congress intended the category of threatened species to give the Secretaries a "broader set of tools" to take preventative action as needed).

But we remain concerned that the chosen language could inhibit listings where the best available scientific information would otherwise demand action. Calibrating how best to determine the "foreseeable future" is critical in order to fully incorporate the effects of longer-term trends, such as climate change, into ESA decision-making, and an appropriately expansive definition should play an important part of this administration's ongoing work to confront the worsening climate crisis. 88 Fed. Reg. at 40,764 (citing Exec. Order 13990). The explanatory

material in the Federal Register notice finds that the Services "do not need to have absolute certainty about the information [they] use[.]" 88 Fed. Reg. at 40,766. This accords with Congress' interest in giving the Services the "ability to forecast population trends by permitting [them] to regulate these animals before the danger becomes imminent while long-range action is begun." S. Rep. No. 93-307, at 3 (1973); *see also* M-Opinion at 14 (same). Nevertheless, any language that emphasizes an inquiry into both threats and species' responses could continue to influence decision-makers to go beyond simply "set[ting] the time period."

We recommend removing the sentence that defines "foreseeable future" to extend "as far into the future as the Services can reasonably rely on information about the threats to the species and the species' responses to those threats" in its entirety. Instead, the definition should make clear that the Services are to "project effects over the longest possible period for which credible projections are available," the standard adopted by NMFS in 2016.[5] Both Services would benefit from memorializing such language in the regulations themselves, rather than relying on guidance that is not subject to the procedural protections of the Administrative Procedure Act.

B. The Reestablishment of the Prohibition on Using Economic Information in Listing Decisions Affirms Clearly Expressed Congressional Intent. (16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b)).

The ESA requires that listing decisions be made "*solely* on the basis of the best scientific and commercial data available[.]" 16 U.S.C. § 1533(b)(1)(A) (emphasis added). Congress added the word "solely" in the 1982 amendments to the Act to underscore that non-biological considerations should not play any role in listing decisions. Conf. Rep. (H.R.) No. 97–835, at 20 (1982) ("economic considerations have no relevance to [listing and delisting] determinations"); *see also* S. Rep. No. 97-418, at 4 (1982) (amendments "would ensure that ... economic analysis ... will not delay or affect decisions on listing"). The previous administration's removal of "without reference to possible economic or other impacts" improperly opened the door to cost benefit analyses and other economic assessments that risked politicizing the listing process. We agree with the Services that "even the appearance of an intention to consider economic impact information could undermine the Services' classification determinations." 88 Fed. Reg. at 40,766. The current proposal to return the phrase to 50 C.F.R. § 424.11(b) affirms the clearly stated legislative intent that listing decisions are to be wholly scientific determinations.

C. The Services' Expanded Path to Delisting Violates the ESA's Focus on Biological Recovery. (16 U.S.C. § 1532(3); 50 C.F.R. § 424.11(d)).

[5] NMFS, Revised Guidance for Treatment of Climate Change in NMFS Endangered Species Act Decisions, 02-110-18, at 3 (Sept. 27, 2016), https://media.fisheries.noaa.gov/dam-migration/02-110-18.pdf. Or, as quoted in the M-Opinion, falling "within the range for which forecasts are possible." M-Opinion at 8 (citing Webster's Third New International Dictionary at 890 (1971)).

For nearly four decades, the ESA's listing regulations limited the delisting of a species to situations where the best scientific data available could substantiate that the species was recovered, actually extinct, or originally listed in error. 45 Fed. Reg. 13,010, 13,022-23 (Feb. 27, 1980) (promulgating the initial 50 C.F.R. § 424.11(d)).[6] The 2019 revisions introduced a fundamentally new approach, entirely jettisoning the concept "recovery" and substituting in whether a species meets the definition of a threatened or endangered species or whether it meets the definition of a "species" at all.

The Services should return to the three strictly defined circumstances that have governed delisting for virtually all of the Act's history. *See Humane Soc'y of the United States v. Jewell*, 76 F. Supp. 3d 69, 123 (D.D.C. 2014) ("The regulations require that the FWS 'conduct[] a review of the status of the species,' and, after doing so, determine if one of the three reasons listed in the regulation applies to allow the delisting of the species."), *aff'd*, 865 F.3d 585 (D.C. Cir. 2017). Instead, the Service's restoration of the concept of recovery is undermined by the decision to insert it into the existing—and objectionable—provisions. Recovery is not one factor among many for the Services to consider; it must be the primary driver of the decision to remove ESA protections, and delisting should reflect that the Act's ultimate aim has been achieved.[7] Under the proposed regulations, however, recovery is confined to one pathway to delisting that sits alongside two other ill-defined rationales.

The ESA's goal is to "not merely forestall the extinction of a species (*i.e.,* promote a species' survival), but to allow a species to recover to the point where it may be delisted." *Gifford Pinchot Task Force v,. U.S. Fish and Wildlife Serv*, 378 F.3d 1059, 1070 (9th Cir. 2004). The Act is designed to bring endangered and threatened species "to the point at which the measures provided pursuant to this [Act] are no longer necessary," *i.e*., to the point of full recovery. 16 U.S.C. § 1532(3). And the ESA mandates that the Services implement recovery plans "for the conservation and survival" of listed species which must include "criteria which, when met, would result in a determination in accordance with the provisions of this section, that the species *be removed from the list*." *Id*. § 1533(f)(1)(B)(ii) (emphases added). In other words, the Act makes recovery a prerequisite to any delisting determination—a fact Congress confirmed when it added the recovery plan requirement in 1988. *See, e.g*., S. Rep. No. 100-240, at 9 (1987), reprinted in 1988 U.S.C.C.A.N. 2700, 2709 (recovery plans to "contain objective, measurable criteria for removal of a species from the Act's lists"). Consequently, prioritizing recovery best comports with the intent of the Act. *Cf*. 88 Fed. Reg. at 40,767 (noting the "clear linkage" between the Act's "primary goal" of recovery and the need for recovery in the regulation governing delisting).

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[6] The "listing error" rationale applied only if "[s]ubsequent investigations . . . show[ed] that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error." 45 Fed. Reg. at 13,023 (citing 50 C.F.R. § 424.11(d)).

[7] Outside, that is, of a confirmed extinction or data that was flawed from the listing's inception. *See* text, *supra*.

The Services' reliance on the D.C. Circuit's decision in *Friends of Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012), to justify devaluing recovery is misplaced. *See* 88 Fed. Reg. at 40,767. Notably, in that case, FWS did in fact rely on the recovery of the West Virginia northern flying squirrel as a basis for delisting. 691 F.3d at 431 (noting that the number of captured squirrels "suggested to the Secretary the population was robust"). The case stands only for the point that the ESA's mandated recovery plans are not necessarily a fixed, binding roadmap that charts the sole means of achieving recovery. The court in *Blackwater* recognized that regardless of the test employed, the Act's delisting "destination" still turns on "recovery of the species." *Id*. at 434.

The two remaining justifications for delisting are problematic not only because their existence dilutes the question of recovery but, equally troubling, they create rationales for delisting that may invite both agency misuse and unnecessary litigation.

First, the Services propose to retain "does not meet the definition of a threatened or endangered species" as a justification for delisting, positioning it as a disjunctive alternative to actual recovery. 88 Fed. Reg. at 40,774. In the Federal Register notice, the Services invoke the example of a status review that examines whether the ESA listing factors continue to apply. *Id*. at 40,676, 40,768.[8] While suitable for providing an informational backdrop, an assessment of listing factors alone is not an adequate means for determining the ultimate question of recovery. Delisting should not, in other words, be implemented as though it were simply listing in reverse. If myopically applied, a review of the listing factors could fail to adequately consider a population's long-term stability, potentially leaving species on the precipice of another downward slide rather than securing the complete recovery that is the promise of the ESA. Consequently, allowing for delisting because a species "otherwise" does not meet the definition of a threatened or endangered species unjustifiably diminishes the role of recovery.

Second, the Services propose to continue to allow delistings if the species "does not meet the statutory definition of a species." This is a consequential departure from the original regulatory language that confined such inquiries to the data that were before the agency at the time of the initial listing. The language proposed here could allow imperiled species to be delisted due to changes in the policies and regulations governing the ESA. For example, in 2020, FWS asserted that currently listed gray wolf populations, which were defined prior to 1978 amendments to the ESA, no longer qualified as "species." *Def. of Wildlife v. Haaland*, 584 F. Supp. 3d 812, 822 (N.D. Cal, 2022). But absent clearly expressed congressional intent, such shifts cannot serve as a "backdoor route" to delisting. *Id*. (*quoting Humane Soc'y of the U.S. v. Zinke*, 865 F.3d 585, 602 (D.C. Cir. 2017)). Our concern is not only that the proposed language could be applied to statutory amendments, but that it could invite future administrations to

[8] The proposed rule also uses the example of a later interpretation of the data revealing that another species is actually part of the listed entity, presumably boosting its population numbers. 88 Fed. Reg. at 40,767. But this scenario conceivably fits within the "listing error" category of the original rule, a formulation that is significantly less subject to misinterpretation that the proposal. *See* note 6, *supra*.

undertake regulatory changes in order to justify categorical revocations of ESA protections. These regulations must be crafted to avoid any such post-hoc manipulations.[9]

D. The Services' Open-Ended Allowance for Avoiding the Designation of Critical Habitat Cannot Be Justified Under the ESA. (16 U.S.C. § 1532-33; 50 C.F.R. § 424.12(a)).

The 2019 regulations overhauled the provision related to when the Services may invoke the "not prudent" justification for avoiding the designation of critical habitat. Rather than simply return to the original language, the Services have created confusion by cleaving off one faulty element but retaining superfluous elements and leaving open-ended what should be a narrow exception to designation, as courts have repeatedly found.

We support the removal of language allowing the Services to avoid designating critical habitat where threats to habitat "stem solely from causes that cannot be addressed through management actions resulting from" Section 7 consultations. That provision ignored the many benefits of critical habitat designation beyond a Section 7 consultation, including providing valuable information about the importance of particular areas to listed species and assisting in recovery planning. Indeed, the court in *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280, 1288 (D. Haw. 1998), struck down FWS's decision not to designate critical habitat simply because much of the area it would have designated would not be subject to Section 7 consultation, recognizing the "significant substantive and procedural protections" that result from critical habitat.

The remainder of the provision, however, raises a number of concerns.

First, the retention of 50 C.F.R. 424.12(a)(ii), which would allow the Services not to designate critical habitat if the "present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species," departs from the Act's clear statutory commands and is potentially open to misuse. The ESA defines critical habitat as areas occupied by the species at the time of listing that contain physical or biological features essential to the conservation of the species and which may require special management considerations or protection, as well as unoccupied areas that are essential to the conservation of the species. 16 U.S.C. § 1532(5)(A)(i)-(ii). The Services are confusing the question of "threats" to a species

[9] If the Services choose to proceed with their proposal, they should—at a minimum—add language to ensure that this avenue for delisting is employed in such a way to minimize the potential for harm and use the best available science. For example, were one of the Services to determine that, due to a change in accepted taxonomy, an entity currently listed as a subspecies is no longer considered a subspecies, it should consider not only whether the entity qualifies as a distinct population segment but also whether that newly defined population is threatened or endangered. This must occur before any final delisting. In other words, a change in classification should not strip away vital ESA protections in the interim between a delisting and relisting.

(appropriate for listing determinations) with the separate question of what is needed for a species' "conservation," which the Act expressly defines as recovery. *Id*. § 1532(3); *see* Sec. II.C., *supra*. For example, a species threatened by an outbreak of disease could nevertheless benefit from protecting land that allows healthy individuals to disperse over a greater area. A singular focus on whether habitat loss is a threat could overlook the potential role that critical habitat would play in a species' recovery, including through future Section 7 consultations designed to prevent the "adverse modification" of designated habitat. *See Gifford Pinchot*, 378 F.3d at 1069 (observing that "it is logical and inevitable that a species requires more critical habitat for recovery than is necessary for the species' survival").

Second, we oppose the Services' proposal to retain the language in Section 424.12(a)(1)(iii) limiting the designation of habitat for "species occurring primarily outside the jurisdiction of the United States." Again, the statutory provisions directly answer the question. Neither the definition nor the other provisions of the Act allow the Services to decline to designate critical habitat for a species generally found outside the U.S. based on the notion that it would have a small impact on the species' conservation compared to its overall range. Yet that is what the Services' new "negligible conservation value" provision appears to suggest.

Third, the language in Section 424.12(a)(1)(iv), regarding circumstances in which "no areas meet the definition of critical habitat," is superfluous. The ESA plainly states that the Services must designate critical habitat "to the maximum extent prudent and determinable" based on the best scientific and commercial data available. 16 U.S.C. §§ 1533(a)(3)(A)(i); 1533(b)(1)(A). And the defining issue is whether an area is essential to the species' "conservation," as in its contribution to the species' full recovery. As with the proceeding Section 424.12(a)(1)(iii), whether or not such a finding is justified is a question of science, not prudence.

Fourth, although we appreciate the elimination of Section 424.12(a)(1)(v), we are greatly concerned that the additional language in Section 424.12(a)(1)—that "not prudent" determinations are "not limited to" the listed justifications—arguably results in an equally open-ended invitation to abuse. The Services' reasoning for the removal of Section 424.12(a)(1)(v) is just as applicable to the addition of "not limited to." *Cf*. 88 Fed. Reg. at 40,768 (stating that the 2019 language could give the impression that "the Services might overstep their authority" by refusing to designate habitat "for any number of unspecified reasons that may be inconsistent with the purposes of the Act"). Framing the section as a non-exclusive list is not only contrary to Congress' expressed intent but also flouts the many court decisions that have concluded that Section 4(a)(3)(A) is to be strictly interpreted, limiting the Services' discretion to evade the statute's presumption in favor of designating habitat.

Congress directed the designation of critical habitat except in the "rare circumstances" when it "would not be beneficial to the *species*." H.R. Rep. No. 95–1625, at 17 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9467 (emphasis added). This accords with the recognition that "the greatest [threat to species] [is] destruction of natural habitats," *Hill*, 437 U.S. at 179. In keeping with Congress' intent, the Services previously set forth only two circumstances in which the

designation of critical habitat would not be prudent: (1) if identifying critical habitat could harm the species (for instance, by identifying where rare species may be found by collectors), or (2) where designating critical habitat would not benefit the species. 45 Fed. Reg. at 13,023 (citing 50 C.F.R. § 424.12(a)(1)&(2)).

The courts have sensibly rejected previous attempts to broaden an otherwise extremely narrow path, finding instead "clear congressional intent that the imprudence exception be a rare exception." *Nat'l Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997) (observing that the "fact that Congress intended the imprudence exception to be a narrow one is clear" and citing legislative history); *see also Sierra Club*, 245 F.3d at 443 (criticizing the Services' practice of "invert[ing] [congressional] intent, rendering critical habitat designation the exception and not the rule"). Leaving the potential reasons for a "not prudent" determination unbounded plainly violates Section 4(a)(3)(A) of the Act. The Services should simply return to the language in their 1980 implementing regulations to remedy the multiple flaws detailed here.

E. <u>The Restoration of the Longstanding Regulatory Language for Unoccupied Critical Habitat Upholds Congressional Intent. (16 U.S.C. § 1532).</u>

We appreciate the Service's restoration of the regulations' approach to unoccupied habitat. The prior administration's revisions were not only legally untenable but unwise as a policy matter. The existing regulations require the Services to assess the sufficiency of occupied habitat before demanding a finding of "certainty" both for the unoccupied habitat's contribution to recovery and the presence of "physical or biological features" that are essential to conservation. Neither demand comports with the governing statutory language.

The ESA asks only whether unoccupied critical habitat is "essential for the conservation of the species," 16 U.S.C. § 1532(5)(A)(ii), *i.e.*, essential to the species' survival and recovery. The Services previously found as much in the past, locating "no specific language in the Act that requires the Services to first prove that the inclusion of all occupied areas in a designation are insufficient to conserve the species before considering unoccupied areas." 81 Fed. Reg. at 7,427. More to the point, "there is no suggestion in the legislative history that the Services were expected to exhaust occupied habitat before considering whether any unoccupied area may be essential." *Id*. at 7,434; 88 Fed. Reg. at 40,769 (same). The Services have also recognized that adding the element of "physical and biological features" risks "conflating the statutory language regarding occupied critical habitat with that of the broader definition of 'habitat.'" 85 Fed. Reg. 81,411, 81,412 (Dec. 16, 2020); 88 Fed. Reg. at 40,769 (noting the potential statutory conflict).

The previous administration's interest in revising the regulations to include "physical and biological features" was apparently driven in part by a desire to grant landowners a *de facto* veto over the designation of unoccupied habitat, allowing them to attest that they would not permit unoccupied areas under their control to develop into habitat or contribute to the species' survival and recovery in order to avoid the designations of their land. *See* 83 Fed. Reg. 35,193, 35,198 (July 25, 2018) (attaching importance to whether landowners were "unwilling to undertake or allow [needed] restoration"). The return to the regulations' earlier language better aligns with

the Act's statutory commands and ensures that unoccupied habitat will continue to play a role in species' recovery.[10]

III. RESTORING BLANKET ESA SECTION 4(D)

We support FWS's proposal to restore the blanket 4(d) rules for threatened terrestrial species. As FWS recognizes in the proposed rule, providing comprehensive protection from take and trade to newly listed or reclassified threatened species is an important, common-sense way to prevent those species from declining further and reaching endangered status. FWS has recognized this since it first promulgated the blanket rule in 1975 to provide for the conservation of threatened species. The agency explained that the blanket rule, along with the authority to supersede the blanket rule with a species-specific rule, formed the "cornerstone of the system for regulating threatened wildlife." 40 Fed. Reg. 44,412, 44,414 (Sept. 26, 1975).

The ESA gives FWS clear authority and discretion to apply default protections to threatened species through the blanket 4(d) rules. Section 4(d) provides:

> Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under [Section 9].

16 U.S.C. § 1533(d).

Notably, Section 4(d) constrains FWS's authority in one direction—that is, if FWS finds that certain regulations are necessary and advisable for conservation, it must issue those regulations. It does not, however, require FWS to take a species-by-species approach to establishing take prohibitions for threatened species. Nor does it constrain FWS's authority to issue regulations that go beyond those that are necessary to promote conservation, or require the agency to determine or demonstrate that any regulations it does choose to issue are necessary for conservation. Rather, the Services have discretion to issue regulations that would benefit conservation even if they are not "necessary" to achieve it.

The D.C. Circuit made this finding when it upheld the blanket 4(d) rule 30 years ago:

[10] Nor is there any statutory justification for elevating the standard to "certainty" when determining what areas are "essential." As the Services themselves ably detail, the ESA's requirement to use the "best available science" cannot be leveraged to justify eliminating all speculation or uncertainty by the expert agencies. 88 Fed. Reg. at 40,770.

> [T]here is a reasonable reading of § 1533(d) that would not require the FWS to issue formal "necessary and advisable" findings when extending the prohibitions to threatened species. According to this interpretation, the two sentences of § 1533(d) represent separate grants of authority. The second sentence gives the FWS discretion to apply any or all of the § 1538(a)(1) prohibitions to threatened species without obligating it to support such actions with findings of necessity. Only the first sentence of § 1533(d) contains the "necessary and advisable" language and mandates formal individualized findings. This sentence requires the FWS to issue whatever other regulations are "necessary and advisable," including regulations that impose protective measures *beyond* those contained in § 1538(a)(1)….

Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.3d 1, 7–8 (D.C. Cir. 1993), *opinion modified on reh'g*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd on other grounds,* 515 U.S. 687 (1995).

Like its initial decision to promulgate the blanket 4(d) rules, FWS's decision to restore the blanket 4(d) rules is consistent with the ESA's direction to take proactive measures to protect threatened species *before* they become endangered. The ESA's stated purpose is "to provide a program for the conservation of … threatened species." 16 U.S.C. § 1531(b). Congress also declared "that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the ESA]." *Id.* § 1531(c)(1). Section 7 expressly requires all federal agencies to "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species." *Id.* § 1536(a)(1). In other words, Congress intended agencies to take affirmative action to conserve threatened species.

The legislative history similarly demonstrates that Congress intended the Service to take protective measures before a species is "conclusively" headed for extinction. Congress gave the Service the authority to protect species which are "likely to become an endangered species within the foreseeable future," 16 U.S.C. § 1532(20), so the Service could "regulate trade, prevent taking, and provide for habitat acquisition for these species before they actually become extinct." 119 Cong. Rec. 30,164. In doing so, Congress provided "[g]reater flexibility" through the ability to issue species-specific 4(d) rules, "while at the same time additional means of protection, conservation, and management is permitted and required." *Id.* As one court explained:

> The purpose of creating a separate designation for species which are "threatened," in addition to species which are "endangered," was to try to "regulate these animals before the danger becomes imminent while long-range action is begun." S. Rep. No. 307, 93d Cong. 1st Sess. 3 (1973), reprinted in Legislative History of the

> Endangered Species Act of 1973, As Amended in 1976, 1977, 1978.1979, and 1980 ("Leg. Hist."), at 302.
>
> The legislative history of the ESA contains ample expressions of Congressional intent that preventive action to protect species be taken sooner rather than later. *See, e.g.*, Leg. Hist. at 204 (H.R. Rep. No. 412, 93d Cong., 1st Sess. 5 (1973) ("[i]n the past, little action was taken until the situation became critical and the species was dangerously close to total extinction. This legislation provides us with the means of preventive action.") (remarks of Rep. Clausen); *id.* at 205 ("[i]n approving this legislation, we will be giving authority for the inclusion of those species which . . . might be threatened by extinction in the near future. Such foresight will help avoid the regrettable plight of repairing damages already incurred. By heeding the warnings of possible extinction today, we will prevent tomorrow's crisis") (remarks of Rep. Gilman); *id*. at 144 ("[s]heer self-interest impels us to be cautious," and "the institutionalization of that caution lies at the heart of the [ESA]").

Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 680 (D.D.C. 1997).

The ESA's language, purpose, history, and context support FWS's finding that applying blanket 4(d) rules to threatened plant and animal species is necessary and appropriate for the conservation of threatened species. 88 Fed. Reg. at 40,747. As the proposed rule explains, applying Section 9 prohibitions by default immediately upon the listing of threatened species provides essential protection from threats that led to the species' threatened status and helps prevent further declines to endangered status. Most species face multiple threats, many of which are not entirely understood at the time of listing. The blanket 4(d) rules give the agency the ability to quickly address threats as they arise and new science emerges, without having to develop a new set of regulations in response to every new threat or scientific finding. Moreover, immediate protection under the blanket rules is essential for species threatened by collection, trade, or malicious take. Listing these species can sometimes draw unwanted attention and attempts to collect or trade in a rare species, or destroy a species that is perceived as an impediment to development. The blanket rules provide an immediate safeguard against those significant threats.

In sum, the blanket 4(d) rule implements the institutionalized caution embodied by the ESA. It takes a precautionary approach to threatened species, providing them similar levels of protection as endangered species unless and until FWS determines that lower or alternative species-specific protections are appropriate. FWS's decades of experience have shown that the blanket rule provides an important, efficient means for conserving most threatened species while also providing the ability to craft species-specific rules when the agency determines that is appropriate.

In contrast, the 2019 rule added significant administrative burden and made it more difficult for threatened species to receive protection in the future. By removing the blanket 4(d) rule, the 2019 rule required the Service to undertake a new species-specific regulation for each newly listed or downlisted threatened species even when the Service determined that all 4(d) protections should apply to that species. 84 Fed. Reg. 40,006. Removing that burden will free critically needed funding and resources for the Service to complete its duties under the Act, including clearing a significant backlog of species awaiting consideration for protection. Restoring blanket 4(d) rules will also provide greater predictability and transparency to the public: interested parties will once again know what prohibitions apply upon the listing of a species absent a species-specific rule.

Finally, we support FWS's proposal to extend federally recognized Tribes the ability currently afforded to FWS and other federal and state agencies to aid, salvage, or dispose of threated species. Doing so recognizes the government-to-government relationship with Tribes and the importance of bringing Indigenous knowledge to species conservation. We recommend that FWS add a provision requiring FWS to review proposals by any entity other than FWS or NMFS to take an individual member of a listed species that poses a "demonstrable but non-immediate threat to human safety that to ensure the relevant Service agrees with the entity's determination that: (1) the species poses a "demonstrable threat" to human safety; (2) the take will be done in a "humane manner"; and (3) it is not "reasonably possible to eliminate such threat by live-capturing and releasing the specimen unharmed, in an appropriate area." *See* proposed new 50 C.F.R. § 17.31(b)(1).

IV. REVISIONS TO ESA § 7

A. <u>The Proposed Definitions of "Effects of the Action" and "Environmental Baseline" Improperly Segregate the Proposed Action and Undermine the ESA's Command to Give the Species the "Benefit of the Doubt."</u>

1. The Services should remove the requirement that consequences be "reasonably certain to occur" to be "effects of the action."

The 2023 draft revisions retain the definition of "effects of the action" from the 2019 revisions that limit the effects that a federal agency must consider in its jeopardy determination to those that would not result "but for" the federal action and are "reasonably certain" consequences of the federal action. ("A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur." 88 Fed. Reg. at 40,763 and 40,757.) The heightened certainty that the 2019 revisions and the draft rule require is contrary to the ESA's requirements and precedent that the Services address uncertainty by giving the species the "benefit of the doubt." *See, e.g.*, *Tenn. Valley Auth. v. Hill*, 437 U.S. at 194 ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'"); *Conner v. Burford*, 848

F.2d 1441, 1454 (9th Cir. 1988); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 873 (D. Or. 2016) (*NWF v. NMFS*).[11]

Agencies often find themselves with limited information on the specific effects of the proposed activity, especially where they make large-scale, programmatic decisions, (*e.g.*, forest management plans, nationwide permits, agency rulemakings), or where the best available scientific and commercial data is changing or constantly emerging (*e.g.*, climate change), but uncertainty and incomplete information cannot excuse agencies from making predictions about the effects of the actions they authorize, fund, or carry out. 16 U.S.C. § 1536(a)(2); *Conner*, 848 F.2d at 1444–45, 1452–54; *Nat'l Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 367–70 (E.D. Cal. 2007) (vacating biological opinion for failure to consider climate change impacts on reduced water levels in delta smelt habitat, even if the data before the agency were inconclusive).

In the context of listing determinations, the Services concede that "[i]mposing a 'reasonable certainty' standard is also unnecessary in light of the best available data standard of the Act," which has "not previously been interpreted to require a specific level of certainty . . ." and "could potentially result in the Services excluding from consideration the best available data merely because it was not deemed to be sufficiently certain." 88 Fed. Reg. 40,769–70. The same "best available science" requirement also applies to the Services' Section 7 consultation duties and process. 16 U.S.C. § 1536(a)(2). With respect to biological opinions, the Services recognize courts' decisions that held the ESA's "best scientific data available" standard does not require that the information relied upon by the Services be perfect or free from uncertainty. 88 Fed. Reg. 40,770.

In *Conner*, the Ninth Circuit held that where the "locations and extent of activity were unknown," the ESA required the agency to project oil and gas leasing activity and analyze their effects on listed species, using the best scientific and commercial data available to avoid

[11] The original language of Section 7 required federal agencies to ensure that their actions "do not" cause jeopardy to listed species. Endangered Species Act of 1973, Pub.L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (amended 1979). Concerned that this language could be interpreted to require the Services "to issue negative biological opinions whenever the action agency cannot guarantee with certainty that the agency action will not jeopardize the continued existence of the listed species," Congress "softened" Section 7 in 1979. Legislative History at 1442. Section 7 now requires agencies to insure that their actions are "not likely" to cause jeopardy. 16 U.S.C. § 1536(a)(2). In the legislative history for the amended Section 7, however, Congress made clear that "this language continues to give the benefit of the doubt to species, and it would continue to place the burden on the action agency to demonstrate to the consulting agency that its action will not violate Section 7(a)(2)." Legislative History at 1442. Courts consistently cite this portion of the legislative history to support the proposition that ESA requires agencies to err on the side of protection. *See, e.g., Conner*, 848 F.2d at 1454. While quoting other portions of this legislative history, the recent decision from the D.C. Circuit questioning this balance did not address or consider this explicit language underlying the 1979 amendments. *See Maine Lobstermen's Assn. v. Natl. Marine Fisheries Serv*., 70 F.4th 582, 596 (D.C. Cir. 2023).

jeopardy; "[t]o hold otherwise would eviscerate Congress' intent to give the benefit of the doubt to the species." *Conner*, 848 F.2d at 1452–54 (internal quotation omitted). In a valid biological opinion, the ESA requires the agency to affirmatively show that it has ensured its action "is not likely" to jeopardize species or destroy or adversely modify critical habitat, and any doubt is to be read in favor of protecting the species. 16 U.S.C. § 1536(a)(2); *see Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 99 F. Supp. 3d 1033, 1059 (N.D. Cal. 2015) ("If NMFS does not have the information to satisfy this duty [to ensure against jeopardy or adverse modification], then it simply cannot issue a finding of no jeopardy."); *see also NWF v. NMFS*, 184 F. Supp. 3d at 873 (no jeopardy conclusion relying on benefits from habitat improvement violated ESA requirement to give "benefit of the doubt" to species where data showed decline but was statistically too uncertain to establish whether improvement or decline occurred).

The definition of "effects of the action" (both as revised in 2019 and as modified by the 2023 proposed rule) reverses that burden. Under the draft rule, the Services could issue a no-jeopardy biological opinion because an effect was not "reasonably certain" to cause the expected harm to species or habitat—either because of a lack of information or attenuated or intervening causes. 88 Fed. Reg. 40,755, 40,757–58; 40,763–64. But the court in *Conner* rejected this type of argument as inconsistent with the ESA. 848 F.2d at 1454. The rule reads the gap in data or information and any doubt in favor of the federal action, rather than protecting the species, contrary to the language and intent of the ESA.

The revisions to "effects of the action" narrow the scope of the Services' and action agencies' analysis of the effects of federal actions on listed species and habitat, in violation of Section 7's requirements to insure that agency actions avoid jeopardy and adverse modification, the ESA's conservation purposes, Congress's direction to read doubt in favor of the species, and controlling case law. 16 U.S.C. §§ 1531(b), (c)(1), 1536(a)–(c).

The Services have appropriately proposed to delete the restrictive factors that applied to determine whether a consequence is "reasonably certain to occur" by deleting 50 C.F.R. § 402.17 and the requirement that a "reasonably certain to occur" finding be based on "clear and substantial information." Such language has created confusion in federal courts. *See*, *e.g.*, *Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 70 F.4th 582, 598–99 (D.C. Cir. 2023) (declining to follow Congress's direction and longstanding Supreme Court precedent in part because it found the Services' adopted an interpretation in the 2019 regulatory revisions that differed from the approach NMFS took in the challenged biological opinion).

While we support the deletion of that regulation, the Services maintain that the "reasonably certain to occur" factors in the deleted Section 402.17 are still relevant to its analysis, including "time distance or multiple steps," "remote in time or location," or "only reached through a lengthy causal chain." The Services propose instead to list and presumably further explain those factors in future guidance. 88 Fed. Reg. at 40,757. But there were fundamental problems with these factors in the 2019 revisions under 50 C.F.R. § 402.17, which

led the Services to delete them. Incorporating them as a later interpretive rule in "guidance" would shield them from notice and comment procedure and potentially complicate legal challenges. To the extent the Service intends to continue applying any version of these factors, they should be identified in informal rulemaking that is appropriately challengeable under the Administrative Procedure Act.

2. The Services should delete the final sentence in the definition of environmental baseline.

The Services propose to further revise the definition of environmental baseline (previously revised in 2019) to read, "The impacts to listed species or designated critical habitat from Federal agency activities or existing federal facilities that are not within the agency's discretion to modify are part of the environmental baseline." 88 Fed. Reg. at 40,763. This definition: (1) misinterprets the limited holding as to agency discretion in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); (2) is contrary to the structure and plain language of the ESA and potentially restricts the Services' ability to require "reasonable and prudent alternatives" ("RPAs") that might allow a federal action to proceed without causing jeopardy; and (3) is inconsistent with other aspects of the regulations and the caselaw. The Services should delete this sentence and the accompanying explanations in the preamble from the final rule.

First, the issue in *Home Builders* was limited to whether the action agency had sufficient discretion to trigger Section 7 consultation in the first place—*i.e.*, whether a statute provided enough room for the agency to follow its commands and obey the ESA's mandate to protect species. *Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928–29 (9th Cir. 2008) (*NWF v. NMFS II*). In other words, *Home Builders* only precludes ESA consultation where it is clear up front that an agency has no ability to comply with two conflicting mandates and no ability to modify any aspect of the action for the benefit of the species. It did not address the distinct question about the precise contours and limits of the agency's discretion *after* consultation is initiated, nor did it suggest that further segregating an action's components is required or even helpful. *Id.* It makes no sense to import the standard for *initiating* consultation into the consultation *process* for determining jeopardy because it can be nearly impossible to know which components of the action are discretionary and which are not.

Agencies must comply with the ESA where they have any ability to protect species in harmony with other mandatory duties. *NWF v. NMFS II*, 524 F.3d at 927–28. In *NWF v. NMFS II*, for example, the court observed that even where Congress directed mandatory goals or purposes—like the Corps' flood control responsibility and Bonneville Power Administration's power production—the way the Corps and BPA implement those mandates involves

innumerable discretionary choices, subjecting their actions to the ESA.[12] *Id. Home Builders* did not limit "effects of the action" only to those consequences that the agency had discretion to modify such that other consequences should be in the environmental baseline.

Second, front-loading questions about the precise contours of agency discretion is contrary to the language and structure of the Act. Once consultation is underway, agency discretion to modify a federal action is only relevant to the availability and design of reasonable and prudent alternatives—when an action will cause jeopardy. 16 U.S.C. § 1536(b)(3)(A) ("reasonable and prudent alternatives" are those which the Secretary "believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action"); 50 C.F.R. § 402.02 ("reasonable and prudent alternatives" must be "consistent with the scope of the Federal agency's legal authority and jurisdiction"). If no such alternatives exist—whether because there is no effective way to avoid or adequately minimize the harms and/or because the agency lacks the authority to implement any effective alternatives—then the Services must so state in a biological opinion and the action cannot proceed. 16 U.S.C. § 1536 (g)(3) & (5)(A). Where that is the case, Congress crafted a detailed path for the proponent of a jeopardizing action to seek an exemption for the action. 16 U.S.C. § 1536(h) (exemption by ESA Committee, colloquially known as the "God Squad").[13] Among other criteria, the committee must determine that there is no alternative to the proposed action without regard to an agency's jurisdiction or authority in order to grant an exemption. *See* 16 U.S.C. §§ 1536 (g)(3)(5)(A); 1536(h)(1)(A)(ii); and 1532 (1) (The term "alternative courses of action" means all alternatives and is not limited to original project objectives and agency jurisdiction). Congress made explicitly clear that the scope of the agency's statutory authority and jurisdiction plays no role in providing an exemption from the ESA's consultation requirements. Attempting to parse an action into its component "discretionary" and "non-discretionary" components at the start of

[12] Moreover, statutes authorizing agency action are often a mix of broad directives and more detailed provisions, making it nearly impossible to delineate the precise contours of an agency's discretion and the resulting effects. *See, e.g., NWF v. NMFS II*, 524 F.3d at 926, 928-29 (rejecting NMFS's construction of a hypothetical "reference operation" that attempted to serve as a proxy for the allegedly non-discretionary aspects of the action). The preamble exacerbates this problem by announcing the Services' intent to defer to the action agency's initial judgment about the limits of its discretion, thereby allowing the action agencies to inflate the environmental baseline without oversight from the Services. *See* 88 Fed. Reg. at 40,756 (Services "would likely defer to the Federal action agency's interpretation of their authorities"). This improperly abdicates this Services' vital role as an independent expert check on agency actions in the consultation process.

[13] Such an exemption has only been approved twice, and one of those was vacated. Endangered Species Comm. Decision on Grayrocks Dam and Reservoir Application for Exemption (Feb. 7, 1979); *Portland Audubon Soc. v. Endangered Species Committee*, 984 F.2d 1534 (9th Cir. 1993) (remanding exemption to Committee as contrary to law; agency withdrew exemption request and agreed to long range forest management plan to protect owls and proceed with timber sale).

the consultation process is not only confusing—and oftentimes impossible—it is inconsistent with the plain language and structure of the statute.

As a practical matter, parsing the "effects of the action" at the outset of the consultation process also improperly limits the Services' ability to consider and require meaningful RPAs to avoid jeopardy before the Services have even made a jeopardy finding. For example, assume modifications to dam operations would cause jeopardy when 100 members of a fish species were harmed. Further assume that 80 of those members were harmed by the environmental baseline, 20 members were harmed by the effects of the action, and 1 member was harmed by cumulative effects. NMFS could require RPAs that would diminish the risk to the 20 members harmed by the effects of the action and avoid jeopardy. Now assume that 99 of those members were harmed by the environmental baseline, 1 was harmed by the effects of the action, and 1 by cumulative effects. In the second example, NMFS could not require RPAs to avoid jeopardy because it would have predetermined that the agency only has "discretion" to modify operations to an extent that it could protect only one member of the species. Preemptively shifting impacts from "effects of the action" to the "environmental baseline" that cannot then be addressed by an RPA increases the likelihood of such outcomes.

Third, other aspects of the regulations indicate that determining which aspects of an activity are considered part of the baseline and which are considered effects of the action should be irrelevant to the jeopardy determination. Under the 2019 revisions to 50 C.F.R. § 402.14(g)(4), which the 2023 proposed revisions retain, the Services formalized the Ninth Circuit's holding in *NWF v. NMFS II*, reading the regulations to mean that the environmental baseline, effects of the action and cumulative effects must together be considered in the jeopardy determination:

> Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Existing case law requires the Services to specifically add these components together and to prohibit proposed actions where the aggregate sum of those components leave no cushion for the agency action to proceed without jeopardizing the species—regardless of the ratios of harm allocated to each individual component. *See PCFFA v. Bureau of Reclamation,* 426 F.3d 1082, 1093 (9th Cir. 2005) ("[t]he proper baseline analysis is not the proportional share the federal agency bears for the decline of the species, but what jeopardy might result from the agency's proposed actions in the present and future human and natural contexts"); *NWF v. NMFS II*, 524 F.3d at 930–31. In short, determining the limits of the agency's discretion to parse which aspects of an activity should be sorted into which definitional box is immaterial to the jeopardy determination if the Services are properly aggregating all of these boxes to determine whether an action may proceed. To the extent § 402.14(g)(4) reflects existing case law interpretations of the

statute that require an aggregate approach to determining jeopardy, we support its retention. However, the proposed retention of the environmental baseline definition from the 2019 regulations and the extended discussion in the preamble conflicts with § 402.14(g)(4) and indicates that the Services still assign some unexplained legal significance to which effects are allocated to the baseline (including from ongoing actions) and which are allocated to the action. This undermines any confidence that the Services will apply the aggregate approach required by the caselaw and raises significant unanswered questions about how the Services and action agencies will analyze the impacts under the environmental baseline together with the consequences under effects of the action to make a jeopardy determination.

This is especially problematic in light of the Services' and federal action agencies' history of treating the environmental baseline as a "reference operation" to which they compare the effects of the action and/or attempting to turn the baseline into a place to silo harmful effects that then are not fully considered and addressed in consultation. *NWF v. NMFS II*, 524 F.3d at 930 (NMFS failed to "incorporate degraded baseline conditions into its jeopardy analysis"); *Am. Rivers v. Fed. Energy Regul. Comm'n*, 895 F.3d 32, 47 (D.C. Cir. 2018) (rejecting argument "that to the extent there are issues with fish passage or seasonal flows, those are part of the environmental baseline (the historically degraded condition) and remain unaffected by this action"). The Services can and should end this history of analyzing the environmental baseline with less scrutiny than the effects of the action or using the baseline to isolate harmful effects, skewing the jeopardy analysis and short-changing the opportunity to minimize the overall harmful effects of the activity through an RPA.

Courts already are often forced to struggle with the question of whether the action itself causes jeopardy when the species is already in jeopardy (*i.e.*, is faring so poorly it cannot sustain *any* additional harm) or nearing a state of jeopardy and the action would make the survival and recovery prospects incrementally worse. *See Appalachian Voices v. Interior*, 25 F.4th 259 (4th Cir. 2022) ("if a species is already speeding toward the extinction cliff, an agency may not press on the gas"); *Am. Rivers v. Fed. Energy Regul. Comm'n*, 895 F.3d 32, 47 (D.C. Cir. 2018); *Cooling Water Intake Structure Coal. v. EPA*, 905 F.3d 49, 81 (2nd Cir. 2018); *Turtle Island Restoration Network v. U.S. Dep't of Com.*, 878 F.3d 725, 736 (9th Cir. 2017); *San Luis & Delta Mendota Water Auth. v. Jewell*, 747 F.3d 581, 639–40 (9th Cir. 2014); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521–25 (9th Cir. 2010); *NWF v. NMFS II*, 524 F.3d at 926, 928–33. Carrying forward an arbitrary distinction between discretionary and non-discretionary aspects of a single action will only add to this confusion and lead to worse outcomes for affected species. The Services should delete the last sentence in the definition of "environmental baseline."

Finally, adding "Federal agency" to the third sentence of the definition of the environmental baseline seems to improperly restrict the "effects of the action" to only those consequences where the federal *action* agency has discretion to modify the action. The Services rely on *Home Builders* for this addition, but that case did not limit the discretion only to the action agency, but the application of the consultation requirements to "actions in which there is discretionary Federal involvement or control" under 50 C.F.R § 402.03. 541 U.S. at 665-66, 669, 673. Multiple federal agencies often have discretionary involvement or control at one time

even if one agency is the lead on ESA Section 7 consultation on behalf of some or all of the agencies. For example, in *NWF v. NMFS II*, several agencies have authority over the Columbia River dams for flood control (Army Corps), water supply (Bureau of Reclamation), and power supply (Bonneville Power Administration). *NWF v. NMFS II*, 524 F.3d at 928–29. The Services should remove "Federal agency" and revise the preamble text that restricts review of actions of only the action agency to avoid unnecessarily restricting the effects of the action that would be considered during consultation. 88 Fed. Reg. 40,755–56.

3. The Services should apply the same procedures in formal and informal consultations.

The 2019 revisions added the requirement to formal consultation procedures, consistent with the Ninth Circuit's decision in *NWF v. NMFS* to "[a]dd the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g).

The Services should add this requirement to informal consultation because both informal and formal consultation serve the same requirement under Section 7 of the ESA—to ensure that a federal action does not jeopardize a listed species. Informal consultation may be a procedural shortcut, but nothing suggests it is also a substantive shortcut. To the contrary, the Services must carefully consider the "effects of the action"—including the impacts of past actions in the baseline, and the future direct and indirect effects of the action before it concurs in an "not likely to adversely affect" finding. *See* 50 C.F.R. § 402.02 ("effects of the action" include the environmental baseline and direct and indirect effects); § 402.12 (a) (action agencies' biological assessment ("BA"), which "is used in determining whether formal consultation … is necessary," "shall evaluate the potential effects of the action "); *see also* 50 C.F.R. § 402.12(j) (requiring submission of the BA to NOAA for its response "as to whether or not [it] concurs with the findings of the biological assessment").

B. <u>The Services Must Significantly Refine the Proposed Revisions to Sections 402.02 and 402.14(i) to Expand the Definition of Reasonable and Prudent Measures.(50 C.F.R. § 402.02; 50 C.F.R. § 402.14(j)).</u>

The Services propose to significantly modify provisions in Sections 402.02 and 402.14(i) governing what kinds of measures can be included in an incidental take statement as reasonable and prudent measures ("RPM") or terms and conditions intended to minimize incidental take for projects that will take – but will not jeopardize – listed species. The Services propose to broaden both the nature of measures that qualify as RPMs to include "offsets" that mitigate the impact of any unavoidable take as well as the spatial scale where those measures may apply by allowing the Services to consider measures outside the action area.

While expanding this definition to be more protective is a laudable goal, the Services' revisions, as proposed, are more apt to erode current protections and undermine conservation by

encouraging agencies to substitute indirect or geographically distant offsets for concrete measures that could directly avoid or reduce take in the action area. The Services should either abandon this proposal or significantly modify and clarify these provisions in a final rule to correct at least the following overarching problems.

First, the Services' description of these changes in the preamble is inconsistent and could lead to confusion as to whether offsets outside the action area would be considered "on par" with measures inside the action area that would directly reduce the amount or extent of incidental take. *Compare* 88 Fed. Reg. at 40,758, col. 2 ("in some circumstances, offsetting measures applied outside the action area would more effectively minimize the impact of the proposed action to the subject species") *with id*. at 40,758–59 ("Such offsetting measures are not an alternative to RPMs that reduce or avoid incidental take, but rather are additional measures to address the residual impacts to the species that remain after measures to avoid and, therefore, reduce incidental take are applied."). To avoid confusion, the Services should unequivocally explain its intent in the final rule and clarify the regulatory language to ensure that the new offsets may be applied only after exhausting all attempts to directly avoid, minimize or reduce the amount of take in the action area.

Similarly, while the Services state that the proposed changes to the RPM provisions are meant to expand on the current interpretation of that term, the proposed regulatory language does not carry out that interpretation. The Services state in the preamble that they intend to ensure that measures that directly reduce the level of take within the action area are considered and exhausted first, before turning to offsets inside or outside the action area. *See, e.g.,* 88 Fed. Reg. at 40,758, col. 3. But the proposed definition in Section 402.02 and the additional details in Sections 402.14(i)(2) and (3) fail to make this primacy clear. If the Services retain these provisions, they must revise these provisions to ensure that the priority/order of their consideration is clear.[14]

Finally, although the concept plays a central role in the proposed revisions, the Services do not define or establish any criteria for what may be considered an "offset" to minimize the impact of take. The lack of minimum criteria undermines the effectiveness of any changes and invites further confusion. The Services should include a detailed description or set of criteria to ensure that the proposed offsets actually provide maximum conservation benefits to listed species.

[14] Making this explicit would also more closely align these definitions of RPMs with other aspects of the regulations. For example, the regulations require the Services to specify the amount or extent of take in an incidental take statement. 50 C.F.R. § 402.14(i)(1)(i). And this quantification, of course, then serves independently as a check on the action, triggering reconsultation if exceeded. Ensuring that measures that most directly avoid or reduce the amount or extent of take within the action area are considered first would allow the Services and action agencies to prioritize actions that can directly reduce that number and hard-wire implementation of those measures into the reinitiation trigger.

If the Services wish to retain this proposed change, we urge the following changes to address the concerns raised above. Many of the recommendations included below are based on or taken directly from language in the preamble. Including those concepts explicitly in the regulations would help to avoid future confusion.

50 C.F.R. § 402.14(i)(2)

> Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action, may involve only minor changes, and may include measures implemented inside or outside of the action area that avoid, reduce, or offset the impact of incidental take. Measures to avoid or reduce the amount or extent of take from the project in the action area shall be considered as a first priority. Offset measures inside or outside the action area shall be considered (in that order) only to the extent that they address residual impacts of take that cannot otherwise be avoided or reduced by the measures inside the action area.

50 C.F.R. 402.14(i)(3)

> ~~Priority should be given~~ The Services shall first ~~to~~ develop~~ing~~ reasonable and prudent measures and terms and conditions that avoid or reduce the amount or extent of incidental taking anticipated to occur within the action area. To the extent ~~it is anticipated that~~ the action may ~~will~~ cause incidental take that cannot ~~feasibly~~ be completely avoided or reduced by such measures in the action area, the Services ~~may~~ will set forth additional reasonable and prudent measures and terms and conditions that use offsets that ~~serve to~~ minimize the residual impact of such taking on the species, provided those offset measures comply at a minimum with the criteria in (i)-(vi). ~~inside the action area~~. After first fully considering offset measures within the action area, the Service may then consider offsets outside the action area. Any offset measure:
>
> (i) must be calibrated to the kind and extent of the take and demonstrate a direct, appreciable recovery benefit;
>
> (ii) must directly benefit the affected population or, for species with a recovery plan, the relevant recovery unit;
>
> (iii) for measures outside the action area, must be based on an evaluation of whether other present or reasonably foreseeable

> activities in the area where a measure is proposed may diminish the conservation value of the measure;
>
> (iv) must not be part of, credited, or counted as mitigation for any other federal, state, tribal, or private activity;
>
> (v) must include specific benefits, verifiable and subject to monitoring and reporting by the action agency; and
>
> (vi) must include deadlines and require the action agency to document and report whether the prescribed actions or activities have occurred.

A brief explanation for these criteria follows:

- Measure must have a direct, appreciable recovery benefit: For example, where new transmission wires will kill endangered birds, an offset that would expand nearby nesting habitat for the species does not provide a 1-for-1 benefit. Dead animals do not benefit from better habitat to hatch or raise their young—and while the population could experience some benefit from expanded nesting habitat, there will be fewer individuals to use it. In these instances, the Services must conduct and include a transparent analysis that explains precisely how the proposed measure would provide the anticipated benefit to the species.

- Measure must ensure benefits to affected population: Where a species is doing relatively better in some parts of its range and faring poorly in others, offsetting the impacts of take in the areas where the species is struggling with measures that benefit the distant and/or more robust populations would only exacerbate the imbalance and thereby slow the recovery of the entire listed species.

- Measures outside of action area must account for impacts of other activities: For example, sediment from a timber sale on Forest Service land threatens to degrade or destroy spawning habitat for threatened bull trout in a watershed. The Service proposes to "offset" the impacts of residual take through habitat restoration in a nearby degraded watershed, improving conditions by 10%. As restoration is underway, a landowner in that watershed clearcuts 700 acres of forest, adding sediment to the stream and degrading habitat by 30%. This intervening action more than swallows the improvement the Service predicted for the offset in the watershed, but without a more expansive review of the activities in that area, the Service cannot ensure that improvements it counted as an offset would not themselves be offset by other harmful activities. This review and analysis of the baseline and cumulative effects in this nearby watershed would ordinarily occur as part of the consultation if it were within the action area, but that hardwired safeguard would not exist for offsets proposed outside the action area.

If the Services retain this proposal, they should adopt at least these revisions to ensure that the expanded definition provides meaningful benefit to species.

C. The Services Should Rescind the 2019 Changes to Section 402.14(g)(8) Because They Require Blind Reliance on Promises of Mitigation, in Violation of the ESA's Precautionary Principle. (50 C.F.R. § 402.14(g)(8))

The Services retain 50 C.F.R. § 402.14(g)(8), which requires the Services to presume the implementation and effectiveness of any measures proposed by an action agency to offset or mitigate the harmful effects of the proposed action. As we explained in our comments opposing the adoption of these changes in the 2019 rule, this provision contravenes the plain language of the ESA and congressional intent by providing the benefit of the doubt to the action agency rather than to the listed species. Its retention will continue to undermine conservation. In 2019, the Service attempted to justify this regulation by asserting that "judicial decisions have created confusion" about the need for certainty for these actions. But the decisions the agencies cited (and many more) are a symptom of agencies' consistent failures to take a precautionary approach to activities that jeopardize listed species, not a cause of confusion. The 2019 change would render the Services unable to even question outlandish speculation about the likelihood of implementation or beneficial effects of proposed mitigation measures when they evaluate a proposed action to determine whether it will jeopardize the continued existence of a species or destroy or adversely modify critical habitat.

It is impossible to reconcile the 2019 change with the precautionary principle embedded in the ESA. As courts have made clear for nearly thirty years, the risk that mitigation measures may not occur or may be ineffective "must be borne by the project, not by the endangered species." *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). This provision flips that risk allocation on its head.

Providing the "benefit of the doubt" to federal action agencies' promises to implement beneficial/mitigation measures as part of the action also creates an irrational double standard for evaluating the effects of the action. While federal beneficial proposals enjoy a favorable presumption in the Services' analysis, harmful effects and activities must meet a more rigorous test before they will be considered. Although the Services propose to delete the definitions of these concepts at 50 C.F.R. § 402.17, the proposed revisions to the definition of "effects of the action" in Section 402.02 would still subject detrimental "consequences" of a proposed action to the two-part test (the but for and reasonably certain to occur standards) before they could be considered in the consultation process. But under the 2019 change, beneficial actions are presumed to be certain to occur simply because those measures are proposed by the action agency. In other words, the Services scrutinize adverse effects only after they have passed through the two-part screen but will presume the opposite for beneficial/mitigation measures without any threshold consideration whether those actions or their supposed benefits are likely to accrue.

The Services' reliance on the language of Section 402.14(c) in the 2019 regulations does not alleviate these shortcomings. The information listed in that section does not include any

requirement that an agency or applicant demonstrate with any level of detail or certainty that particular measures will take place or that they would have their intended effect. Relying on after-the-fact-reinitiation of consultation is a similarly empty gesture. At the point that consultation is reinitiated, the harm to listed species has been done and, where the Services relied on incomplete or ineffective mitigation measures to avoid jeopardy, may be jeopardizing the species. Simply reinitiating consultation (especially when the same favorable assumptions about the action agencies' promises will be applied the second time around) does nothing to alleviate that harm, let alone satisfy the substantive duty to ensure that the action does not cause jeopardy.

Moreover, presuming that an action agency will fully implement beneficial aspects of a proposed action ignores reality. The track record of decades of Section 7 implementation underscores the need for the Services to question and independently ensure that that proposed mitigation measures will actually offset the very real harms to species and their habitats. The past thirty years provide numerous examples of action agencies (or the Services themselves in the development of reasonable and prudent alternatives) either: (1) promising more mitigation than they could possibly deliver in order to alleviate the harmful effects of a proposed action; and/or (2) making optimistic assumptions about the efficacy of mitigation measures that fall far short of what is needed to avoid jeopardy. In short, the Services should know better—they have ample experiences to draw from which underscores that beneficial mitigation actions frequently do not occur or are not sufficient. As just two examples:

- On the White River in Washington State, NMFS concluded in 2007 that an antiquated Army Corps of Engineers fish trap and dam was jeopardizing threatened chinook salmon and steelhead but relied in its biological opinion on the Corps' promise to replace the facility with a new one by 2012. That date came and went without the Corps even designing a new facility. NMFS sought reinitiated consultation, but it took several years and a lawsuit by conservation groups to ensure that consultation was complete and the ongoing oversight of a federal court to ensure that the Corps completes the project by the new deadline.

- In a series of legally invalid biological opinions, NMFS relied heavily on the action agencies' promise to complete habitat improvement projects in the Columbia River to conclude that the operation of federal dams on the Snake and Columbia Rivers would avoid jeopardy. But the promised actions never materialized. Despite a series of holdings in successive court opinions that the actions were not likely to occur, the action agencies continued to rely on them such that near the end of a ten-year biological opinion, the action agencies had implemented no more than 18 percent of the promised projects and fell far short of their own wildly optimistic predictions of benefits. *NWF v. NMFS*, 184 F. Supp. 3d at 903–09.

There is nothing in the track record that would justify the Services' blind faith that federal action agencies must be taken at their word that they will accomplish promised mitigation measures necessary to avoid jeopardy or undue harm to listed species simply because they say

they will. *See, e.g.*, *Tenn. Valley Auth. v. Hill*, 437 U.S. at 194.[15] We urge the Services to rescind this detrimental 2019 change in the final rule.

D. Retaining "As a Whole" Language in Section 402.02 Invalidly Rewrites the ESA, Undermines the Special Role Designated Critical Habitat Plays in Recovery, And Would Allow Harm to Imperiled Species through "Death by a Thousand Cuts."

The Services retain the 2019 redefinition of "destruction or adverse modification" to apply only on the scale of the impacts relative to the value of critical habitat "as a whole." This approach conflicts with the ESA's focus on recovery and invites a comparative analysis that leads to a "death by a thousand cuts." This is a special concern for highly migratory or wide-ranging species that, by definition, require large amounts of designated critical habitat. The comparative approach of the proposed regulation prejudices any meaningful analysis of individual or cumulative effects to these species' critical habitat simply because these species have more habitat to serve as the "denominator" in this comparison. The Services should remove this unnecessary language from any final rule.

First, Congress wrote and enacted the ESA without requiring destruction or adverse modification of critical habitat as a whole. The Services' attempt to add that language—and to limit what qualifies as destruction or adverse modification—contradicts the plain language of the Act and congressional intent and invades Congress's legislative sphere. In fact, inserting "as a whole" threatens to render Section 7's jeopardy provisions meaningless surplus, as any federal action that would appreciably diminish the value of critical habitat as a whole would almost assuredly jeopardize the continued existence of that species.

Second, the "as a whole" language disregards circumstances where the Services have designated critical habitat necessary for certain functions, such as dispersal habitat or nesting/roosting/foraging habitat for threatened northern spotted owls in the Pacific Northwest. While the preamble includes a recognition that some areas of critical habitat may be disproportionately biologically important or relevant to the species, the proposed language does not capture those nuances or require an analysis that would ensure the Services' conclusions are based on such biologically determinative distinctions. Requiring the Services' determination to be based on appreciably diminishing the value of critical habitat "as a whole" would countenance destruction or adverse modification of one type of designated critical habitat, even if loss of that habitat would harm the species or forestall its recovery.

Third, the language invites and encourages a biologically meaningless comparison between destruction or harm to a specific amount of habitat and critical habitat as a whole. The

[15] Compounding these problems, the regulations contain no definitions or standards the Services would employ to evaluate the material or assertions coming from the federal action agencies. In order for the Services to truly be an independent check on impacts to species and habitat, to meet the best available science requirement, and to avoid even more confusion and uncertainty, the regulations must at least include clear language requiring the Services to make independent analysis for accuracy, reliability, and assure that the best available science is employed.

notion that the amount of critical habitat affected by any one single project must be "large" or "significant" before the agency will find adverse modification virtually guarantees that projects across the range of a species could cumulatively destroy large amounts of critical habitat, yet never individually be found to "adversely modify" critical habitat. *See Or. Natural Desert Ass'n v. Lohn*, 485 F. Supp. 2d 1190, 1198 (D. Or. 2007), *judgment vacated as moot*, 2007 WL 2377011 (D. Or. June 11, 2007) (noting agency's "reference to 'rangewide' effects to critical habitat" and "critical habitat overall" and finding that "nothing in the statute as far as I can tell permits adverse modification of critical habitat on a unit by unit basis.").

Finally, the proposed change also fails to account for the role that critical habitat plays in the recovery of species. "[T]he ESA was enacted not merely to forestall the extinction of species (i.e., promote a species['s] survival), but to allow a species to recover to the point where it may be delisted." *Gifford Pinchot,* 378 F.3d at 1070. Moreover, "the purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery." *Id.* Recovery and survival are distinct, though complementary, goals. Critical habitat promotes both: "Congress said that 'destruction or adverse modification' [of designated critical habitat] could occur when sufficient critical habitat is lost so as to threaten a species' recovery even if there remains sufficient critical habitat for the species' survival." *Id.* (emphasis added). "[I]t is logical and inevitable that a species requires more critical habitat for recovery than is necessary for the species' survival…." *Id.* at 1069. Treating some areas or parcels of critical habitat as somehow "expendable" simply because they are small by comparison would erode the potential for the habitat as a whole to provide for recovery. The Services have provided no standards or sideboards to ensure that habitat necessary for a species' recovery (as opposed to its mere continued existence) is not discounted or more permissibly adversely modified when conducting a range-wide analysis.

E. <u>There Is No Need To Create a 60-Day Limit on Informal Consultation (50 C.F.R. § 402.13(c)(1)).</u>

The 2023 draft regulations make no change to the 2019 revisions to limit the informal consultation process to 60 days. According to the information included in the preamble to the 2018 draft revisions, only 3% (n=46) of informal consultations take more than three months to complete. 83 Fed. Reg. 35,185; 84 Fed. Reg. 44,979, 44,997–98. There is no rational justification to adopt a rule to address this low number of informal consultations. Nor is there any reason to believe that any of the small percentage of informal consultations are causing a problem for the action agencies. Rather than establishing an arbitrary deadline, the Services' focus would be better directed to addressing the sliver of informal consultations that it highlights as the reason for this proposal.

F. <u>Adoption of Other Agencies' Biological Analyses (50 C.F.R. § 402.14(h)(3))</u>

The 2023 draft regulations make no change to the 2019 revisions that unlawfully allow the Services t o adopt, as their own biological opinions, all or part of a federal action agency's consultation initiation package. 50 C.F.R. § 402.14(h)(3)(i). Only the Services, and not the federal action agency, are statutorily authorized to perform a biological analysis of the effects of

the action and have the requisite biological expertise to do so. 16 U.S.C. § 1536(b)(3)(A); *Karuk Tribe of Cal. v. ,U.S. Forest Serv.,* 681 F.3d 1006, 1020 (9th Cir. 2012) ("[T]he purpose of consultation is to obtain the expert opinion of wildlife agencies"); accord *Turtle Island Restoration Network v. NMFS*, 340 F.3d 969, 974 (9th Cir. 2003). As the Second Circuit noted: "[t]he ESA requires the Services to *independently* evaluate the effects of agency action on a species or critical habitat." *Cooling Water Intake Struc. Coalition*, 905 F.3d 49, 80 (2d Cir. 2018) (emphasis added). The rule unlawfully permits the Services to abdicate their statutory consultation duty to nonexpert agencies in violation of Section 7(b)(3)(A).

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

The 2023 draft regulations make no change to the 2019 revisions that allow the Services to enter into expedited consultation under 50 C.F.R. § 402.14(l). The Services provided no evidence to support their claim that the new "expedited consultation" process "will benefit species and habitats by promoting conservation and recovery through improved efficiencies in the Section 7 consultation process," nor did they provide any explanation as to how this process "will still allow for the appropriate level of review." 84 Fed. Reg. 45,008. While claiming that "many projects" that "have minimal adverse impacts" would qualify for the new expedited consultation procedure, the Services identify just one such example and provide no qualifying criteria for such projects. *Id*. The lack of any appropriate guidelines on this process—such as limiting it to projects whose primary purpose is the conservation of listed species with a successful record of implementation, as exists in current FWS guidance—will only lead to further confusion and arbitrary application of the regulation. *See Nat'l Cable & Telecom. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 981 (2005) (unexplained change in agency policy was arbitrary and capricious).

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

The 2023 draft regulations make no change to the unlawful 2019 revisions that added section 402.16(b), which exempts the Bureau of Land Management ("BLM") and the U.S. Forest Service ("USFS") from having to reinitiate consultation on a land management plan when a new species is listed or new critical habitat is designated in the plan area, provided that actions authorized under the plan "will be addressed through a separate action-specific consultation." 84 Fed. Reg. 44,980, 45,010–11. The Section 7 consultation requirement applies on an ongoing basis to all federal agency actions over which the agency retains discretionary involvement or control. *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 667–68 (2007). In making that determination, the key issue is not whether the action is "complete" but whether the federal agency retains some degree of discretion or control to modify its implementation of the action "for the benefit of a protected species." *Karuk Tribe*, 681 F.3d at 1021; *accord Turtle Island*, 340 F.3d at 974, 977; *see, e.g.*, *NWF v. NMFS II*, 524 F.3d at 926–29 (obligation to consider effects of ongoing operations of dam, where Congress specified broad goals, but agency retained significant discretion as to how to achieve those goals). The Services do not and cannot contend that the BLM and USFS do not retain sufficient discretionary involvement, authority, or control over land management plans to implement additional protections for species and habitat upon a new listing or critical habitat designation.

Instead, the Services plainly admit that this rule change was designed to overrule the Ninth Circuit's holding in *Cottonwood Environmental Law Ctr. v. U.S. Forest Serv*., 789 F.3d 1075 (9th Cir. 2015). 84 Fed. Reg. 44,980, 45,009–10. In *Cottonwood*, the Court held that a federal agency "has a continuing obligation to follow the requirements of the ESA" where it has continuing regulatory authority over the action. 789 F.3d at 1087. Applying this reasoning, the Court held that the USFS was required to reinitiate consultation on a management plan where FWS had revised a previous critical habitat designation to include National Forest land. *Id.* at 1087–88. The Court reasoned that "requiring reinitiation in these circumstances comports with the ESA's statutory command that agencies consult to ensure the '*continued* existence' of listed species." *Id.* (emphasis in original). "[N]ew [critical habitat] protections triggered new obligations," the Court explained, and USFS could not "evade its obligations by relying on an analysis it completed before the protections were put in place." *Id*. at 1088.

Nor can the agencies adequately address harm to newly listed species though later site-specific consultations, as the Services opined when adopting this provision in 2019. 84 Fed. Reg. 44,993, 44,996–97. Consultation on programmatic actions provides a full picture of all relevant impacts in order to determine whether the combination of activities in the program/plan will avoid jeopardy and adverse modification of critical habitat. These determinations are appropriately made at the programmatic level, where the agency is best able to consider the aggregate impacts of all the proposed activities, together with other activities taking place in the same area. Deferring this analysis to project-specific consultations risks masking or missing these collective impacts. Indeed, courts have rejected agencies' attempts to "defer [programmatic-level] analysis to future site-specific consultations" for precisely these reasons. *PCFFA v. NMFS*, 482 F. Supp. 2d 1248, 1267 (W.D. Wash. 2007).

The 2019 rule limiting the USFS's and BLM's obligations to reinitiate consultation is contrary to their obligations under Section 7 to insure against jeopardy and adverse modification of critical habitat, as well as the ESA's conservation mandate. 16 U.S.C. §§ 1531(b), (c)(1), 1536(a)(1), (a)(2). The Services should delete the 2019 exemption for these land management plans.

V. REGULATORY CHANGES WITH SUBSTANTIVE IMPACTS MUST BE ANALYZED PURSUANT TO THE NATIONAL ENVIRONMENTAL POLICY ACT.

As detailed in these comments, many of the Services' proposed changes to the regulations would significantly undermine existing safeguards for current and future ESA-listed species and their critical habitat. The Services must consider and disclose the significant environmental impacts under NEPA. The final regulations will be major federal actions; none qualify for categorical exclusions from NEPA compliance; and each will have an extraordinary effect. The Services must prepare an environmental impact statement ("EIS") or environmental assessment ("EA") taking a hard look at the foreseeable impacts of their regulatory changes along with a reasonable range of alternatives. The Services cannot validly invoke Categorical Exclusions, and it was likewise improper to do so in promulgating the 2019 revised ESA regulations. These ESA rules are substantive, not administrative or procedural; their application

is not speculative; extraordinary circumstances are present; and the Services have previously complied with NEPA when promulgating regulations.

VI. THE SERVICES SHOULD NOT VIOLATE THE ESA'S CONSULTATION REQUIREMENT.

Because these rules will be final agency actions that may affect threatened and endangered species, the Services must ensure, through self-consultation, that the new regulations are not likely to jeopardize the continued existence of threatened and endangered species or destroy or adversely modify critical habitat. The Services will violate ESA § 7(a)(2) if they do not consult on the final rules. Additionally, acting in reliance on the final rules prior to the completion of consultation would violate ESA § 7(d)'s prohibition on the irreversible or irretrievable commitment of resources. Neither FWS nor NMFS may rely on these rules until they complete consultation, using the best available science, and ensure the rules will not jeopardize species or destroy/adversely modify critical habitat.

* * * *

If you have any questions about these comments, please do not hesitate to contact us.

Sincerely,

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Steve Mashuda
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Michael Mayer
Paulo Palugod

Together with:

Center for Biological Diversity	Natural Resources Defense Council
The Humane Society of the United States	Sierra Club
National Parks Conservation Association	WildEarth Guardians
Animal Welfare Institute	Cascadia Wildlands
Appalachian Trail Conservancy	Conservation Law Foundation
Buffalo Field Campaign	Endangered Habitats League

Endangered Species Coalition

Environmental Defense Center

FOUR PAWS USA

Friends of the Inyo

International Marine Mammal Project of Earth Island Institute

Los Angeles Audubon Society

Native Plant Society of the United States (formerly Native Plant Conservation Campaign)

North Central Washington Audubon Society

Northcoast Environmental Center

Safe Alternatives for our Forest Environment (SAFE)

Sierra Forest Legacy

Snowlands Network

Standing Trees

The #RelistWolves Campaign

The Fire Restoration Group

The Ocean Project

Western Watersheds Project

Wyoming Wildlife Advocates