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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI‘I

CONSERVATION COUNCIL FOR HAWAI‘I; CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; NATIONAL PARKS CONSERVATION ASSOCIATION; NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB; and WILDEARTH GUARDIANS, Plaintiffs, v. DAVID BERNHARDT, U.S. Secretary of the Interior; U.S. FISH AND WILDLIFE SERVICE; WILBUR ROSS, U.S. Secretary of Commerce; and NATIONAL MARINE FISHERIES SERVICE, Defendants.	CIVIL NO. 1:21-CV-00040 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Conservation Council for Hawai‘i, Center for Biological Diversity, Defenders of Wildlife, National Parks Conservation Association, Natural Resources Defense Council, Sierra Club and WildEarth Guardians (collectively, "Plaintiffs") file this Complaint challenging the Trump administration's promulgation of a definition for "habitat" as part of the regulations that implement section 4 of the Endangered Species Act. Specifically, Plaintiffs complain of defendants David Bernhardt, in his official capacity as the United States Secretary of the Interior, United States Fish and Wildlife Service, Wilbur Ross, in his official capacity as the United States Secretary of Commerce, and National Marine Fisheries Service (collectively, "Defendants") as follows:

INTRODUCTION

1. Congress enacted the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, in 1973 to affirm our nation's commitment to the conservation of threatened and endangered species and their habitat—the forests, grassland, prairies, rivers, and seas these species need to survive. Congress specifically gave "conservation" a sweeping definition—the use of all methods and procedures necessary to recover threatened and endangered species so that they no longer need the Act's protections. 16 U.S.C. § 1532(3). The ESA works, in part, by placing

the survival and recovery of imperiled animals and plants at the forefront of every federal action and decision.

2. When Congress enacted the ESA, it understood that habitat protection was key to saving species from extinction and allowing for their eventual recovery. *See* H.R. Rep. No. 93-412, at 5 (1973). Consistent with that understanding, Congress identified as the first of the ESA's purposes "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b).

3. Section 4 of the ESA, *id.* § 1533, requires the listing of species as endangered or threatened when they meet the statutory listing criteria. Further evidencing Congress's understanding of habitat's vital role in species conservation, the first listing criterion is "the present or threatened destruction, modification, or curtailment of [the species'] habitat or range." *Id.* § 1533(a)(1)(A). Moreover, Congress commanded that the Services generally designate critical habitat—including unoccupied areas that are "essential to the conservation of the species"—concurrently with a species' listing as endangered or threatened. *Id.* § 1532(5)(A)(ii); *see also id.* § 1533(a)(3)(A).

4. For nearly half a century, the Department of the Interior and the Department of Commerce, acting through the U.S. Fish and Wildlife Service

("FWS") and the National Marine Fisheries Service ("NMFS") (collectively, "the Services"), have administered the ESA through duly promulgated joint regulations.

5. This action challenges the Services' final rule, promulgated December 16, 2020, which, for the first time, defines the term "habitat" for the purposes of designating an imperiled species' critical habitat. *See* 85 Fed. Reg. 81,411 (Dec. 16, 2020) (to be codified at 50 C.F.R. § 424.02). The challenged regulatory definition of "habitat" precludes the Services from designating critical habitat in "areas that do not currently or periodically contain the requisite resources and conditions [to support one or more life processes of a listed species], even if such areas could meet this requirement in the future after restoration activities or other changes"—such as foreseeable climate change—"occur." *Id.* at 81,413.

As detailed below, in promulgating this definition, the Services violated the plain language of the ESA and subverted its fundamental purpose. Additionally, the promulgated definition lacks any reasoned basis and is arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*.

6. In promulgating the habitat definition, the Services also failed to consider and disclose the regulation's significant environmental impacts in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* The new definition of "habitat" removes important protections for areas that are essential for the conservation of endangered and threatened species and

will significantly and adversely affect the human environment by undermining the ESA's purpose and protections. As a major final action, the rule's significant and adverse impacts on imperiled species and the ecosystems on which they depend preclude the use of a categorical exemption from NEPA and require the preparation of an environmental impact statement ("EIS").

7. For these violations of law, Plaintiffs seek an order from this Court (1) declaring the regulatory habitat definition invalid, (2) vacating the regulation, and (3) enjoining the Services from applying or otherwise relying on the regulatory habitat definition.

JURISDICTION AND VENUE

8. Plaintiffs bring this action pursuant to the APA, 5 U.S.C. §§ 701-706. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (actions arising under the laws of the United States) and 28 U.S.C. §§ 2201-2202 (power to issue declaratory judgments in cases of actual controversy).

9. Venue is properly vested in this judicial district by virtue of 28 U.S.C. § 1391(e), because this is a civil action in which officers or employees of the United States or an agency thereof are acting in their official capacities or under color of legal authority, Plaintiff Conservation Council for Hawai‘i resides in this district, other Plaintiffs have members and offices in this district, and many of the

consequences of Defendants' violations of the laws giving rise to the claims articulated herein occurred or will occur in this district.

10. The challenged agency action is final and subject to this Court's review under the APA, 5 U.S.C. §§ 701-706.

PARTIES

Plaintiffs

11. Plaintiff Conservation Council for Hawai‘i ("CCH") is a non-profit citizens' organization based in Hawai‘i with approximately 5,000 members in Hawai‘i and throughout the United States mainland and foreign countries. CCH is the Hawai‘i affiliate of the National Wildlife Federation, a non-profit membership organization with over 5.8 million members and supporters nationwide. CCH's mission is to protect native Hawaiian species, including threatened and endangered species, and to restore native Hawaiian ecosystems.

12. For over 70 years, CCH has been foundational to conservation efforts in Hawai‘i. The protection of Hawai‘i's endangered and threatened plants and animals, and the habitat upon which they depend, is of particular concern to CCH. In furtherance of these goals, CCH filed suit in *Conservation Council for Hawai‘i v. Lujan*, Civ. No. 89-953 ACK (D. Haw. 1990) (resulting in a settlement pursuant to which FWS listed 187 taxa of Hawaiian plants), *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998) (finding arbitrary and

capricious FWS's refusal to designate critical habitat for 245 taxa of endangered and threatened plants), and *Conservation Council for Hawai'i v. Babbitt*, Civ. No. 99-00283 HG (D. Haw. 1999) (securing listing and critical habitat designation for ten plant taxa from Maui Nui). As a result of CCH's advocacy, FWS has designated critical habitat for hundreds of endangered and threatened plant taxa, including designation of highly degraded areas that require extensive restoration to contribute to the conservation of those species.

13. CCH has also been instrumental in the protection of critical habitat for ESA-listed Hawaiian forest birds such as the palila (*Loxioides bailleui*). In 1975, FWS identified the palila, as one of ten "high priority species" whose "critical habitat" should be determined "as rapidly as possible." 40 Fed. Reg. 21,499, 21,501 (May 16, 1975). When FWS finalized the palila's critical habitat in 1977, it designated unoccupied areas decimated by feral grazing animals that required "eradication of the sheep and goats … to achieve the regeneration of the forest and restoration of the Palila." *Palila v. Hawai'i Dep't of Land and Natural Resources*, 639 F.2d 495, 496 (9th Cir. 1981); *see also* 42 Fed. Reg. 47,840, 47,842 (Sept. 22, 1977). CCH has launched numerous campaigns to keep pressure on federal and state governments to protect and restore currently unoccupied critical habitat on Mauna Kea for the palila by removing ungulates that destroy and degrade the

native forest habitat, eradicating invasive species and predators, and carrying out necessary reforestation and other restoration work.

14. CCH continues to be a leading voice for wildlife in Hawai‘i. CCH members regularly advocate for imperiled species and the conservation of the ecosystems upon which these species rely and will continue to do so on an ongoing basis in the future. CCH’s members rely on the designation of critical habitat to preserve and aid in the recovery of endangered and threatened Hawaiian plants and animals, such as the palila, that they frequently engage in observing, researching, and photographing for aesthetic enjoyment, and other recreational, scientific, commercial, and educational activities, and CCH members have specific intentions to continue to do so frequently and on an ongoing basis in the future. CCH’s members also include professional and lay wildlife photographers that derive substantial scientific, educational, economic, recreational, commercial, aesthetic and personal benefits from studying, observing, photographing, and enjoying these species in the wild.

15. CCH members participate in restoration work to restore the native forest habitat of Hawai‘i’s endangered and threatened species, including designated critical habitat. CCH members lead hikes, observations, and educational activities in designated critical habitat areas that are currently capable of supporting ESA-listed Hawaiian plants and animals, as well as in designated

critical habitat that would be capable of supporting these species with further restoration and management. CCH members will continue to conduct the aforementioned activities on an ongoing basis in the future.

16. Plaintiff Center for Biological Diversity ("the Center") is a non-profit environmental organization founded in 1989, dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center is incorporated in California and headquartered in Tucson, Arizona, with field offices throughout the United States and Mexico, including in Honolulu, Hawai‘i. The Center has more than 1.7 million members (including members who reside in Hawai‘i) and online activists dedicated to the protection and restoration of endangered species and wild places. The Center has worked for many years to protect imperiled plants and wildlife, open space, air and water quality, and overall quality of life. As a result of the Center's work, over 700 species and nearly half a billion acres of critical habitat have been protected under the ESA.

17. The Center has a long history of environmental advocacy with a particular focus on threatened and endangered species in geographic areas across the United States, including work to secure and protect critical habitat for imperiled species. For example, the Center filed litigation to secure the designation of critical habitat for the Guam Micronesian kingfisher (*Halcyon cinnamomina*), which is extinct in the wild. *See* 69 Fed. Reg. 62,944, 62,945 (Oct.

28, 2004). When FWS designated critical habitat for the kingfisher, it knew that reintroducing the species into the wild would require eradicating brown tree snakes and other nonnative predators. *Id.* at 62,953, 62,958. Notwithstanding the fact that kingfishers could not then survive anywhere on Guam, FWS designated unoccupied habitat to ensure areas would be protected for the species' eventual reintroduction. *Id.* at 62,950-51. As FWS emphasized in designating this habitat, "[w]hile efforts to control the brown treesnake continue …, it is vital that habitat for Guam's native wildlife be safeguarded for the future." *Id.* at 62,960. Furthermore, based on the best available science, FWS designated not only areas with relatively intact native forest, but also "non-forested areas interspersed with forested areas because of their potential for reforestation." *Id.* at 62,949; *see also id.* at 62,959 (peer reviewers supported designation of "degraded areas with restoration potential").

18. The Center's members derive recreational, spiritual, cultural, professional, commercial, scientific, educational, and aesthetic benefits from their interactions with imperiled species, and the Center and its members are concerned with the continued conservation of imperiled species, including ones that will be adversely affected by the habitat definition at issue in this suit. One such species is the 'i'iwi (*Vestiaria coccinea*), a Hawaiian forest bird. The spread of avian malaria and avian pox has limited the 'i'iwi's range to high-elevation areas where it is too

cool for the mosquitos that carry the diseases. As climate change pushes warmer temperatures father and farther upslope, the bird will have fewer and fewer high-mountain refuges. To save the ‘i‘iwi from extinction, in 2010, the Center petitioned FWS to list the species under the ESA, as well as to designate its critical habitat. In 2011, the Center reached a historic agreement with FWS, compelling it to make a listing proposal for the ‘i‘iwi by 2012, as well as move forward on listing decisions for 756 other rare species. FWS listed the ‘i‘iwi as threatened in 2017, but to date, has not designated critical habitat for this species. In October 2020, the Center noticed its intent to sue FWS over its failure to designate the ‘i‘iwi’s critical habitat. Critical habitat for the ‘i‘iwi would be subject to the Services’ new habitat definition, which deeply concerns the Center and its members because the rule will preclude critical habitat designation for the ‘i‘iwi in historically occupied—but currently unoccupied—areas that are essential to the recovery of the species but will require restoration and management to become habitable. The Center and its members regularly advocate for imperiled species like the ‘i‘iwi and the conservation of the ecosystems upon which these species rely, and the Center and its members will continue to do so on an ongoing basis in the future.

19. Plaintiff Defenders of Wildlife (“Defenders”) is a non-profit conservation organization based in the United States dedicated to the protection of

all native animals and plants in their natural communities. Defenders is incorporated and headquartered in Washington D.C., and has more than 1.4 million members and supporters located across the United States and its territories, including over 5,000 members and supporters in the State of Hawai‘i. Defenders is a leading advocate for innovative solutions to safeguard our wildlife heritage for generations to come, and its primary mission is to protect native wild animals and plants in their natural communities. Defenders has developed programs for combating species extinction, the loss of biological diversity, and habitat alteration and destruction. Defenders has long been involved in seeking to promote the protection and recovery of threatened and endangered species using the ESA. Defenders regularly provides comments on critical habitat designation proposals to ensure that the most biologically critical areas for imperiled species' survival and recovery are included in the Services' final designation.

20. Defenders is invested in ensuring the protection of imperiled species through various advocacy actions. One such example is the Florida leafwing butterfly (*Anaea troglodyte floridalis*). In designating critical habitat for the Florida leafwing butterfly, FWS included in its designation unoccupied areas that "are still suitable for the butterfly or that could be restored." 79 Fed. Reg. 47,180 (Aug. 12, 2014). FWS reasoned such areas "would help to offset the anticipated loss and degradation of habitat occurring or expected from the effects of climate

change." 79 Fed. Reg. at 47,188. Defenders works continually to ensure that Congress takes actions that maintain conservation funding for programs, such as the Agriculture Improvement Act of 2018, Pub. L. No. 115-334 (2018), that benefit landowners and wildlife like the Florida leafwing butterfly, while preserving environmental protections. Defenders also fights for proper consultation with the Services to ensure that activities like pesticide application or development will not further jeopardize imperiled species like the Florida leafwing butterfly.

21. Defenders and its members regularly advocate for imperiled species and for the conservation and protection of the ecosystems upon which those species rely, and they will continue to do so on an ongoing basis in the future. Defenders' members rely on the designation of critical habitat to preserve and aid in the recovery of the imperiled species that they frequently engage in visiting, observing, studying, and photographing for recreational, spiritual, professional, scientific, educational, and aesthetic purposes.

22. Plaintiff National Parks Conservation Association ("NPCA") is a non-profit environmental group founded in 1919 as a leading voice for America's national parks. NPCA's core mission is to protect and enhance the nation's national parks through the protection and restoration of air, land, water, and wildlife, including the imperiled animal and plant species that inhabit these parks, for the benefit of present and future generations. Over 600 listed species are found

in the national parks system, including in Haleakalā National Park and Volcanoes National Park, both of which are located in the State of Hawai‘i. NPCA is headquartered in Washington, D.C., and has 27 regional and field offices throughout the country, including the Pacific Regional Field Office, which focuses on protecting national parks and their resources in Hawai‘i and elsewhere in the Pacific region. NPCA has nearly 1.4 million members and supporters invested in its mission of ecosystem preservation and public access to the country's natural wonders, including members who reside in Hawai‘i.

23. NPCA has worked for over 100 years to protect wildlife in national park landscapes. In 2019, as part of its centennial-year recommitment to this work, NPCA formally established and staffed its first national program focused fully on park wildlife conservation. The program unites staff from across the organization and engages supporters and allies to ensure long-term protections for park wildlife, including seeking measurable progress in the recovery of threatened and endangered species in national park landscapes. To accomplish the program's goals, NPCA drafts comments on critical habitat, federal and state wildlife management, and wildlife regulations.

24. NPCA has advocated for addressing the effects that climate change has on imperiled species such as the ‘ākohekohe (crested honeycreeper, *Palmeria dolei*) and kiwikiu (Maui parrotbill, *Pseudonestor xanthophrys*), two critically

endangered Hawaiian forest birds. The ʻākohekohe and kiwikiu have populations on the island of Maui within Haleakalā National Park, and NPCA members frequent the park to observe, photograph, and study these beautiful birds in the wild. In 2016, FWS designated severely degraded areas as critical habitat for the ʻākohekohe and kiwikiu. 81 Fed. Reg. 17,790 (Mar. 30, 2016). In making this designation, FWS noted that these species currently occupy "less than 5 percent of the estimated historical ranges," which, due to mosquito-borne diseases at lower elevations, is "almost all habitat that is currently suitable." *Id.* at 17,866. "To ensure the potential for population increase," which the birds' recovery plans identify as "essential to the conservation of both bird species," FWS recognized that "additional habitat must be restored." *Id.*; *see also id.* at 17,816 ("The recovery plan recognizes that to ensure the potential for population increase, additional unoccupied but potentially suitable habitat will require restoration. These areas include koa forest and grazed areas that have potential for reforestation upslope from current populations … ."). To allow for the species' continued survival and eventual recovery, FWS designated those unoccupied, highly degraded areas as critical habitat. *See id.* at 17,816. To ensure they will have opportunities to observe these species in the future, NPCA members are committed to the recovery of the ʻākohekohe and kiwikiu, and NPCA's Wildlife Program will track and engage in the continued protection and conservation of these species.

25. NPCA and its members rely on the protection of ecosystems both inside and near to national parks to promote the recovery of the imperiled species that members seek to observe, study, and photograph for scientific, educational, recreational, conservation, commercial, spiritual, and aesthetic purposes. Designating and protecting critical habitat outside of national parks helps expand the available habitat that imperiled species can occupy, allowing for the increases in population size that are essential for species' conservation. Increased populations in areas near to national parks contribute to more robust populations and increased viewing and presence within the national parks. As such, NPCA and its members have an interest in the conservation, recovery and resiliency of imperiled species like the ʻākohekohe and kiwikiu both within and near national parks. NPCA plans to continue to advocate on behalf of these and similarly situated species in the future.

26. Plaintiff Natural Resources Defense Council, Inc. ("NRDC") is a non-profit membership corporation founded in 1970 and organized under the laws of the State of New York. NRDC has more than 420,000 members nationwide, and over 2,200 members in Hawaii. NRDC's mission is to safeguard the earth—its people, its plants and animals, and the natural systems on which all life depends.

27. NRDC has long been active in efforts to protect endangered and threatened species and regularly engages in advocacy and provides comments on

critical habitat designation proposals to ensure that the most biologically critical areas for imperiled species' survival and recovery are included in the Services' final designations. One such example is the endangered tidewater goby (*Eucyclogobius newberryi*). After NRDC successfully sued the Service over its failure to designate the goby's critical habitat, the Service designated critical habitat in 2000. 65 Fed. Reg. 69,693 (Nov. 20, 2000). The critical habitat designation recognized that reintroduction of tidewater gobies into unoccupied habitat is essential to the species' recovery. *See id.* at 69,699 ("unoccupied habitats which can support gobies in the future play an essential role in the conservation of the goby"); *see also* 64 Fed. Reg. 42,250, 42,254 (Aug. 3, 1999) ("the colonization of gobies to additional areas that are currently unoccupied will be necessary").

28. The Service revised the tidewater goby's critical habitat in 2008. In 2009, NRDC filed a lawsuit challenging the Service's failures to include in revised critical habitat any unoccupied areas and to explain why unoccupied habitat included in the 2000 designation was not left out of the 2008 revised designation. NRDC prevailed, and the Service's revised critical habitat designation was remanded in its entirety for reconsideration.

29. When FWS revised tidewater goby critical habitat designation on remand in 2013, it acknowledged that the areas that the goby occupied at the time

of listing alone were not sufficient to meet the species' recovery goals because, among other things, "[w]e anticipate a further loss of habitat in the future due to sea-level rise resulting from climate change." 78 Fed. Reg. 8,745, 8,757 (Feb. 6, 2013). FWS further determined that "some form of restoration will be necessary to support the successful reintroduction or recolonization of the tidewater goby in the units that are unoccupied." *Id.* at 8,758. Thus, even though tidewater gobies could not use Oso Flaco Lake until water quality impairments were remedied, FWS nonetheless designated that unoccupied habitat, concluding that "the habitat at this location will be suitable for tidewater goby in the future and … that this unit is essential for the conservation of the species." *Id.* at 8,772. Under the new regulatory definition of "habitat," unoccupied areas like Oso Flaco Lake that require restoration to support the tidewater goby's conservation could no longer be protected as critical habitat.

30. Plaintiff Sierra Club is a national nonprofit organization with 67 chapters and about 830,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Hawai‘i Chapter of the Sierra Club has approximately 4,673 members.

31. The Sierra Club and its members regularly advocate for imperiled species and for the conservation and protection of the ecosystems upon which these species rely, including through the designation of critical habitat, and they will continue to do so on an ongoing basis in the future. For example, Sierra Club was a plaintiff in the landmark lawsuit, *Palila v. Hawai'i Department of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981), which jumpstarted decades of native forest restoration efforts in highly degraded, unoccupied critical habitat for the palila on Manua Kea, efforts that continue to this day.

32. Sierra Club was also a plaintiff in *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998), which challenged FWS's refusal to designate critical habitat for 245 taxa of endangered and threatened Hawaiian plants. As a result of that litigation, FWS finally designated critical habitat for hundreds of plant species. In 2016, FWS revised the critical habitat designations for many of those species from the island cluster of Maui Nui (Moloka'i, Maui, Lāna'i, and Kaho'olawe), including Hawai'i's endangered state flower, the yellow hibiscus (*Hibiscus brackenridgei*). *See* 81 Fed. Reg. 17,790 (Mar. 30, 2016). Because "there are no areas of lowland dry habitat that remain in pristine condition or are unaffected to some degree by … deleterious agents," FWS concluded that it was "essential to [these species'] conservation" to designate unoccupied and severely degraded critical habitat. *Id.* at 17,845; *see also id.* ("the lowland dry

ecosystem is one of the most negatively affected native habitats on the island of Maui"). Even though the area was "affected by invasive plants and other disturbances," FWS determined that it has "the capability to be functionally restored to support the physical and biological features and provide essential habitat for the 17 species for which it is designated critical habitat." *Id.*

33. Sierra Club's members rely on the protection of ecosystems through critical habitat designation to aid in the recovery of imperiled species (such as those discussed above) that members frequently engage in visiting, observing, studying, and photographing. Sierra Club members and staff derive substantial recreational, spiritual, professional, scientific, educational, and aesthetic benefits from their interactions with imperiled species in the wild.

34. Plaintiff WildEarth Guardians ("Guardians") is a non-profit, membership organization with over 175,000 members and supporters with the shared mission of protecting threatened and endangered species and their habitats. Guardians uses science and environmental laws to protect and restore the wildlife, wild places, wild rivers, and health of the American West. In particular, Guardians advocates for the protection and restoration of endangered and threatened species and their habitats throughout the Western United States.

35. As one example, Guardians has been actively working to restore habitat for the New Mexico meadow jumping mouse (*Zapus hudsonius luteus*),

including designated critical habitat, on several streams. Guardians has a long history of environmental advocacy in relation to the mouse. In October 2008, Guardians filed an ESA petition to list the mouse as an endangered species. Following litigation due to FWS's failure to act on the listing petition, in 2011, Guardians entered into a settlement agreement involving 252 species that required, *inter alia*, FWS to make a final listing decision for the mouse. Pursuant to the settlement, FWS listed the mouse as endangered in 2014.

36. When FWS designated critical habitat for the mouse in 2016, it determined that conserving the species "requires increasing the number and distribution of populations of the jumping mouse to allow for the restoration of new populations and expansion of current populations into areas that were historically occupied … ." 81 Fed. Reg. 14,264, 14,296 (Mar. 16, 2016). To accomplish that, FWS concluded that it was essential to designate unoccupied areas that were too degraded to be "suitable habitat," but could be restored to allow for the species' recovery. *Id.* at 14,301; *see also id.* at 14,296 (designating unoccupied units that are "highly restorable and essential for the conservation of the species"); *id.* at 14,300 (unoccupied "areas need habitat protection to allow restoration of the necessary herbaceous vegetation for possible future reintroductions"). FWS explained that "[t]he areas that are unoccupied at the time of listing are not required to contain the [primary constituent elements] essential to

conservation of the subspecies." *Id.* at 14,279. Rather, to be eligible for designation, FWS understood that unoccupied areas needed only to "have ***the potential to be restored*** to suitable habitat." *Id.* (emphasis added).

37. Guardians' members and staff regularly visit the mouse's designated critical habitat and seek to observe, study or photograph the mouse. They intend to continue to do so in the future and hope to have additional opportunities to observe, study or photograph the mouse after degraded critical habitat is restored. Guardians' staff and members derive recreational, aesthetic, spiritual, professional, scientific, educational, and moral benefits from being able to look for, observe, study and photograph the mouse in its natural habitat.

38. Plaintiffs submitted comments on two alternative, proposed "habitat" definitions that the Services put out for public comment in the Federal Register, highlighting those proposals' flaws—namely, that the proposed definitions would preclude the Services from protecting areas that are essential to listed species' conservation. The new formulation of the habitat definition that the Services finalized on December 16, 2020 suffers from the same fatal flaws that Plaintiffs raised in their comment letters on the proposed definitions.

39. The final habitat definition harms Plaintiffs who have fought for decades, and continue to fight, to secure protection for currently unoccupied areas that imperiled species need for their continued survival and eventual recovery. The

final habitat definition will preclude the Services from designating—and protecting—as critical habitat unoccupied areas that are essential for newly listed species' conservation. Moreover, given that the Services routinely revise existing critical habitat designations (either *sua sponte* or in response to petitions from critical habitat opponents), the currently designated unoccupied (but nonetheless essential) critical habitat that Plaintiffs have worked so hard to protect is now at imminent risk of being stripped of vital critical habitat protection on the grounds that it is no longer considered "habitat."

40. As detailed above, the Plaintiffs and their members regularly advocate for listed species that rely on currently uninhabitable areas for their long-term survival and recovery. Plaintiffs and their members derive recreational, spiritual, scientific, professional, educational, and aesthetic benefits from those species and from the ecosystems upon which those species rely.

41. Plaintiffs have a concrete interest in the Services' lawful implementation of the ESA and its vital role in preventing harm to and promoting recovery of imperiled species. The regulatory definition challenged in this lawsuit fundamentally undermines and contradicts the requirements of the ESA and reverses decades of agency practice. Plaintiffs' concrete interests are also injured by the Services' violation of procedural duties under NEPA and the APA.

42. The ESA expressly declares that endangered and threatened "species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). The harms that would result from the loss of biological diversity are enormous, and the nation cannot fully apprehend their scope because of the "***unknown*** uses that endangered species might have and … the ***unforeseeable*** place such creatures may have in the chain of life on this planet." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 178-79 (1978) (emphasis in original); *see also id.* at 178 (the value of this genetic heritage is "quite literally, incalculable"). The aesthetic, conservation, organizational, recreational, professional, and scientific interests of these groups and their members in threatened and endangered species and their critical habitat have been, are being, and, unless the relief prayed for is granted, will continue to be directly and adversely affected by Defendants' failure to comply with the law.

Defendants

43. Defendant David Bernhardt is sued in his official capacity as Secretary of the Department of the Interior. Secretary Bernhardt has responsibility for implementing and fulfilling the duties of the United States Department of the Interior, including the administration of the ESA with regard to threatened and endangered terrestrial and freshwater plant and animal species.

44. Defendant U.S. Fish and Wildlife Service is the agency of the United States Department of the Interior charged with administering the ESA with respect to threatened and endangered terrestrial and freshwater plant and animal species.

45. Defendant Wilbur Ross is sued in his official capacity as Secretary of the Department of Commerce. Secretary Ross has responsibility for implementing and fulfilling the duties of the United States Department of Commerce, including the administration of the ESA with regard to threatened and endangered marine species and anadromous fish species.

46. Defendant National Marine Fisheries Service is the agency of the United States Department of Commerce responsible for administering the ESA with regard to threatened and endangered marine species and anadromous fish species.

BACKGROUND

I. CONGRESS MANDATED THE DESIGNATION AND PROTECTION OF CRITICAL HABITAT TO ACHIEVE THE ENDANGERED SPECIES ACT'S GOAL OF IMPERILED SPECIES' CONSERVATION

47. An "examination of the language, history, and structure [of the Endangered Species Act] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Tenn. Valley Auth.*, 437 U.S. at 174.

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

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

H.R. Rep. No. 93-412, at 5 (1973).

49. Consistent with that understanding, Congress identified as the first of the ESA's purposes "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Congress defined "conserve" and "conservation" broadly under the ESA as "to use and the use of ***all methods and procedures*** which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary," that is, when the species have recovered and no longer need the protection of the ESA. *Id.* § 1532(3) (emphasis added).

50. ESA Section 4, 16 U.S.C. § 1533, requires the listing of species as endangered or threatened when they meet the statutory listing criteria. Further evidencing Congress's understanding of habitat's vital role in species conservation,

the first listing criterion is "the present or threatened destruction, modification, or curtailment of [the species'] habitat or range." *Id.* § 1533(a)(1)(A).

51. For the ESA's first five years, the Services were authorized, but not obliged, to designate critical habitat. Congress amended the ESA in 1978 to require that, at the time a species is listed as endangered or threatened, the Services generally must also "concurrently … designate any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A)(i). In making critical habitat designation mandatory, Congress reaffirmed that "[t]he loss of habitat for many species is universally cited as the major cause for the extinction of species worldwide." H.R. Rep. No. 95-1625, at 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9453, 9455.

52. Critical habitat is defined under the ESA to include both:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, 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 in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Only the "habitat" of a listed species is eligible for designation as critical habitat. *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*,

139 S. Ct. 361, 368 (2018).

53. Following the initial designation of critical habitat at the time of listing, the Services may, from time-to-time thereafter as appropriate, revise such designation, either *sua sponte* or in response to a petition. 16 U.S.C. § 1533(a)(3)(A)(ii), (b)(3)(D).

54. The Services must make both initial critical habitat designations and subsequent revisions "on the basis of the best scientific data available." *Id.* § 1533(b)(2).

55. Congress characterized ESA Section 4's listing and critical habitat designation provisions as the "cornerstone of effective implementation" of the Act. S. Rep. No. 97-418, at 10 (1982). Critical habitat designation provides additional benefits to listed species, beyond the prohibition against agency actions that jeopardize their continued survival, because critical habitat further provides for the "conservation" needs of the species. 16 U.S.C. § 1532(5)(A)(i), (ii); *see also Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004).

56. ESA Section 7 applies to all federal agencies and prohibits agency actions that are "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." 16

U.S.C. § 1536(a)(2). The Supreme Court has recognized that "the legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species," giving "endangered species priority over the 'primary missions' of federal agencies." *Tenn. Valley Auth.*, 437 U.S. at 185.

57. 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. 94-887, at 3 (1976) (emphasis added). Critical habitat designation is designed to provide the additional benefit of assisting in the recovery of listed species, as well as alerting the public and agency decisionmakers to the importance of these areas.

58. Today, the ESA protects more than 1,600 plant and animal species and millions of acres have been designated as critical habitat to allow for imperiled species' survival and recovery. Since its enactment, the ESA has prevented the extinction of 99 percent of the species under its protections.

II. THE CHALLENGED "HABITAT" DEFINITION STRIPS VITAL PROTECTIONS FROM AREAS THAT ARE ESSENTIAL TO THE CONSERVATION OF THREATENED AND ENDANGERED SPECIES

59. On August 5, 2020, the Services issued a proposal to add a new definition of "habitat" to the regulations that implement ESA Section 4. 85 Fed. Reg. 47,333 (Aug. 5, 2020). In the proposal, the Services provided two alternative definitions for the term "habitat." The first proposed definition was:

> The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species.

Id. at 47,334. The alternative definition was:

> The physical places that individuals of a species use to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist.

Id.

60. The Services maintained that promulgating a definition of "habitat" would "provide transparency, clarity, and consistency for stakeholders," *id.*, yet the proposed definitions cobbled together a string of terms that are completely undefined elsewhere in the ESA's implementing regulations, in the large body of case law regarding ESA Section 4 that the federal courts have developed over the decades, or in the biological literature.

61. In the Federal Register notice for the proposed rulemaking, the Services stated that "the proposed regulatory definition of 'habitat' would not

impose any … change in how [the Services] designate critical habitat." *Id.* at 47,335.

62. Plaintiffs and numerous commenters noted that, in fact, the proposed definitions would reverse decades of agency practice designating critical habitat in unoccupied areas that cannot presently support individuals of the species but are nonetheless essential for conservation. In their comments, Plaintiffs urged the Services not to preclude designation of currently unoccupied areas that may require some level of restoration to be fully habitable or that may become habitable in the future due to climate change.

63. The Services' notice of proposed rulemaking further stated that the habitat definition would be prospective in nature and is not "intended to require that any previously finalized critical habitat designations (*i.e.*, designations that were made final on or before the date on which this rule becomes effective) be reevaluated on the basis of any final revisions to this proposed rule." *Id.* The definition would, however, apply whenever the Services revise critical habitat designations (either *sua sponte* or in response to a petition), opening the door for currently designated critical habitat to lose the protections afforded under the ESA for failure to meet the stringent requirements of the new habitat definition.

64. In the Federal Register notice, the Services stated that they expected to conclude that promulgating their definition of "habitat" falls under a categorical

exclusion to the requirement to prepare a NEPA analysis. *Id.* at 47,336. In comments on the proposed revisions, Plaintiffs reminded the Services of their duty to comply with NEPA and prepare an EIS because (1) the agencies needed to take a "hard look" at the environmental consequences of their actions before those actions occur in order to ensure that the agencies carefully considered detailed information concerning significant environmental impacts; (2) the agencies needed to consider alternatives to the proposed definitions; and (3) the agencies needed to make relevant information available to the public so that it could play its role in the decision-making process.

65. The Services accepted comments on the proposed habitat definition through September 4, 2020. The proposed definition sparked great concern and controversy, with nearly 168,000 public comments submitted.

66. The Services' final habitat definition rule, promulgated on December 16, 2020, did not adopt either of the alternative definitions put out for public review and comment in the proposed rule. Instead, the final rule defines "habitat" using entirely new terminology, as follows:

> For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.

85 Fed. Reg. at 81,412. The new habitat definition will take effect on January 15, 2021. *Id.* at 81,411.

67. In promulgating the final habitat definition, the Services made clear that "the definition excludes areas that do not currently or periodically contain the requisite resources and conditions, even if such areas could meet this requirement in the future after restoration activities or other changes occur." *Id.* at 81,413. The definition thus introduces a new limitation, not based in the statute, that restricts the designation of critical habitat in areas that are currently unoccupied but are nonetheless "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

68. The Services also concluded that the habitat definition rulemaking was exempt from NEPA analysis under the categorical exclusion for "[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature." 85 Fed. Reg. at 81,419. In response to comments stating that extraordinary circumstances are present necessitating NEPA analysis, the Services baldly asserted that "promulgating this definition does not alter the outcomes for any species or critical habitat designations." *Id.*

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CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(VIOLATION OF THE ENDANGERED SPECIES ACT AND ADMINISTRATIVE PROCEDURE ACT – CONTRARY TO LAW)

69. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in all preceding paragraphs of this Complaint.

70. The Services cannot adopt regulations that are manifestly contrary to the text and purpose of the ESA. Under the APA, a "reviewing court shall … hold unlawful and set aside" federal agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C), or "without observance of procedure required by law," *id.* § 706(2)(D). An agency does not have authority to adopt a regulation that is "manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

71. In enacting the ESA, Congress's intent was to provide a program for the conservation of . . . endangered species and threatened species." 16 U.S.C. § 1531(b). The ESA defines "conservation" as "the use of ***all methods and procedures*** which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." *Id.* § 1532(3) (emphasis added). Congress expressly listed

"habitat acquisition and maintenance" among the methods and procedures required to further species conservation. *Id.* The ESA's legislative history affirms that Congress understood the need to acquire and restore "habitats [that] have been cut in size, polluted, or otherwise altered so that they are unsuitable environments for natural populations of fish and wildlife." 119 Cong. Rec. 25,669 (1973). Indeed, given that most species are imperiled due to lack of suitable habitat, restoration is—and will increasingly be—an essential tool for species recovery; it is much less common that species need only to recolonize or be reintroduced to pristine, "turn-key" habitat.

72. In the final regulatory definition for "habitat," the Services limit "habitat"—and thus, areas eligible to be designated as "critical habitat" for a listed species—to only geographic areas that, in their current state, are capable of supporting individuals of that species. *See* 85 Fed. Reg. at 81,412-13.

73. As the Services note, the regulatory definition of habitat "excludes areas that do not currently or periodically contain the requisite resources and conditions, even if such areas could meet this requirement in the future after restoration activities or other changes occur." *Id.* at 81,413. The new regulatory definition thus excludes unoccupied areas where, due to habitat alteration or degradation, the presence of predators, or other factors, individuals of that species could not currently survive.

74. The ESA's plain language makes clear that Congress did not intend to limit the unoccupied habitat that may be designated as "critical" to only areas that already have attributes necessary to support individuals of a listed species. When it promulgated its definition of "critical habitat," Congress specified that only areas "occupied by the species" at the time of listing must have "those physical or biological features" that are "essential to the conservation of the species" in order to qualify as critical habitat. 16 U.S.C. § 1532(5)(A)(i). In contrast, Congress did not similarly require that unoccupied areas have any existing physical or biological features to qualify as critical habitat, requiring only that designated unoccupied areas be "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii).

75. "[W]here Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (citation and internal quotation marks omitted). This canon of statutory interpretation applies with particular force where, as here, Congress enacted the provisions with disparate language at the same time. *See Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 (2009).

76. There is no question that Congress did not intend that, to qualify as "critical habitat," unoccupied habitat must "currently or periodically contain" the resources and conditions that are essential to species conservation, much less that

unoccupied habitat would need to possess the present "conditions necessary to support one or more life processes of a species." 85 Fed. Reg. at 81,412. That the ESA defines unoccupied critical habitat solely in terms of what is essential for species conservation confirms that Congress—which understood that habitat destruction was "the major cause for the extinction of species worldwide"—did not intend to preclude designation of unoccupied areas that are currently too degraded for individuals of an imperiled species to survive there, but that can (and must) be restored to play an essential role in that species' conservation. H.R. Rep. No. 95-1625, at 5 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9453, 9455.

77. While the Services note that the definition of "habitat" must inherently be at least as broad as the statutory definition of "critical habitat," 85 Fed. Reg. 81,411, the Services' final definition illogically establishes a more demanding standard for unoccupied areas to be deemed "habitat" than to qualify as "critical habitat."

78. The Services' recently revised regulatory definition of "critical habitat" provides that, "for an unoccupied area to be considered essential," it need contain only "one or more of those physical or biological features essential to the conservation of the species." 50 C.F.R. § 424.12(b)(2). As such, the Services' own regulatory definition of "critical habitat" does not require that unoccupied areas have the present capacity to support individuals of a listed species. The

Service's new "habitat" definition, however, requires that, in order to be "habitat," an unoccupied area must be immediately capable of supporting a species. By requiring that all of the features necessary for individuals of the species to survive be currently present for unoccupied areas to qualify as "habitat," the Services' definition illogically establishes a more demanding standard for unoccupied areas to be deemed "habitat" than "critical habitat." This flies in the face of logic and is in clear contravention of congressional intent.

79. The habitat definition further fails to account for the impacts of climate change by giving species only enough habitat to eke out an existence in today's climate, as opposed to protecting the areas they will need to recover and thrive in the long term. The ESA's plain language provides no support for excluding from the definition of "habitat"—and thus precluding the designation of critical habitat in—currently unoccupied areas that the best available science identifies as essential to species conservation in the future, when imperiled species will need to move to or otherwise utilize new areas in response to climate change.

80. For the reasons above, the Services' newly promulgated habitat definition is arbitrary, capricious, an abuse of discretion, and not in accordance with law within the meaning of the APA, 5 U.S.C. § 706(2).

SECOND CLAIM FOR RELIEF

(VIOLATION OF THE ENDANGERED SPECIES ACT AND ADMINISTRATIVE PROCEDURE ACT – FAILURE OF RATIONAL DECISIONMAKING)

81. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in all preceding paragraphs of this Complaint.

82. The Services' newly promulgated definition—which narrowly limits "habitat" to only areas that currently can support individuals of an imperiled species—represents a 180-degree reversal of past agency practice. For decades, the Services have designated critical habitat in unoccupied areas that were not, at the time, habitable for the listed species, but were nonetheless deemed essential for that species' conservation. By excluding such areas from "habitat," the new definition would preclude the Services from designating these and similar unoccupied areas as "critical habitat" in the future.

83. In the nearly half-century since the ESA was enacted, the Services have frequently designated critical habit in unoccupied and degraded areas requiring restoration when necessary for species conservation. The following examples illustrate the Services' long-standing practice of designating unoccupied areas that were not, at the time of designation, habitable, but were nonetheless deemed essential for that species' conservation:

- In 1977, FWS designated critical habitat for the palila in unoccupied areas decimated by feral grazing animals that required "eradication of the

sheep and goats . . . to achieve the regeneration of the forest and restoration of the Palila." *Palila*, 639 F.2d at 496; *see also* 42 Fed. Reg. at 47,842.

- In 2004, FWS designated unoccupied habitat for the Guam Micronesian kingfisher with the understanding that eradication of brown tree snakes and other nonnative predators would be required before the species could survive in that designated critical habitat. *See* 69 Fed. Reg. at 62,953-60. Based on the best available science, FWS designated not only areas with relatively intact native forest, but also "non-forested areas interspersed with forested areas because of their potential for reforestation." *Id.* at 62,949.

- In 2013, to provide for the tidewater goby's conservation in the face of future habitat loss "due to sea-level rise resulting from climate change," 78 Fed. Reg. at 8,757, FWS designated unoccupied critical habitat that required substantial restoration to be habitable, concluding that, once restored, the habitat "will be suitable for tidewater goby in the future and … is essential for the conservation of the species." *Id.* at 8,772.

- In 2016, FWS designated critical habitat for seventeen listed plant species that historically occurred on the island of Maui but were no longer there, concluding that it was "essential to [these species'] conservation" to designate unoccupied and severely degraded critical habitat. 81 Fed. Reg. at 17,845. FWS expressly recognized that, even though the area was "affected by invasive plants and other disturbances," it has "the capability to be functionally restored to support the physical and biological features and provide essential habitat for the 17 species for which it is designated critical habitat." *Id.*

- In 2016, FWS also designated severely degraded areas as critical habitat for two critically endangered Hawaiian forest birds, the ʻākohekohe and the kiwikiu. In making that designation, FWS specifically recognized that "additional habitat must be restored" to ensure the potential for population increase. *Id.* at 17,816. In order to allow for the species' continued survival and eventual recovery, FWS designated those unoccupied, degraded areas as critical habitat. *Id.*

- In 2016, when FWS designated critical habitat for the endangered New Mexico meadow jumping mouse, it concluded that it was essential to

> designate unoccupied areas that were too degraded to be "suitable habitat," but could be restored to allow for the species' recovery. 81 Fed. Reg. at 14,301; *see also id.* at 14,296 (designating unoccupied units that are "highly restorable and essential for the conservation of the species"); *id.* at 14,300 (unoccupied "areas need habitat protection to allow restoration of the necessary herbaceous vegetation for possible future reintroductions"). FWS explained that "[t]he areas that are unoccupied at the time of listing are not required to contain the [primary constituent elements] essential to conservation of the subspecies." *Id.* at 14,279. Rather, to be eligible for designation, FWS maintained that unoccupied areas needed only to "have ***the potential to be restored*** to suitable habitat." *Id.* (emphasis added).

84. The Services' new definition would preclude designation of similar areas as critical habitat in the future and would strip the protections from previously designated critical habitat in the event of a designation revision in response to an industry petition or initiated *sua sponte* on the whim of the Services.

85. When promulgating regulations, the Services must articulate a satisfactory explanation for their action, including a rational connection between the facts found and the choice made.

86. Nothing in the Services' promulgation of the new habitat definition provides a rational basis for departing from the agencies' longstanding practice of designating currently degraded, unoccupied areas as critical habitat when those areas are essential to species conservation. On the contrary, the Services do not even acknowledge that their new definition departs from their past practice, a hallmark of arbitrary decision-making. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). Nor do the Services provide any explanation of how their

new definition will further the conservation purposes of the ESA, benefit imperiled species, or increase regulatory flexibility. Instead, the habitat definition appears to be adopted pursuant to a deregulatory agenda unmoored from the purposes of the ESA.

87. The promulgation of the habitat definition lacks detailed justification and a rational basis for a change in longstanding agency practice and is not based on the best available science, as required under the ESA. The Services' newly promulgated habitat definition is arbitrary, capricious, an abuse of discretion, and not in accordance with law within the meaning of the APA, 5 U.S.C. § 706(2).

THIRD CLAIM FOR RELIEF

(VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT AND ADMINISTRATIVE PROCEDURE ACT – FAILURE TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT OR ENVIRONMENTAL ASSESSMENT)

88. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in all preceding paragraphs of this Complaint.

89. In enacting the National Environmental Policy Act of 1969, Congress declared "a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). To accomplish its purposes, NEPA establishes "important 'action-forcing' procedures." *Id.* (citation omitted). The statute ensures that federal agencies, in

making decisions, "will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Id.* at 349. NEPA "also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision," including the public. *Id.*

90. NEPA requires all agencies of the federal government to prepare a "detailed statement" that discusses the environmental effects of, and reasonable alternatives to, all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). A "major federal action" for which an environmental impact statement may be required includes "[a]doption of official policy, such as rules, regulations, and interpretations adopted under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* or other statutes." 40 C.F.R. § 1508.1(q)(3)(i); *see also id.* § 1508.1(q)(2). The environmental effects that must be considered in an EIS include effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action, including those effects "that are later in time or farther removed in distance from the proposed action or alternatives." *Id.* § 1508.1(g).

91. Under regulations adopted by the Council on Environmental Quality ("CEQ"), the federal agency responsible for overseeing implementation of NEPA, federal agencies may satisfy compliance with NEPA for any action by (1)

preparing an EIS, (2) preparing a less extensive environmental assessment ("EA") and making a finding of no significant impact on the environment; or (3) documenting that the action falls within an established categorical exclusion. *Id.* § 1501.3(a).

92. CEQ has defined "categorical exclusion" to mean "a category of actions that the agency has determined, in its agency NEPA procedures . . ., normally do not have a significant effect on the human environment." *Id.* § 1508.1(d). Agencies are tasked with identifying categories of actions "that normally do not have a significant effect on the human environment, and therefore do not require preparation of an environmental assessment or environmental impact statement." *Id.* § 1501.4(a). In the event an agency determines that a categorical exclusion applies, federal agencies are further mandated to evaluate the action for "extraordinary circumstances in which a normally excluded action may have a significant effect." *Id.* § 1501.4(b). If that is the case, agencies may categorically exclude the proposed action only if the agency determines there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects; otherwise, the agency must prepare an EA or EIS, as appropriate. *Id.*

93. FWS has adopted a categorical exclusion for "[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal,

technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case," except in situations where any of the extraordinary circumstances in 43 C.F.R. § 46.215 apply. 43 C.F.R. § 46.210(i). Section 46.215, in turn, lists extraordinary circumstances to include, in part, where FWS actions "may":

> (b) Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands …; floodplains …; national monuments; migratory birds; and other ecologically significant or critical areas.
>
> (c) Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources … .
>
> (d) Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.
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> * * *
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> (e) Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.
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> * * *
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> (h) Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species.

94. NMFS similarly defines categorical exclusions to include "[p]reparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature, or for which the environmental effects are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or on a case-by-case basis." NOAA Administrative Order 216-6A and Companion Manual, Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities (Jan. 13, 2017), Appendix E at E-14. NMFS further identifies, in relevant part, "adverse effects on species or habitats protected by the ESA . . . that are not negligible or discountable;" "highly controversial environmental effects;" "the potential to establish a precedent for future action or an action that represents a decision in principle about future actions with potentially significant environmental effects;" and "environmental effects that are uncertain, unique, or unknown" as extraordinary circumstances that may preclude the application of a categorical exclusion. *Id.* at p. 4-5.

95. Here, the Services concluded that the habitat definition rulemaking was categorically excluded from NEPA because "this rulemaking is of a technical nature." 85 Fed. Reg. at 81,419. To the contrary, the habitat definition rulemaking imposes significant, new restrictions on the designation of critical habitat that will strip vital protections from areas that are essential to the continued survival and

eventual recovery of endangered and threatened species. As such, the habitat definition rulemaking is far from "technical" and is likely to have significant adverse environmental effects, including harm to ESA-listed species.

96. Even if the regulation were to fall within one of the Services' categorial exclusion categories, extraordinary circumstances would still require the preparation of an EIS or EA. The habitat definition not only has highly controversial and significant environmental impacts on imperiled species, but it subverts decades of agency practice and establishes a precedent for future actions with potentially significant environmental effects. The new habitat definition removes important protections for unoccupied habitat that is nonetheless essential for the conservation of endangered and threatened species. The new definition restricts the areas that may be designated as critical habitat under the ESA to "turn-key" habitat, precluding the designation of critical habitat in areas that are essential to conservation merely because they require restoration or other changes to be habitable or will be needed in the future for species to survive climate change. Because the new habitat definition significantly and adversely affects imperiled species and the ecosystems on which they depend, the Services could not lawfully apply a categorical exclusion to avoid the need to prepare an EIS (or, at a minimum, an EA).

97. The Services' invocation of a categorical exclusion to avoid their duty to prepare a legally adequate NEPA analysis for their new habitat definition regulation is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of NEPA, the CEQ regulations, the FWS and NMFS guidelines implementing NEPA, and the APA, 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court:

1. Declare that FWS and NMFS acted arbitrarily, capriciously, and contrary to law, including the ESA, in violation of the APA, in promulgating the habitat definition;

2. Declare that FWS and NMFS acted arbitrarily, capriciously, and contrary to law, including NEPA and the CEQ regulations, in violation of the APA, by invoking categorical exclusions and failing to prepare an EIS or EA for promulgation of the habitat definition;

3. Hold unlawful and vacate the habitat definition;

4. Enjoin FWS and NMFS from applying or otherwise relying upon the habitat definition;

5. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees; and

6. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

DATED: Honolulu, Hawai‘i, January 14, 2021.

Respectfully submitted,

/s/ Elena L. Bryant
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EARTHJUSTICE

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