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

August 21, 2023

By Electronic Submission to www.regulations.gov

Hon. Deb Haaland, Secretary
U.S. Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

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

Re: Comments on Proposed Rules entitled:

- Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 88 Fed. Reg. 40,742 (June 22, 2023), Dkt. No. FWS–HQ–ES–2023–0018
- Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat, 88 Fed. Reg. 40,764 (June 22, 2023), Dkt. No. FWS–HQ–ES–2021–0107
- Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 88 Fed. Reg. 40,753 (June 22, 2023), Dkt. No. FWS–HQ–ES–2021–0104

Dear Secretaries Haaland and Raimondo:

The Attorneys General of California, Maryland, Massachusetts, Connecticut, Illinois, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia ("States") respectfully submit the following comments on two proposed rules issued jointly by the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (together, the "Services") and one proposed rule issued by the FWS under the Endangered Species Act ("ESA"). *See* Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 88 Fed. Reg. 40,742 (June 22, 2023) ("**Proposed 4(d) Rule**"); Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat, 88 Fed. Reg. 40,764 (June 22, 2023) ("**Proposed**

Listing and Critical Habitat Rule"); and Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 88 Fed. Reg. 40.753 (June 22, 2023) ("**Proposed Consultation Rule**") (together, "**2023 Proposed Rules**"). The 2023 Proposed Rules would address several issues raised by changes made to the ESA's implementing regulations in 2019. *See* 84 Fed. Reg. 44,753 (Aug. 27, 2019) ("2019 4(d) Rule"); 84 Fed. Reg. 45,020 (Aug. 27, 2019) ("2019 Listing and Critical Habitat Rule"); and 84 Fed. Reg. 44,976 (Aug. 27, 2019) ("2019 Consultation Rule") (together, "2019 ESA Rules").[1] If finalized, the 2023 Proposed Rules would greatly improve species conservation, but leave other problematic provisions unchanged. We urge the Services to finalize the proposed revisions and to further strengthen the 2023 Proposed Rules as follows.

Summary of the States' Comments

The Proposed 4(d) Rule

The States strongly support FWS's proposal to restore the "blanket" extension of the Section 9 take prohibitions to newly-listed threatened species—which was abandoned in the 2019 4(d) Rule. With the Proposed 4(d) Rule, FWS will once again provide newly listed threatened species the same protections afforded to endangered species, while still maintaining the option for FWS to promulgate species-specific rules as necessary for species conservation. The States also support the proposal to expand the regulatory prohibitions for endangered plants in section 17.61(c), consistent with the text of the ESA. Finally, the States request that the proposed new exemption from the take prohibition for taking a member of a threatened species in 17.31(b)(1) be amended to require Service review in certain instances to ensure that the exemption is only applied in narrow circumstances.

The Proposed Listing and Critical Habitat Rule

The States applaud the Services' proposal to restore language requiring that species listing, delisting, and reclassification determinations are made without consideration of economic impacts in section 424.11(b)—language that had been removed in the 2019 Listing and Critical Habitat Rule. The Services now acknowledge that this 2019 change "created the problematic impression" that they may compile information regarding the economic impacts of listing, thus creating an "appearance of an intention to consider economic impact information."[2] Because the Proposed Listing and Critical Habitat Rule once again clarifies and affirms that listing decisions must be based *solely* on scientific determinations without regard to economic concerns—as required by the ESA—the States fully support the Proposal's restoration of the language deleted in the 2019 Listing and Critical Habitat Rule.

[1] The FWS issued the Proposed 4(d) Rule. The Proposed Listing and Critical Habitat Rule and Proposed Consultation Rule were both issued jointly by the Services.
[2] 88 Fed. Reg. at 40,765-66.

The States also recognize that the proposed changes regarding the definition of "foreseeable future" would correct significant problems with the 2019 Listing and Critical Habitat Rule. The 2019 Listing and Critical Habitat Rule modified section 424.11(d), so that it now unlawfully and arbitrarily embeds consideration of quantitative probability into the term foreseeable future for listing threatened species. By removing the reference to "likely" threats, the proposed rule would be a vast improvement, but the States recommend that the Services further improve the final rule by removing all language regarding the term "foreseeable future" that was added to the 2019 Listing and Critical Habitat Rule.

The States also strongly support the Services' proposal to reinsert the specific reference to species recovery as a criterion for species delisting in section 424.11(e). Such language was removed by the 2019 Listing and Critical Habitat Rule, contravening the letter, spirit, and purpose of the ESA. The proposed rule would once again express the clear linkage between recovery—a primary goal of the ESA—and the circumstances under which the Services may delist a species.

The Proposed Listing and Critical Habitat Rule also would make several changes to regulations governing the designation of critical habitat in section 424.12 that the States strongly support. First, the proposal would remove several broad situations, which were added to the regulations in 2019, allowing the Services to categorically find that it is "not prudent" to designate critical habitat in the first instance. That language conflicts with the statute's clear instruction to designate critical habitat to the "maximum extent prudent and determinable" and also likely forecloses the use of critical habitat when a species is threatened by global phenomena like climate change.

Second, the proposal would better align the regulatory treatment of unoccupied critical habitat with its statutory definition by removing references to physical and biological features, which are noticeably absent from the statutory definition. The proposal would allow unoccupied critical habitat to once again be designated if it is essential to the species' conservation, consistent with the definition of critical habitat in the ESA.

The Proposed Consultation Rule

With regard to the Proposed Consultation Rule, the States commend the minor improvements to the definitions of "effects of the action" and "environmental baseline" in section 402.02 and the proposed deletion of section 402.17 regarding the "reasonably certain to occur" standard for effects. However, the States recommend that the Services make the following additional changes to these definitions to bring these provisions into conformity with section 7 and the ESA as a whole:

- Reinstate the definition of "effects of the action" in section 402.02 which was in effect prior to 2019, to eliminate the unlawful 2019 two-part "but-for" and "reasonably certain to occur" causation test for "effects of the action" in its entirety; and
- Delete the entire unlawful third sentence from the definition of "environmental baseline" which was added to section 402.02 in 2019. regarding actions that the federal agency has no discretion to modify.

The States also believe that the proposed new authority to include off-site mitigation in reasonable and prudent measures ("RPMs") in section 402.14(i)(2)-(3) could be helpful for species conservation in the section 7 process, but that these new provisions will need significant clarification in order to achieve this goal.

The States also recommend that the Services rescind the challenged portions of the 2019 Consultation Rule that would not otherwise be addressed by the Proposed Consultation Rule. Specifically, the States recommend that the Services do the following:

- Rescind the "as a whole" language in the definition of "destruction or adverse modification" in section 402.02;
- Rescind the provision regarding the enforceability of mitigation measures in section 402.14(g)(8);
- Rescind the provision authorizing the Services' adoption of action agencies' biological analyses in section 402.14(h)(3);
- Clarify the definition of "programmatic consultation" in 402.02;
- Rescind the expedited consultation procedure in 402.14(*l*); and
- Rescind the exemption from reinitiation of consultation requirements in section 402.16(b) for new listings or critical habitat designations within the area of Bureau of Land Management ("BLM") land management plans.

In sum, while the States applaud many of the proposed revisions, we urge the Services to make further improvements and clarifications to a number of those provisions, as detailed below. Moreover, the States suggest that the Services rescind those portions of the unlawful 2019 Consultation Rule which our States previously challenged in the Northern District of California, that are not addressed through the current proposal. Doing so is necessary to align the Services' implementing regulations with the statutory language of section 7 of the ESA and to further advance species conservation.

I. Introduction and Background

A. The Federal Endangered Species Act ("ESA")

Signed into law by President Richard Nixon, the ESA constitutes "the most comprehensive legislation for the preservation of endangered species ever enacted

by any nation."[3] The fundamental purposes of the ESA are to "provide a means whereby the ecosystems upon which endangered ... and threatened species depend may be conserved" and "to provide a program for" the conservation of such species.[4] The ESA enshrines a national policy of "institutionalized caution," in recognition of the "overriding need to devote whatever effort and resources [are] necessary to avoid further diminution of national and worldwide wildlife resources."[5] Accordingly, the ESA declares "the policy of Congress that all Federal departments and agencies *shall seek to conserve* endangered … and threatened species and shall utilize their authorities in furtherance of the purposes of [the ESA]."[6] The Act broadly defines "conserve" as "the use of all methods and procedures which are necessary to bring any endangered … or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary," *i.e.*, to the point of full recovery.[7]

The ESA achieves its overriding conservation purpose through multiple vital programs. Section 4 prescribes the process for the Services to list a species as "endangered" or "threatened" based solely on the best scientific and commercial data.[8] 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 that are currently occupied and those that are currently unoccupied by those species.[9] 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.[10]

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[3] *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) ("*TVA v. Hill*").
[4] 16 U.S.C. § 1531(b).
[5] *TVA v. Hill*, 437 U.S. at 177, 194 (internal quotation omitted).
[6] 16 U.S.C. § 1531(c)(1) (emphasis added).
[7] *Id.* § 1532(3); *see Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) ("[T]he ESA was enacted not merely to forestall extinction of species … but to allow a species to recover to the point where it may be delisted").
[8] 16 U.S.C. §§ 1533(a)(1)-(2), (b)(1). The ESA defines an "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range," and a "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* §§ 1532(6), (20).
[9] *Id.* § 1533(a)(3).
[10] *Id.* § 1532(5)(A).

Section 7 places an affirmative obligation on all federal agencies to "utilize their authorities in furtherance of the purposes of this chapter," *i.e.*, conservation of listed species.[11] Section 7 also requires all federal agencies to consult with the Services to "insure" that any action they propose to authorize, fund, or carry out "is not likely to jeopardize the continued existence of any endangered … or threatened species or result in the destruction or adverse modification of" any designated critical habitat.[12]

If a proposed federal agency action may affect a listed species or critical habitat, the federal action agency must initiate consultation with the relevant Service.[13] The Service must then prepare a biological opinion to determine whether the action is likely to jeopardize any listed species or destroy or adversely modify any designated critical habitat. If so, the Services must provide "reasonable and prudent alternatives" to the agency action that would avoid jeopardy or adverse modification, as well as "reasonable and prudent measures … necessary or appropriate to minimize such impact," and specified "terms and conditions" for implementing those measures.[14]

Finally, section 9 prohibits any person from "taking" (i.e., killing, injuring, harassing, or harming) any listed endangered fish or wildlife species and prohibits certain other actions with respect to listed endangered plant species.[15] Section 4(d) authorizes the Services to extend by regulation any or all of these section 9 prohibitions to threatened species,[16] which, prior to 2019, the FWS had done since the 1970s.[17]

B. The 2019 ESA Rules

On August 27, 2019, the Services finalized three rules that departed from the plain language of the ESA, dramatically revised prior ESA regulations that had been in effect since the 1970s and 1980s, and severely undermined conservation of listed species. The 2019 4(d) Rule eliminated the "blanket" 4(d) rule—a longstanding regulation that automatically extended all of the section 9 protections applicable to endangered species to threatened species as a default. Among other changes, the 2019 Listing and Critical Habitat Rule fundamentally undermined the species listing and critical habitat designation processes. And the 2019 Consultation Rule significantly weakened requirements for interagency consultation on federal actions affecting listed species in multiple unlawful and extra-statutory ways.

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[11] *Id*. § 1536(a)(1).
[12] *Id*. § 1536(a)(2).
[13] *Id*. §§ 1536(b)(3), (c)(1).
[14] *Id*. §§ 1536(b)(3)(A), (b)(4).
[15] *Id*. §§ 1532(19), 1538(a)(1)(B), (G).
[16] *Id*. § 1533(d)
[17] *See* 40 Fed. Reg. 44,412, 44,414 (Sept. 26, 1975) (fish and wildlife species); 42 Fed. Reg. 32,374 (June 24, 1977) (plants).

Nineteen States and two cities, along with multiple environmental and animal rights organizations, challenged the 2019 ESA Rules in the U.S. District Court for the Northern District of California.[18] The district court ultimately granted the Services' motion to voluntarily remand the cases without vacatur and without ruling on the merits of the 2019 ESA Rules.[19] The Services represented in their motion that they intended to revise some aspects of the 2019 ESA Rules.

C. The 2023 Proposed ESA Rules

On January 20, 2021, President Biden issued Executive Order 13,990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," in which he directed all departments and agencies to immediately review agency actions taken between January 20, 2017 and January 20, 2021, and, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding actions that conflict with important national objectives, including promoting and protecting our public health and the environment.[20] In an accompanying fact sheet, the White House identified the 2019 ESA Rules as among those federal actions subject to Executive Order 13,990.[21]

Pursuant to that direction, and in light of the States' and other challenges to the 2019 ESA Rules, on June 22, 2023, the Services published the Proposed 4(d) Rule, Proposed Listing and Critical Habitat Rule, and Proposed Consultation Rule, requesting comments on each, and on any existing ESA rules, by August 21, 2023. As noted above, these proposed rules would address several of the issues raised by changes made to the ESA's implementing regulations in 2019, but leave other problematic 2019 regulatory amendments in place. In the detailed comments below, the States applaud the proposals that remedy problems with the 2019 ESA Rules, while suggesting improvements for provisions that either need further clarification or were left unchanged from the 2019 ESA Rules.

II. State Interests

Efforts to weaken implementation of the ESA put at risk the States' irreplaceable natural heritage and harm the States and their residents in numerous

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[18] *See State of California et al. v. Haaland et al.*, 4:19-cv-06013-JST (N.D. Cal.); *Center for Biol. Diversity et al. v. Haaland et al.*, 4:19-cv-05206-JST (N.D. Cal.) (lead case); *Animal Legal Def. Fund v. Haaland et al.*, 4:19-cv-06812-JST (N.D. Cal.).

[19] *See* Amended Order Granting Motion to Remand, 4:19-cv-06013, Dkt. 165 (N.D. Cal. Nov. 16, 2022).

[20] 86 Fed. Reg. 7037 (Jan. 25, 2021).

[21] The White House, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.

ways.[22] All of our States have an important interest in preventing and remedying harm to endangered and threatened species and their habitat and in seeing the recovery of threatened and endangered wildlife within our respective borders.

For example, the State of California has a sovereign interest in its natural resources and holds all the State's fish and wildlife and water resources in trust for the benefit of the people of the State.[23] California also has enacted numerous laws concerning the conservation of the fish and wildlife resources of the State, including, among others, the California Endangered Species Act, which declares that the conservation, protection, restoration and enhancement of endangered and threatened species and their habitat is a matter of statewide concern, and the state has a duty to conserve, protect, restore, and enhance endangered and threatened species and their habitat.[24]

There are currently 317 species listed as endangered or threatened under the ESA that reside wholly or partially within the State of California and its waters—more than any other mainland state. Examples include the southern sea otter (*Enhydra lutris nereis*) found along California's central coastline, the desert tortoise (*Gopherus agassizii*) and its critical habitat in the Mojave Desert, the marbled murrelet (*Brachyramphus marmoratus*) in north coast redwood forests, as well as two different runs of Chinook salmon (*Oncorhynchus tshawytscha*) and their spawning, rearing, and migration habitat in the Bay-Delta and Central Valley rivers and streams. The California condor (*Gymnogyps californianus*), the largest land bird in North America, has been listed as "endangered" since the Act's inception and was on the brink of extinction in 1982 with just twenty-three known individuals. By 1987, all remaining wild condors had been placed into a captive breeding program. Recovery efforts led by FWS, California state agencies, and other partners have increased the population and successfully reintroduced captive-bred condors to the wild. These efforts are now in their final phase, with a focus on creating self-sustaining populations and managing continued threats to the species, such as lead ammunition, trash, and habitat loss.[25]

California also has tens of millions of acres of federal public lands, multiple federal water projects, numerous military bases and facilities and other federal facilities and infrastructure projects that are subject to the ESA's section 7

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[22] *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1053-53 (D.C. Cir. 1997); *see also San Luis & Delta–Mendota Water Auth. v. Salazar,* 638 F.3d 1163, 1177 (9th Cir. 2011); *Hughes v. Oklahoma,* 441 U.S. 322, 333-34 (1979) (discussing states' general regulatory interest in protecting fish and wildlife).

[23] *People v. Truckee Lumber Co*., 116 Cal. 397 (1897); *Betchart v. Cal. Dep't of Fish & Game*, 158 Cal. App. 3d 1104 (1984); *Nat'l Audubon Soc'y v. Superior Ct*., 33 Cal. 3d 419 (1983); Cal. Water Code § 102; Cal. Fish & Game Code §§ 711.7(a), 1802.

[24] Cal. Fish & Game Code §§ 2050, 2051(c), 2052.

[25] *See* California Condor Recovery Program, FWS, https://www.fws.gov/cno/es/CalCondor/Condor.cfm (last checked Aug. 9, 2023)

consultation requirements. Moreover, countless acres of non-federal lands and numerous non-federal facilities and activities in California are subject to federal permitting and licensing requirements—and therefore section 7 consultation requirements.

The Commonwealth of Massachusetts has sovereign and proprietary interests in the conservation and protection of its natural resources and the environment.[26] At least eighteen federally listed endangered or threatened species are known to occur in Massachusetts, including, for example, the endangered northern long-eared bat (*Myotis septentrionalis*), shortnose sturgeon (*Acipenser brevirostrum*), and leatherback sea turtle (*Dermochelys coriacea*). As another example, populations of the Atlantic Coast piping plover (*Charadrius melodus*), which is listed as a threatened species along most of the East Coast, have more than doubled in the last twenty-five years thanks to FWS's conservation planning, federal enforcement, and cooperative efforts between federal, state, and local partners pursuant to the ESA.[27] Recovery efforts have been particularly successful in New England generally,[28] and especially in Massachusetts, where the East Coast's largest piping plover breeding population has rebounded from fewer than 150 pairs in 1990, to about 1,033 pairs in 2022,[29] increasing 800 percent since the species was listed in 1986.[30] Despite these gains, however, piping plovers' continued recovery is threatened by habitat loss from sea level rise caused by climate change.[31]

Massachusetts also has enacted, and devotes significant resources to implementing, numerous laws concerning the conservation, protection, restoration, and enhancement of the Commonwealth's plant, fish, and wildlife resources, including the Massachusetts Endangered Species Act, which protects over four

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[26] *See* Mass. Const. Am. Art. 97; Mass. Gen. Laws, Ch. 12, §§ 3 and 11D.

[27] *See* FWS, PIPING PLOVER (*CHARADRIUS MELODUS*), 5-YEAR REVIEW: SUMMARY AND EVALUATION (March 2020) ("FWS Piping Plover 2020 5-Year Review"), https://ecos.fws.gov/docs/five_year_review/doc6378.pdf. *See generally* FWS Piping Plover (*Charadrius melodus*)("FWS Piping Plover"), https://fws.gov/species/piping-plover-charadrius-melodus (last accessed Aug. 11, 2023); *see also United States v. Town of Plymouth*, 6 F. Supp. 2d 81, 92-94 (D. Mass 1998) (federal enforcement example).

[28] FWS Piping Plover 2020 5-Year Review, *supra* note 27 at 116 ("The largest and most sustained [piping plover] population increase has occurred in New England where . . . the population reached a post-listing high of 917 pairs in 2018, for a net increase of 29 percent between 2008 and 2018.")

[29] MASS. DIV. OF FISHERIES & WILDLIFE, SUMMARY OF THE 2022 MASSACHUSETTS PIPING PLOVER CENSUS (Feb. 2023), at 5-7, https://www.mass.gov/doc/summary-of-the-2022-massachusetts-piping-plover-census/download.

[30] *See* FWS Piping Plover, *supra* note 27.

[31] *See* MASS. DIV. OF FISHERIES & WILDLIFE & ICF INT'L, HABITAT CONSERVATION PLAN FOR PIPING PLOVER 2-10 to 2-25, 5-21 to 5-22 (2016), https://www.fws.gov/newengland/pdfs/MADFW_HCP/MADFW%20Final%20Piping%20Plover%20HCP_June%202016.pdf; *see also* MASSACHUSETTS HABITAT CONSERVATION PLAN FOR PIPING PLOVER: 2019 ANNUAL REPORT (May 2020), https://www.mass.gov/doc/hcp-for-piping-plover-2019-annual-report/download.

hundred imperiled species and their habitat, including species listed as endangered, threatened, and of special concern.[32]

The State of Maryland has enacted laws to protect sensitive species and their habitat and explicitly incorporates federally listed species into state regulations governing imperiled species.[33] Thirty-nine federally listed species, including thirty animals and nine plants, have occurred historically or currently occur in Maryland.[34] A few examples include the federally endangered dwarf wedgemussel (*Alasmidonta heterodon*), the federally threatened bog turtle (*Glyptemys muhlenbergii*), and the federally threatened Puritan tiger beetle (*Cicindela puritan*). Many of these species occur not just in Maryland but in other states as well. Maryland therefore has an interest in the recovery of these species not just within its own borders but throughout each species' range.

The State of New York has an ownership interest in all non-privately held fish and wildlife in the State and has enacted laws for the protection of endangered and threatened species, protections long recognized to be vitally important and in the public interest.[35] Wildlife conservation is a declared policy of the State of New York.[36] There are dozens of federally endangered or threatened species that reside in whole or in part within the State of New York and its waters. Many of these species are highly migratory, and their recovery requires conservation efforts in New York, up and down the Atlantic Seaboard, and beyond. Examples include four species of sea turtles found in New York waters—the loggerhead (*Caretta caretta*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*), and Kemp's Ridley (*Lepidochelys kempii*). Achieving effective recovery for each of these species requires strong ESA enforcement to protect such individuals that feed around Long Island, as well as those breeding and nesting in the southern United States.

Wildlife, fish, and shellfish are the property of the State of Washington.[37] The Washington Department of Fish and Wildlife actively carries forth the legislative mandate to, *inter alia*, preserve, protect, perpetuate, and manage wildlife, fish, and their habitat.[38] The Washington Fish and Wildlife Commission classifies forty-seven

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[32] *See* Mass. Gen. Laws, ch. 131A.
[33] *See* Nongame and Endangered Species Act, MD Code. Nat. Res. §§ 10-2A *et seq*.
[34] *See* Maryland Department of Natural Resources, *Rare, Threatened, and Endangered Species – Plants & Animals*, https://dnr.maryland.gov/wildlife/Pages/plants_wildlife/rte/espaa.aspx; *see also* Maryland Dep't of Nat. Res., *List of Rare, Threatened, and Endangered Plants of Maryland*, Mar. 2021, https://dnr.maryland.gov/wildlife/Documents/rte_Plant_List.pdf; Maryland Dep't of Nat. Res., *List of Rare, Threatened, and Endangered Animals of Maryland*, Nov. 2021, https://dnr.maryland.gov/wildlife/Documents/rte_Animal_List.pdf.
[35] *See* N.Y. Envtl. Conserv. Law §§ 11-0105, 11-0535; *Barrett v. State*, 220 N.Y. 423 (1917).
[36] *See* N.Y. Const. art. XIV, § 3
[37] *See* Rev. Code Wash. (RCW) § 77.04.012.
[38] *Id*. § 77.04.055; see also id. § 77.110.030 (declaring that "conservation, enhancement, and proper utilization of the state's natural resources … are responsibilities of the state of Washington").

species as Endangered, Threatened, or Sensitive under State law.[39] Many of these species are also federally listed as endangered or threatened under the ESA. Washington also has tens of millions of acres of federal lands across ten national forests, three national parks, twenty-three national wildlife refuges, three national monuments, and numerous Department of Defense lands, all subject to the ESA's section 7 consultation requirements. Washington expends significant resources to monitor, protect, and recover state and federally listed species and their critical habitat, including, for example, the endangered Taylor's checkerspot butterfly (*Euphydryas editha taylori*) and the smallest rabbit in North America, the pygmy rabbit (*Brachylagus idahoensis*).

As these examples illustrate, for nearly fifty years, the States have seen significant benefits and steps toward recovery of at-risk species from the Services' implementation of the ESA, including, notably, the recovery and delisting of our national bird, the bald eagle (*Haliaeetus leucocephalus*). The States maintain a strong interest in effective implementation of the ESA nationwide to assure continued national progress towards the conservation of threatened and endangered wildlife.

III. Comments on the Proposed 4(d) Rule — Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 88 Fed. Reg. 40,742 (June 22, 2023), Dkt. No. FWS–HQ–ES–2023–0018

The States applaud the FWS's proposal to restore the "blanket" extension of Section 9 prohibitions to newly listed threatened species. In the 2019 4(d) Rule, FWS abandoned its longstanding regulatory policy of automatically providing Section 9 protections to all newly listed threatened species as a default. With the Proposed 4(d) Rule, FWS will once again provide newly listed threatened species the same protections afforded to endangered species.[40] At the same time, the proposal still maintains the option for FWS to promulgate species-specific rules, which has always existed.

Applying section 9 prohibitions to all threatened species as a default furthers the ESA's conservation purpose and policy of "institutionalized caution" because it will protect newly listed threatened species from the negative effects of "taking" and other prohibited acts.[41] The Proposed 4(d) Rule thus promotes the ESA's core purpose "to halt and reverse the trend toward species extinction, whatever the cost."[42] The Proposed 4(d) Rule is also well within FWS's authority under the ESA, which provides that FWS "may by regulation prohibit with respect to any threatened species any act prohibited under [section 9]" whenever any species is

[39] Wash. Admin. Code 220-610-010; 220-200-100.
[40] 16 U.S.C. § 1538(a)(1)(B); *see id.* § 1532(19) (definition of "take").
[41] *See id.* §§ 1531(b), (c)(1), 1536(a)(1); *TVA v. Hill*, 437 U.S. at 178-79.
[42] *TVA v. Hill*, 437 U.S. at 184.

listed as threatened.[43] Indeed, the D.C. Circuit has squarely rejected arguments that the FWS blanket rule, which would be restored under the Proposed 4(d) Rule, impermissibly blurred the statutory distinction between endangered and threatened species, concluding that blanket rule is a "reasonable and permissible construction of the ESA."[44] The States thus strongly support this change.

The States also support FWS's proposed revision to section 17.61(c)(1) to clarify that it is unlawful to "maliciously damage or destroy" an endangered plant species on an area under federal jurisdiction or "remove, cut, dig up, or damage or destroy" an endangered plant species on an area outside of federal jurisdiction in knowing violation of any state law or regulation, including a state criminal trespass law.[45] The States support this change because it conforms the regulation to the longstanding statutory prohibitions for endangered plants and furthers the ESA's conservation goals.[46]

Additionally, the States also support the new rule that would provide state conservation agencies and Tribes an exemption from ESA permit requirements when they are acting to aid sick, injured, diseased or damaged members of, or dispose of/salvage dead members of, threatened wildlife or plant species.[47] However, the States encourage FWS to add a provision requiring FWS review where a non-Service entity proposes taking an individual that poses a "demonstrable but non-immediate threat to human safety," to ensure that this exception is narrowly applied in limited circumstances and does not undermine the conservation goals of the ESA.[48]

In sum, the Proposed 4(d) Rule is an important, necessary, and fully authorized measure to prevent newly listed threatened species from sliding closer to endangered status.

IV. Comments on Proposed Listing and Critical Habitat Rule — Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat, 88 Fed. Reg. 40,764 (June 22, 2023), Dkt. No. FWS–HQ–ES–2021–0107

[43] 16 U.S.C. § 1533(d).
[44] *See Sweet Home Chapter of Cmtys. for a Greater Oregon v. Babbitt*, 1 F.3d 1, 6-8 (D.C. Cir. 1993).
[45] 88 Fed. Reg. at 40,746, 40,752.
[46] *See* 16 U.S.C. §§ 1531(b), (c)(1), 1538(a)(2)(B).
[47] *See* 88 Fed. Reg at 40,745-46.
[48] *See* proposed new 50 C.F.R. § 17.31(b)(1)(iv). Specifically, we recommend that the Service review determinations by other federal land management agencies, state conservation agencies, and Tribes 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." *Id*. Note, however, that the State of Washington does not join in this specific recommendation as to the need for Service review under section 17.31(b)(1)(iv), but it does join in all the other recommendations in this letter.

A. The Proposal to Restore Language Barring Consideration of Economic Factors in Listing Decisions is Consistent with the ESA's Text and Legislative History.

The States also applaud the Services' proposal to restore language requiring that species listing, delisting, and reclassification determinations are made without consideration of economic impacts.[49] The 2019 Listing and Critical Habitat Rule removed the phrase "without reference to possible economic or other impacts of such determination" from section 424.11(b). But ESA section 4 expressly states that listing decisions must be made "*solely* on the basis of the best scientific and commercial data available" regarding the status of the species, such as habitat destruction, disease, and predation.[50] Unlike in critical habitat designations,[51] the ESA expressly requires that all listing decisions center exclusively on the biological threats to the species without regard to the economic effects of listing.[52] Indeed, Congress added the term "solely" to section 4's listing provisions in 1982 to emphasize that listing determinations were to be made "solely upon biological criteria and to prevent non-biological considerations from affecting such decisions."[53]

The Services themselves now acknowledge that the 2019 Listing and Critical Habitat Rule "created the problematic impression" that they may compile information regarding the economic impacts of listing, thus creating an "appearance of an intention to consider economic impact information" in listing decisions, despite the ESA's clear prohibition on doing so.[54] Because the proposed rule would clarify and affirm that listing decisions be based solely on scientific determinations without regard to economic concerns—as required by the ESA—the States fully support the proposal's restoration of the language deleted in the 2019 Listing and Critical Habitat Rule.

B. The Proposal to Remove the Reference to "Likely" Threats is a Vast Improvement from the 2019 Listing and Critical Habitat Rule, but the Services Should Further Improve the Rule's Interpretation of "Foreseeable Future" For Listing Threatened Species.

In the 2019 Listing and Critical Habitat Rule, the Services added a new section 424.11(d), which currently provides that, when determining whether to list a

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[49] *See* 88 Fed. Reg. at 40,765.

[50] 16 U.S.C. § 1533(b)(1)(A) (emphases added). The ESA's legislative history makes clear that the term "commercial data" refers to data about species trading and does "not . . . authorize the use of economic considerations in the process of listing a species." H.R. REP. No. 97-567, at 20 (1982).

[51] 16 U.S.C. § 1533(b)(2).

[52] *Id.* § 1533(a)(1), (b)(1)(A). *See also TVA v. Hill,* 437 U.S. at 174, 184 (the purpose of ESA is "to halt and reverse the trend toward species extinction, whatever the cost").

[53] H.R. REP. No. 97-567, at 19 (1982).

[54] *See* 88 Fed. Reg. at 40,765-66.

species as threatened because it is "likely to become endangered within the foreseeable future,"[55] "the term foreseeable future extends 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*."[56] Recognizing the "confusion" and perception that the 2019 Listing and Critical Habitat Rule adopted "a novel requirement" for determining foreseeable threats, the Services now propose to retain section 424.11(d), but to remove any language regarding probability, striking the reference to threats that are "likely." The proposed revised language would thus state that "the term foreseeable future extends 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."[57] The States acknowledge that the proposed changes to section 424.11(d) greatly improve upon the 2019 Listing and Critical Habitat Rule but urge the Services to instead adopt the proposed alternative revision: a recission of all language regarding the "foreseeable future" that was added by the 2019 Listing and Critical Habitat Rule.[58]

The Services correctly now recognize that the term "foreseeable future" in the ESA's definition of "threatened species" is intended to "simply set[] the time period" that guides the Services in evaluating the required best available scientific information when deciding whether to list species as threatened.[59] In 2019, the Services unlawfully and arbitrarily embedded considerations of quantitative probability into the term "foreseeable future," in clear contravention of the phrase's time-setting focus. In doing so, the 2019 Listing and Critical Habitat Rule violates the text and purpose of the ESA. Again, the ESA requires the Services to make listing determinations "solely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species,"[60] based on threats to the species.[61] Requiring both the threats to the species *and the species' responses to those threats* to be "likely" adds a new, arbitrary criterion to listing determinations that appears nowhere in the statute, and which can conflict with the best scientific and commercial data available about risks to species. Thus, the 2019 Listing and Critical Habitat Rule's addition of section 424.11(d) was not only contrary to the text of the ESA, but also improperly constrained the Services' consideration of future threats to a species' continued existence.

The "likely" requirement adopted in signaled the Services' intent to only consider threats that have a fifty percent or greater chance of occurring during a particular time period. This is particularly concerning given the growing number of threats related to climate change, the precise probability of which may be difficult

[55] 16 U.S.C. § 1532(20).
[56] 84 Fed. Reg. at 45,052 (emphasis added).
[57] 88 Fed. Reg. at 40,774 (emphasis added).
[58] *See id.*
[59] *Id.* at 40,766 (*citing* 16 U.S.C. § 1532(20)).
[60] 16 U.S.C. § 1533(b)(1)(A).
[61] *Id.* § 1533(a)(1).

to quantify and thus may be deemed not sufficiently likely to occur within a "foreseeable" timeframe. Though there may be several plausible projections of climate impacts predicting somewhat different effects on species or habitats within different timeframes, such threats cannot be arbitrarily discounted or ignored simply because the likelihood of any given scenario falls below a fifty percent threshold. As the Services now recognize, they "do not need to have absolute certainty about the information" used to make listing decisions.[62] Instead, the Services need only have "a reasonable degree of confidence in the prediction," consistent with the best available information standard.[63]

The Services' proposed revision would eliminate some of the concerns and ambiguity introduced in the 2019 Listing and Critical Habitat Rule—but not all. Specifically, retaining the 2019 Listing and Critical Habitat Rule's language in section 424.11(d) about "threats to the species and the species' responses to those threats" raises concerns that the Services will let factors—including, potentially, the magnitude of threats and species impacts—influence the scope of the "foreseeable future." That would go beyond "simply set[ting] the time period" for considering the status of a species based on the best scientific data available designed to achieve the ESA's overriding goal of species conservation and recovery.

As the Services acknowledge, maintaining this language may be "potentially confusing to the public," because "that regulatory provision is susceptible to being read or understood as inconsistent with the M-Opinion, which provides a more thorough and detailed examination and explanation of how this statutory phrase is interpreted."[64] Should the Services rescind the 2019 Listing and Critical Habitat Rule's section 424.11(d) in its entirety, the M-Opinion, a 2009 opinion from the Department of the Interior's Solicitor's Office, will still provide guidance on the term "foreseeable future,"[65] in accordance with the Services' longstanding practice. The States urge the Services to fully rescind this provision and to initiate a supplemental rulemaking to codify a definition of foreseeable future that is consistent with the M-Opinion and the Services' statutory obligations to conserve threatened species from the many, complex, and compounding existential threats they face.

C. The Proposal to Restore the Express Reference to Recovery in the Delisting Factors Is Consistent with the ESA's Text and Purpose.

The States strongly support the Services' proposal to reinsert the specific reference to species recovery as a criterion for species delisting in section 424.11(e).

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[62] 88 Fed. Reg. at 48,766.
[63] *Id.*; *cf. Greater Yellowstone Coal. Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011) ("It is not enough for the [FWS] to simply invoke 'scientific uncertainty' to justify its action.").
[64] *Id.*

The 2019 Listing and Critical Habitat Rule removed the reference to species recovery at section 424.11(e), simply listing three circumstances in which it is appropriate to delist a species: (1) the species is extinct, (2) the species does not meet the definition of a threatened or endangered species, and (3) the listed entity does not meet the definition of a "species."[66]

Removing the express reference to species recovery from the factors to be considered in delisting decisions contravenes the letter, spirit, and purpose of the ESA. The ESA plainly states that its species conservation measures are intended to "bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary."[67] Indeed, "the ESA was enacted not merely to forestall the extinction of species (*i.e.*, promote a species survival), but to allow a species to recover to the point where it may be delisted."[68]

Additionally, the ESA specifically requires the Services to develop and implement recovery plans "for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless [they find] that such a plan will not promote the conservation of the species."[69] Among other things, those plans must include "to the maximum extent practicable . . . objective, measurable criteria which, when met, would result in a *determination*, in accordance with the provisions of this section, *that the species be removed from the list*."[70] As the Services' Proposed Listing and Critical Habitat Rule acknowledges, "satisfying a recovery plan is one, but not the exclusive, possible pathway by which a species may reach the point of no longer requiring the protections of the Act."[71]

The States thus strongly support the proposal, which recognizes that expressly referencing species recovery in the delisting regulations "acknowledges one of the principal goals of the Act" and "maintains a clear linkage between this primary goal and one of the circumstances in which the Services would delist a species."[72] The States also suggest that the Services go even further by inserting regulatory text expressly recognizing that species recovery should be the primary reason for delisting, consistent with the overarching recovery goal of the ESA.[73]

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[66] 84 Fed. Reg. at 45,052.
[67] 16 U.S.C. § 1532(3).
[68] *Gifford Pinchot Task Force*, 378 F.3d at 1070.
[69] 16 U.S.C. § 1533(f)(1).
[70] *Id.* § 1533(f)(1)(B)(ii) (emphases added).
[71] 88 Fed Reg. at 40,767; *Friends of Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012).
[72] 88 Fed Reg. at 40,767.
[73] 16 U.S.C. §§ 1531(b), (c)(1), 1532(3), 1536(a)(1).

D. The Proposed Changes to the Critical Habitat Regulations Are an Overall Improvement From the 2019 Listing and Critical Habitat Rule and Will Advance Species and Habitat Conservation.

The States applaud the Services for proposing changes to the regulations governing designation of critical habitat that will advance the ESA's overarching conservation purpose. The States urge the Services to finalize the proposed changes, recognizing the importance of unoccupied critical habitat designations and limiting the Services' ability to determine critical habitat designation is "not prudent" in the first instance.

1. *The proposal's treatment of situations where it is "not prudent" to designate critical habitat is more faithful to the text of the ESA and will advance conservation in the face of climate change*.

The States largely support the Services' proposed revisions to regulations establishing the circumstances under which they will determine that it is "not prudent" to designate critical habitat.[74] The Services propose to delete language indicating that critical habitat designation is "not prudent" when "threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultation."[75] That language was problematic in several respects.

First, this existing language conflicts with the ESA's clear instruction that critical habitat should be designated to the "maximum extent prudent and determinable."[76] The statute is therefore clear that not-prudent situations should be extremely limited, and courts have acknowledged as much.[77]

Second, this language predetermines that designation is "not prudent" whenever the threats to a species' habitat are outside of federal control. But global phenomena, like climate change, are threatening species with increasing intensity, and while any individual action agency may not be able to fully address those threats, that inability does not discount the value of critical habitat to species conservation. Indeed, it may make such designations even more important because the Services may be able to identify areas that are likely to remain essential habitat for species under changing climate conditions. A mountainous species that relies on extensive winter snowpack, for example, may be threatened by a warming climate that limits the extent of suitable winter snowpack to higher elevations. Under the current language, simply because a federal action agency cannot itself solve climate

[74] 88 Fed. Reg. at 40,768-71.
[75] 88 Fed. Reg. at 40,774 (to be codified at 50 C.F.R. § 424.12(a)(1)(i)-(iv)).
[76] 16 U.S.C. § 1533(b).
[77] *See, e.g.*, *Nat. Res. Defense Council v. U.S. Dep't. of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997) ("The fact that Congress intended the imprudence exception to be a narrow one is clear from the legislative history").

change, the Services could find it "not prudent" to designate critical habitat for this species even though there are identifiable areas that are essential to the species' conservation.

Additionally, the 2019 Rule's myopic focus on threats that can be addressed through consultation ignores the many other benefits that accrue from designating critical habitat. Take again, the high elevation areas described in the previous hypothetical. They may be private land or unlikely to be the subject of federally supported actions that would trigger consultation, but identifying those specific areas as critical habitat would have a significant informational benefit. The Services, or other federal agencies acting pursuant to their affirmative obligations under section 7(a)(1) of the ESA, could then target those areas, or adjacent properties, for land acquisition or habitat rehabilitation efforts to ensure that the species has continued access to those essential areas.[78] Ignoring those additional benefits deprives critical habitat of its independent value, demoting it to only a bit part in the consultation process.

To fully resolve these infirmities, the States suggest that the Services simply return to the language of the 1980 critical habitat regulations.[79] There, the Services determined that it was generally "not prudent" to designate critical habitat in two situations: first, "when the species is threatened by taking or other human activity, and the identification of critical habitat can be expected to increase the degree of such threat to the species,"[80] and second, "when such designation of critical habitat would not be beneficial to the species."[81]

In line with the ESA's clear instruction that critical habitat should be designated to the "maximum extent prudent and determinable," the Services decided in 1980 that the only situations where designation would not be "prudent" were where designation would be counterproductive to the ESA's conservation goal. Under the 1980 approach, the Services could still, of course, find that it was not prudent to designate a particular unit of critical habitat based on the statutory factors enumerated at 16 U.S.C. §1533(b)(2), but the specific situations where it was assumed that designation was not prudent *at all* were limited to those circumstances where designation would actually *harm* the species.[82] This former regulatory approach is more consistent with the ESA's text and purpose than the Services' proposed changes.

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[78] *See* 16 U.S.C. § 1536(a)(1) (Directing all federal agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of …[listed] species."). Additionally, the Services are explicitly authorized to acquire land through Section 5 of the ESA. 16 U.S.C. § 1534.

[79] 45 Fed. Reg. 13,010, 13,023 (Feb. 27, 1980).

[80] *Id.* at 13,023 (codified at 50 C.F.R. § 424.12(a)(1) (1980)).

[81] *Id.* (codified at 50 C.F.R. § 424.12(a)(2) (1980)).

[82] *Id.* (codified at 50 C.F.R. § 424.12(a)(1) (1980)).

The Services also propose deleting the catchall language currently found at 50 C.F.R. §424.12(a)(1)(v), which broadly states that the Secretary may make a "not prudent" determination if "the Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available." The Services are correct to note that this language "gave the appearance that [they] might overstep their authority under the Act by issuing 'not prudent' determinations for any number of unspecified reasons," and should therefore be deleted.[83] Any benefits from removing that provision are, however, undermined by the Services' proposed addition of language indicating that the circumstances listed at § 424.12(a)(1) are not exhaustive.[84] The Services should abandon their proposed addition to § 424.12(a)(1) for the same reasons that they propose to delete the current § 424.12(a)(1)(v).

2. *The proposed changes to the regulations for designating unoccupied critical habitat are a vast improvement over the 2019 Listing and Critical Habitat Rule and properly adhere to the text of the statute.*

The States strongly support the Services' proposed restoration of the role of unoccupied critical habitat, which is essential to species conservation. The ESA defines occupied critical habitat as "the specific areas within the geographical area occupied by the species, at the time it is listed … 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 protections."[85] The ESA defines unoccupied critical habitat as areas "outside the geographic area occupied by the species at the time it is listed" that the Secretary determines are "essential for the conservation of the species."[86] Accordingly, the ESA already explicitly recognizes that both types of critical habitat are "essential" to species conservation.

Until 2019, the Services' regulations faithfully implemented the ESA's direction that critical habitat include unoccupied areas "essential" to species conservation. From 1980 to 2016, the Services' regulations specified that unoccupied critical habitat would only be designated "when a designation limited [to the species'] present range would be inadequate to ensure the conservation of the species."[87] In 2016, the Services modified the regulations for designating critical habitat to promote the effective use of this previously underutilized conservation tool.[88] Those provisions specified that unoccupied critical habitat should be

[83] 88 Fed. Reg. at 40,768.
[84] *Id.* at 40,774 ("Designation of critical habitat may not be prudent in circumstances such as, *but not limited to*, the following:") (proposed § 424.12(a)(1) (emphasis added)).
[85] 16 U.S.C. § 1532(5)(A)(i).
[86] *Id.* § 1532(5)(A)(ii).
[87] 45 Fed. Reg. at 13,023 (codified at 50 C.F.R. § 424.12(f) (1980)).
[88] 80 Fed. Reg. 7414 (Feb. 11, 2016).

identified simultaneously with occupied critical habitat,[89] and that only those unoccupied areas "that are essential for [species] conservation, considering the life history, status, and conservation needs of the species based on the best available scientific data" could be designated as critical habitat.[90]

The 2019 Listing and Critical Habitat Rule, however, severely and arbitrarily curtails the circumstances under which unoccupied critical habitat can be designated.[91] It does so by, first, barring the Services from considering unoccupied areas at all unless "a critical habitat designation limited to [] occupied [areas] would be *inadequate* to ensure the conservation of the species," and second, by requiring the Services to determine "that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species."[92] These regulations unlawfully limit the circumstances in which unoccupied critical habitat can be designated and inject the extratextual requirement that unoccupied critical habitat, like occupied habitat, also must *currently* possess specified features "essential" to conservation. This unlawfully blurs the clear statutory distinction between occupied and unoccupied critical habitat and curtails the Services' ability to designate unoccupied critical habitat that is essential for species recovery through future restoration and range expansion.

The Services now propose to remedy the 2019 Listing and Critical Habitat Rules' unlawful amendments by removing the "reasonable certainty" language and the requirement that unoccupied areas contain essential physical or biological features. As proposed, the regulatory language relating to unoccupied areas would read:

> After identifying areas occupied by the species at the time of listing, the Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species at the time of listing that the Secretary determines are essential for the conservation of the species. Such a determination must be based on the best scientific data available.[93]

The States support these changes. The proposed regulations reflect a conscious change of course that returns to an interpretation that is consistent with

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[89] *Id.* at 7439 (codified at 50 C.F.R. § 424.12(b) (2016)) ("Where designation of critical habitat is prudent and determinable, the Secretary will identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical areas occupied by the species to be considered for designation as critical habitat").
[90] *Id.* (codified at 50 C.F.R. § 424.12(b)(2) (2016)).
[91] *See* 84 Fed. Reg. 45,020 (Aug. 27, 2019).
[92] *Id.* at 45,053 (codified at 50 C.F.R. § 424.12(b)(2) (2019)) (emphasis added).
[93] 88 Fed. Reg. at 40,774.

the statutory text. Congress clearly included the physical and biological features requirement in the definition of occupied critical habitat, but just as clearly left it out of the definition of unoccupied critical habitat.[94] It is a basic canon of statutory construction that Congress acts intentionally when it omits from one section of a statute terms that it applies in another.[95]

Additionally, the proposal would remove the requirement from the 2019 Listing and Critical Habitat Rule that the Services must have a "reasonable certainty" that the area will actually contribute to species conservation[96]—a term that the Services defined in 2019 to require a "high degree of certainty but not to require absolute certainty."[97] As the Services now acknowledge, that requirement is unnecessary in light of the ESA's requirement that the Services base critical habitat designations on the "best available data."[98] And removing that language will restore the appropriate standard for determining that an area qualifies as unoccupied critical habitat based on the best scientific data available.

As the Services now acknowledge, the Supreme Court's opinion in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 139 S.Ct. 361 (2018), should not be read to require the current existence of physical or biological features in *unoccupied* areas in order for those areas to be eligible for designation as critical habitat.[99] There, the Court did not define habitat or inject any extra-statutory requirements into the definition of unoccupied critical habitat. Rather, it simply held that "an area is eligible for designation as critical habitat… only if it is *habitat* for the species."[100] Determining whether an area is habitat for a given species—whether occupied or not—is a fact specific inquiry that must be based on the best

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[94] *Compare* 16 U.S.C. § 1532(5)(A)(i) (critical habitat means occupied areas "on which are found those *physical and biological features* (I) essential to the conservation of the species and (II) which may require special management considerations or protection"), *with id.* § 1532(5)(A)(ii) (critical habitat means "specific areas outside the geographic 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") (emphases added).

[95] *See e.g.*, *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest"); *Dean v. United States*, 556 U.S. 568, 573 (2009) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)) (cleaned up) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

[96] *See* 50 C.F.R. § 424.12(b)(2).

[97] 84 Fed. Reg. at 45,022.

[98] *Id.* at 40,769 ("Imposing a 'reasonable certainty' standard is also unnecessary in light of the best available data standard of the Act"); *see* 16 U.S.C. § 1533(b)(2).

[99] 88 Fed. Reg. at 40,771.

[100] 139 S.Ct. at 369 n.2 (emphasis added).

available science.[101] The Services now state that they anticipate making that species specific factual inquiry when designating critical habitat for each species,[102] an appropriate approach that is consistent with *Weyerhaeuser* and does not require unlawful modifications to the statutory definition of critical habitat.

Removing these arbitrary and unlawful requirements also will allow the Services to better utilize unoccupied critical habitat to promote species conservation as required by the ESA.[103] Other sections of the ESA protect species from direct harm[104] and authorize discretionary land acquisition,[105] but only the critical habitat provisions explicitly mandate that the Services determine exactly what areas are essential to species conservation,[106] *i.e.*, recovery.[107] And unoccupied critical habitat is by definition essential to the recovery effort for species that have experienced a decrease in their historic range and/or will need to expand their range in order to survive and recover in the future.[108]

The States also note that concerns over the impact of designating unoccupied critical habitat are often overblown and reflect a lack of understanding of the consultation process. Critical habitat designated on private land has no immediate impact on the activities that can occur there. It is only when a federal agency becomes involved, by permitting or funding a specific project, that the impact on the critical habitat unit must be evaluated through consultation with the appropriate Service.[109] Such consultation is completed informally in the majority of cases.[110] When formal consultation is required, the Services rarely issue a jeopardy finding

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[101] *See* 87 Fed. Reg. 37,757, 37,758 (June 24, 2022) (Revoking previous regulatory definition of "habitat" because "we find that relying on the best available scientific data, including species-specific ecological information, is the best way to determine whether areas constitute habitat and may meet the definition of 'critical habitat' for a species.")*; see also* 16 U.S.C. § 1533(b)(2) (Requiring critical habitat designations to be based on "the best scientific data available.").
[102] 88 Fed. Reg. at 40,771.
[103] 16 U.S.C. §§ 1531(b), (c)(1), 1536(a)(1).
[104] *Id.* § 1538.
[105] *Id.* § 1534.
[106] *Id.* § 1532(5).
[107] *See id.* § 1532(3) ("The terms 'conserve', 'conserving', and 'conservation' mean 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."); *see also Gifford Pinchot Task Force*, 378 F.3d at 1070 (instructing that the Services must consider species recovery, and not just survival, when designating critical habitat).
[108] *See e.g.*, Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Reviving Critical Habitat Under the Endangered Species Act*, 58 Buff. L. Rev. 1095, 1105 (2010) ("It will be necessary to protect . . . former habitat as well as that which it currently occupies," in order to achieve recovery).
[109] 16 U.S.C. § 1536(a)(2).
[110] Jacob Malcolm & Ya-Wei Li, *Data contradict Common Perceptions About a Controversial Provision of the U.S. Endangered Species Act*, 112 PNAS 15844, 15845 (2015) (finding that of 88,920 consultations conducted by the U.S. Fish and Wildlife Service from January 2008 – April 2015, only 6,829 were formal consultations.).

that would stop a project outright.[111] Even then, the project proponent could still apply to the statutorily created Endangered Species Committee for relief.[112] In sum, the States support the Services' proposed changes to the regulations governing critical habitat designations.

V. Comments on the Proposed Consultation Rule — Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 88 Fed. Reg. 40,753 (June 22, 2023), Dkt. No. FWS–HQ–ES–2021–0104

In the Proposed Consultation Rule, among other changes, the Services propose to: (1) slightly revise the definitions of "effects of the action" and "environmental baseline" in section 402.02, both of which were significantly revised in 2019; (2) delete section 402.17 (Other Provisions), regarding the "reasonably certain to occur" standard for "effects of the action," which was added in 2019; and (3) add new provisions to section 402.14(i) authorizing off-site mitigation in incidental take statements accompanying biological opinions.

For the reasons explained below, the States applaud the Services' proposed revisions to the definitions of "effects of the action" and "environmental baseline," and the accompanying proposed deletion of section 402.17, which are helpful improvements over the unlawful 2019 Consultation Rule. We urge the Services, however, to revisit other aspects of these definitions that are contrary to Section 7, the conservation purposes of the ESA, and applicable case law. The States also urge the Services to clarify its proposed changes related to off-site mitigation measures to ensure they are lawfully applied to the benefit of species and habitat in the myriad highly fact-bound circumstances across the nation.

Finally, the Services indicate in the Proposed Consultation Rule that they are "accept[ing] public comment on all aspects of the 2019 [Consultation] rule, including whether any of those provisions should be rescinded in their entirety (restoring the prior regulatory provision) or revised in a different way."[113] For the reasons stated below, the States again request that the challenged 2019 Consultation Rule be rescinded in its entirety.

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[111] *See id*. (finding that "no project has been stopped or extensively altered as a result of FWS concluding either jeopardy or destruction/adverse modification of critical habitat," during the seven year period studied); *see also* Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 Fla. L. Rev. 141, 164 (2012) (finding that from 2005 to 2009, only 7.2% of consultations conducted by the U.S. Fish and Wildlife Service for fish species resulted in jeopardy and 6.7% in adverse modification.); H.R. Rep. No. 97-567 at 13 (1982) (noting, in a house report on the 1982 ESA amendments, that only 1.8% of consultations resulted in jeopardy and that only two of those projects were ultimately stopped).

[112] 16 U.S.C. § 1536(e).

[113] 88 Fed. Reg. at 40,760.

A. The Proposed Amendments to the Definition of "Effects of the Action" (50 C.F.R. § 402.02) and Removal of 50 C.F.R. § 402.17 Correct Some Important Infirmities in the 2019 Consultation Rule, but the Two-Part Causation Test Should Be Removed Entirely.

1. Proposal to partially restore the definition of "effects of the action" to its former scope properly effectuates section 7 and the ESA's conservation purpose.

The Services propose to add the following italicized text to the first sentence of the definition of "effects of the action": "Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action *but that are not part of the action*."[114] The States support this proposed change as a helpful clarification of the definition.

The Services also propose to delete, in its entirety, section 402.17 (Other Provisions), which identifies a number of additional limiting factors for determining whether a consequence of the proposed agency action is "reasonably certain to occur."[115] This includes, for example, that the consequence is: (1) "remote in time from the action"; (2) "geographically remote from the immediate [action] area"; and (3) "only reached through a lengthy causal chain."[116] In addition, section 402.17 unlawfully requires the effects analysis to be based on "clear and substantial information."[117] For the reasons stated in the States' comments on the then-proposed 2019 Consultation Rule, this provision is unlawful and contrary to Section 7, the ESA's conservation purposes, and controlling case law.[118] The States strongly support this proposed change and also urge the Services not to consider the section 402.17 "reasonable certainty" factors in future effects analyses.[119]

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[114] *Id.* at 40,763 (emphasis added).
[115] *Id.* at 40,757-58, 40,764.
[116] 50 C.F.R. § 402.17(b).
[117] *Id.*
[118] *See* Comments of the Attorneys General of Massachusetts, California, Maryland, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia, Sept. 24, 2018, Docket ID No. FWS-HQ-ES-2018-0009: Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. 35,178 (July 25, 2018), pp. 26-27 (hereafter "States' 2018 Proposed ESA Rules Comments").
[119] The Services state several times that they intend to develop a future regulatory guidance document regarding application of the "reasonably certain" criterion, which seems to signal their intent to reintroduce consideration of at least some of the 402.17 factors. *See* 88 Fed. Reg. 40,757-58. This would be problematic for the reasons stated below.

2. The Services should further amend the definition of "effects of the action" to delete the two-part "but for" and "reasonably certain to occur" causation test, which was added in 2019.

The Proposed Consultation Rule, however, still would maintain problematic additions to the second sentence of the definition of "effects of the action" that were made in 2019. The 2019 Consultation Rule added a "two-part causation test" that a consequence can only be considered an "effect of" a proposed federal agency action if: (1) it would not occur "but for": (a) the proposed agency action, or (b) "other activities that are caused by the proposed agency action"; *and* (2) the consequence "is reasonably certain to occur."[120]

As an initial matter, the Services should, at the very least, modify the regulatory definition to clarify that the two-part causation test does not apply to the proposed action itself (as opposed to other activities caused by, but that are not a part of, the proposed action). While the Services claim that the Proposed Consultation Rule is intended to do this, the proposed amended definition of "effects of the action" does not appear to actually accomplish that result.[121] Making this point explicit is important because the preamble to the 2019 Consultation Rule repeatedly states that the two-part causation test applies to *all* effects of the proposed action.[122]

Additionally, contrary to the Services' claim, the two-part causation test has not "long been part of" the Services' section 7 practice.[123] Prior to 2019, the "but for" language was used only as a shorthand reference for actions "interrelated" with the proposed action, which formerly were required to be evaluated within the full scope of "effects of the action" under section 7.[124] Also, prior to 2019, the "reasonable certainty" standard only applied to *indirect* and *cumulative* effects of the proposed federal agency action, not the direct effects of the proposed action and other activities caused by the action, as is now the case following the 2019 Consultation Rule.[125]

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[120] *Id.* at 40,755; 84 Fed. Reg. at 45,016 (amending definition of "effects of the action" in § 402.02).
[121] *See* 88 Fed. Reg. at 40,755.
[122] *See* 84 Fed. Reg. at 44,977, 44,989-90, 44,993.
[123] 88 Fed. Reg. at 40,755.
[124] *See* former 50 C.F.R. § 402.02, 51 Fed. Reg 19,926, 19,958 (June 3, 1986) (defining "interrelated actions" as "those that are part of a larger action and depend upon the larger action for their justification"); *Center for Biol. Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1047 (9th Cir. 2015) and *Center for Biol. Diversity v. Bur. of Land Mgmt.*, 698 F.3d 1101, 1113 (9th Cir. 2012) (both referring to the "but for" test for "interrelatedness").
[125] *See* former 50 C.F.R. § 402.02, 51 Fed. Reg at 19,958 (former definitions of "effects of the action" and "cumulative effects," limiting consideration of indirect and cumulative effects, but not direct effects, to those that are "reasonably certain to occur"). In addition, in 2015, the Services applied the "reasonably certain" standard to incidental take statements required by ESA section 7(b)(4), such that only take that is "reasonably certain to occur" needs be accounted and mitigated for in such statements. *See* 80 Fed. Reg. 26,832, 26,836-37, 26,844 (May 11, 2015) (adding 50 C.F.R. § 402.14(g)(7)).

More fundamentally, however, the two-part "but for" and "reasonably certain to occur" causation test does not "maintain[ ] the scope of the assessment required to ensure a complete analysis of the effects of proposed actions" and therefore is not consistent with section 7, for three main reasons.[126]

First, the two-part causation test is contrary to the statutory trigger for section 7 consultation. Section 7 requires federal action agencies to consult with the Services if all or any part of a proposed action "'*may affect*' any listed species or critical habitat."[127] The "may affect" trigger for consultation is a "relatively low threshold[,]" allowing an agency to "avoid the consultation requirement only if it determines that its action will have 'no effect' on a listed species or critical habitat."[128] Thus, "[a]ny possible effect, whether beneficial, benign, adverse, *or of undetermined character*, triggers the [section 7] requirement."[129] For proposed federal actions that meet this "may affect" threshold, if the federal agency or the Services in turn find that the proposed action is "likely" to adversely affect listed species or critical habitat, then formal section 7 consultation with the Services is required.[130] The section 7 "may affect" threshold is necessarily low so that federal agencies meet their statutory obligation to "insure" that their actions are not "likely" to jeopardize listed species or adversely modify or destroy designated critical habitat.[131]

The "but for" and "reasonably certain to occur" requirements set an unlawfully higher bar, even for the direct effects of a proposed federal action. As the preamble to the 2019 Consultation Rule states, the "reasonably certain to occur" test is "an explicit foreseeability test," and in fact it is intended to set an even "higher threshold than 'reasonably foreseeable.'"[132] This is manifestly contrary to section 7.[133] Indeed, the D.C. Circuit has twice recently rejected a federal agency's determinations that its actions would have "no effect" on listed species and critical

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[126] 88 Fed. Reg. at 40,755.
[127] *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011) (emphasis added) (citing 16 U.S.C. § 1536(a)(2)-(c)); *see also id*. at 496 and *Karuk Tribe of Cal. v. U.S. Forest Serv*., 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc); 50 C.F.R. § 402.14(a).
[128] *Karuk Tribe*, 681 F.3d at 1027; *see also Growth Energy v. Env't Prot. Agency*, 5 F.4th 1, 30 (D.C. Cir 2012) ("'may affect' purposefully sets a low bar").
[129] *Karuk Tribe*, 681 F.3d at 1027; *Growth Energy*, 5 F.4th at 30; *Western Watersheds*, 632 F.3d at 496 (emphasis changed) (*quoting* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)).
[130] 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(b)(1); *Center for Biol. Diversity v. Bernhardt*, 982 F.3d 723, 741 (9th Cir. 2020).
[131] *Karuk Tribe*, 681 F.3d at 1027 (*citing* 51 Fed. Reg at 19,949); *see* 16 U.S.C. § 1536(a)(2)); *see also Center for Food Safety v. Regan*, 56 F.4th 648, 658 (9th Cir. 2022) ("To 'insure' something means '[t]o make certain, to secure, to guarantee." (internal ellipsis and citation omitted)).
[132] 84 Fed. Reg. at 44,991-92.
[133] The "reasonably certain to occur" requirement also flouts the ESA's overriding conservation purpose, which likewise calls for a low threshold for adverse effects that is maximally protective of species and habitat. 16 U.S.C. §§ 1531(b), (c)(1), 1536(a)(1).

habitat, and that consequently no section 7 consultation was required, based on application of the two-part causation test.[134]

Second, for agency actions that otherwise meet the "may affect" and "likely to adversely affect" thresholds, the two-part causation test unlawfully limits the statutory requirement that the Services must comprehensively evaluate *all* effects of the *entire* proposed agency action, including short-term, long-term, temporary, permanent, site-specific, regional, and cumulative effects.[135] As the Ninth Circuit stated decades ago, "the scope of the agency action is crucial because the ESA requires the biological opinion to analyze the effect of the *entire* agency action."[136] Moreover, "[t]he delineation of the scope of an action can have a determinative effect on the ability of a biological opinion fully to describe the impact of the action" on the species and habitat.[137]

The two-part causation test, by contrast, unlawfully limits both the type and extent of effects analyzed as part of the proposed federal agency action, contrary to section 7.[138] Instead, an effect purportedly would not be "caused by the proposed action," and therefore need not be considered in the section 7 analysis, if it "would not occur but for the proposed action" or is not "reasonably certain to occur."[139] This limitation, in turn, unlawfully restricts the type and extent of reasonable and prudent alternatives and mitigation measures that must be included as part of the proposed action to avoid jeopardy and adverse modification and reduce the project's

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[134] *See Growth Energy*, 5 F.4th at 30-32 (invalidating "no effect" determination for renewable fuel regulation because EPA's finding regarding alleged lack of reasonable causation was not the same as a "no effect" determination, and EPA instead needed to determine whether rule was "likely to affect" listed species or critical habitat); *Am. Fuel & Petrochem. Mfrs. v. Env't Prot. Agency*, 937 F.3d 559, 597-98 (D.C. Cir. 2019) (invalidating as contrary to section 7 EPA's "no effect" determination for another renewable fuel regulation, which found that harm to species "cannot with reasonable certainty be attributed to" the proposed regulation; holding that this finding "is not the same as a finding that the 2018 Rule 'will not affect' or 'is not likely to adversely affect' listed species or critical habitat").

[135] 16 U.S.C. § 1536(b)(3)(A); *see, e.g.*, *Appalachian Voices v. U.S. Dep't of the Interior*, 25 F.4th 259, 271-76 (4th Cir. 2022); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521-24 (9th Cir. 2010); *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1270-71 (11th Cir. 2009) *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 524 F.3d 917, 934-35 (9th Cir. 2008); *Pac. Coast Fed'n of Fishermen's Ass'n v. U.S. Bureau of Reclam*., 426 F.3d 1082, 1090-95 (9th Cir. 2005) ("*Pacific Coast II*"); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034-38 (9th Cir. 2001) ("*Pacific Coast I*"); *Conner v. Burford*, 848 F.2d 1441, 1452-54, 1457-58 (9th Cir. 1988).

[136] *Conner*, 848 F.3d at 1453 (emphasis in original); *see also Wild Fish Conservancy*, 628 F.3d at 521-22 (citing *Conner* with approval on this point).

[137] *Wild Fish Conservancy*, 628 F.3d at 522.

[138] 16 U.S.C. §§ 1536(a)(2), (b)(3)(A).

[139] 50 C.F.R. § 402.02 (current 2019 definition of "effects of the action," which would not be changed by the Proposed Consultation Rule).

adverse effects on listed species and critical habitat,[140] in contravention of section 7, controlling case law, and the overriding conservation purposes of the ESA.[141]

Third, the "reasonably certain to occur" standard also runs counter to the ESA's requirement that the Services must use the "best available science" in conducting consultations.[142] Courts have held that the Services cannot shirk their duty to comprehensively analyze the effects of a proposed agency action simply because the available information does not necessarily point to a definite conclusion or outcome.[143] Indeed, in the context of the Proposed Listing and Critical Habitat Rule, the Services concede that "[i]mposing a "reasonable certainty" standard" is both unnecessary and unwarranted "in light of the best available data standard of the Act," which "has not previously been interpreted to require a specific level of certainty."[144] Indeed, the Services now concede that the ESA's best available science standard is applied in the same manner in the listing, critical habitat, and section 7 contexts.[145]

For all these reasons, the States respectfully request that the Services rescind the two-part causation test and restore the definition of "effects of the action" to the version that, prior to 2019, had been in effect since 1986.[146]

B. The Proposed Amendments to the Definition of "Environmental Baseline" (50 C.F.R. § 402.02) Improves upon the 2019 Consultation Rule but the Last Sentence of the Definition Should Be Removed in its Entirety

1. *The proposed elimination of "ongoing" federal agency actions from the 2019 definition of the environmental baseline is a positive improvement*

The States strongly support the proposed change to the last sentence of the definition of "environmental baseline" that was added in 2019, which would exclude

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[140] 16 U.S.C. §§ 1536(b)(3)(A), (b)(4).
[141] *Id.* §§ 1531(b), (c)(1), 1536(a)(1), (a)(2), (b)(3)(A).
[142] *See id.* §§ 1536(a)(2), (c)(1).
[143] *Conner*, 848 F.2d at 1454 ("incomplete information … does not excuse the failure to comply with the statutory requirement of a comprehensive biological opinion using the best information available") (citing 16 U.S.C. § 1536(a)(2)); *Wild Fish Conservancy*, 628 F.3d at 525 (same).
[144] 88 Fed. Reg. at 40,769-70; *see also id*. at 40,770 (reasonable certainty standard "could potentially result in the Services excluding from consideration the best available data merely because it was deemed not to be sufficiently certain").
[145] *See id*. ("Courts have held that the Act's 'best scientific data available' standard, which also applies (with slight differences not relevant here) to listing decisions and biological opinions under section 7, does not require that the information relied upon by the Services be perfect or free from uncertainty").
[146] *See* 51 Fed. Reg. at 19,958.

"ongoing" federal agency activities and facilities from the environmental baseline.[147] This new proposal is a positive change that is consistent with the case law and which remedies a misperception created by the 2019 Consultation Rule that continued, ongoing operations of dams and other federal facilities are part of the "environmental baseline" and need not be analyzed as part of the effects of a proposed federal agency action in section 7 consultations.

Section 7 in general applies to all federal "agency actions" over which there is "discretionary Federal involvement or control."[148] The courts have repeatedly held that "agency action" is a broad concept that includes *ongoing* federal agency actions, provided the agency has some discretionary involvement or control over those actions.[149] Indeed, the U.S. Supreme Court has held that "it is clear Congress foresaw that § 7 would, on occasion, *require agencies to alter ongoing projects* in order to fulfill the goals of the Act."[150] The Services previously have taken the position that the distinction between the environmental baseline and the effects of the proposed agency action is important because "whether an action is included in the baseline determines whether its impacts are considered at all in the agency's basic jeopardy [and adverse modification] analysis."[151] Accordingly, the Services' proposal to remove ongoing actions from the baseline is consistent with the ESA and case law.

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[147] 88 Fed. Reg. at 40,763. The last sentence currently reads as follows: "The consequences to listed species or designated critical habitat from *ongoing* agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline." 84 Fed. Reg. at 45,016 (current definition of "environmental baseline" in 50 C.F.R. § 402.02) (emphasis added). The 2023 Consultation Rule would delete the word "ongoing" from this sentence, and also add the word "Federal" before "agency activities" and "agency facilities". 88 Fed. Reg. 40,763.

[148] *Nat'l Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666-67 (2007) (citing 50 C.F.R. § 402.03); 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.02 (definition of "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," including "actions directly or indirectly causing modifications to the land, water, or air").

[149] *See, e.g., Wild Fish Conservancy*, 628 F.3d at 521-22, 523-24; *Karuk Tribe*, 681 F.3d at 1020-21, 1024-25; *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv*., 340 F.3d 969, 974-77 (9th Cir. 2003); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1053-55 (9th Cir. 1994).

[150] *TVA v. Hill*, 437 U.S. at 186 (emphasis added).

[151] *NWF v. NMFS*, 524 F.3d at 930 n.9. The States note that the Services' attempt to make a clear distinction between the environmental baseline and the effects of the action is belied by other provisions of the ESA regulations, which provide that the effects of the action must be added to the environmental baseline as well as cumulative effects to determine whether the proposed action is likely to cause jeopardy or adverse modification. *See, e.g*., 50 C.F.R. § 402.14(g)(4) (during formal consultation, the Service must "[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," determine "whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat."). This holistic approach to the effects analysis essentially has been mandated by the courts. *See, e.g.,* cases cited in footnote 154 *infra*.

2. *The Services should delete the last sentence of the 2019 definition of environmental baseline altogether, which continues to allow federal agency actions to be improperly segmented into discretionary and non-discretionary components*

Unfortunately, however, the Services' explanation for their proposed removal of the word "ongoing" in the preamble, as well as their proposal to maintain the last sentence of the definition of "environmental baseline," undercuts the clarity of the proposed removal of ongoing agency actions from the environmental baseline. The preamble states that the Services intend to continue their existing unlawful practice of segmenting federal agency actions, including ongoing agency actions, into "discretionary" and "non-discretionary" components, the former being subject to section 7 consultation, and the latter being included in the environmental baseline.[152] As authority for this approach, the Services rely exclusively on *Home Builders*, 551 U.S. at 667-71, which held that the EPA's decision to transfer permitting authority to a state under section 402(b) of the Clean Water Act (33 U.S.C. § 1342(b)) was not subject to section 7 consultation because the EPA had no discretion under any of the nine specific criteria in section 402(b) to consider protections for listed species.[153]

But whether an agency retains sufficient discretionary authority under its authorizing statute to protect listed species and habitat when undertaking a proposed action is a very different question than whether a federal agency action—over which it otherwise has discretionary involvement and control—may be segmented into discretionary and non-discretionary components. And, indeed, numerous decisions—all of which post-date *Home Builders*—have rejected the Services' attempts to segment federal agency actions, and place some components or aspects of the action at issue into the environmental baseline, as contrary to Section 7.[154] As the Ninth Circuit explained in *Wild Fish Conservancy*, 628 F.3d at 521-25,

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[152] Specifically, the preamble states that "those components of" federal activities or facilities that are not within the federal agency's discretionary control "are not subject to the requirement to consult, and as a result, the impacts of those non-discretionary activities and facilities to listed species and critical habitat are not a consequence of a proposed discretionary Federal action." 88 Fed. Reg. 40,755-56. The preamble further expressly states that the Service's existing practice "will not change" and that the prior approach to the environmental baseline, as explained in the preamble to the 2019 Consultation Rule, "remain[s] relevant." 88 Fed. Reg. at 40,756 (citing 84 Fed. Reg. at 44,976, 44,978-79 (Aug. 27, 2019)); *see also* 84 Fed. Reg. at 44,995.

[153] 88 Fed. Reg. at 40,756. Significantly, and often overlooked, is the fact that the U.S. Supreme Court was not construing *section 7* itself, which is not limited to "discretionary" federal agency actions (*see* 16 U.S.C. § 1536(a)(2)), but rather, the Court was applying the Services' *regulation* limiting application of section 7 consultation to discretionary agency actions (*see* 50 C.F.R. § 402.03). *Home Builders*, 551 U.S. at 665-69.

[154] *See, e.g., Appalachian Voices*, 25 F.4th at 279 (4th Cir. 2022) ("when baseline conditions or cumulative effects are already jeopardizing a species, an agency may not take action that deepens the jeopardy by causing additional harm") (internal emphases and brackets omitted); *Cooling Water*

under such an approach, "a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide into oblivion is one of the very ills the ESA seeks to prevent."[155]

The Services attempt to explain their approach as a distinction between the "existence" or "physical presence" of a federal facility (such as a dam) on the landscape, which the federal agency has no discretion to modify, versus the impacts of operation of that facility, which the federal agency does have discretion to modify.[156] But the preamble defines the "existence" of a federal facility such as a dam to include "the *past and present* impacts of dam *operations* up to *the time of consultation*," while "operations" subject to consultation would only include *future* operations.[157] Because the impacts attributable to the *presence* and *past and present operations* of a dam or other federal activity or facility are often inextricably intertwined with those attributable to its *future* operations, the distinction between the "existence" and "past and present" operational impacts of a federal facility, on the one hand, and the impacts of future operations of that same facility, on the other, has been repeatedly rejected by the courts.[158]

Intake Structure Coal. v. U.S. Env'tl Prot. Agency, 905 F.3d 49, 81 (2d Cir. 2018) (noting that "[w]here the future operation of a regulated facility depends upon the discretion of the acting agency, the continued operation of that facility is not a 'past' or 'present' impact of a previous federal action" that is included in the environmental baseline) (citing *NWF v. NMFS*, 524 F.3d at 930-31)); *Am. Rivers v. Fed. Energy Reg. Comm'n*, 895 F.3d 32, 47 (D.C. Cir. 2018) (holding FWS acted arbitrarily by placing past and present impacts of a hydropower project within the environmental baseline "without considering the degradation to the environment caused by the . . . Project's operation and its continuing impacts" (*citing NWF v. NMFS*, 524 F.3d at 930)); *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 737-39 (9th Cir. 2017) (NMFS biological opinion "improperly minimized the risk of bycatch to the loggerhead [turtle]'s survival by only comparing the effects of the fishery against the baseline conditions that have already contributed to the turtles' decline" (internal quotations, brackets and emphases omitted)); *San Luis & Delta Mendota Water Auth. v. Jewell*, 747 F.3d 581, 639-40 (9th Cir. 2014) (federal action agency and the Services may not "segregate discretionary from non-discretionary actions when it considers the environmental baseline" and *Home Builders* does not dictate a different result); *Wild Fish Conservancy*, 628 F.3d at 521-25 (invalidating biological opinion that segmented analysis of ongoing fish hatchery operations into an arbitrary five year future term because "[t]he artificial division of a continuing operation into short terms" undermined the "ability to determine accurately the species' likelihood of survival and recovery," and can "mask the long-term impact of Hatchery operations"); *NWF v. NMFS*, 524 F.3d at 926, 928-33 (holding FWS cannot minimize effects of ongoing dam operations on listed species by subsuming within the baseline the "existence" and past and present operations of a dam as a "nondiscretionary" agency action, and noting that "even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm").

[155] *Id*. at 523 (*quoting NWF v. NMFS*, 524 F.3d at 930).

[156] 88 Fed. Reg. at 40,756.

[157] *Id*. (emphasis added).

[158] *See* footnote 154 *supra*. To add to the confusion regarding the real meaning of the Services' proposed deletion of the word "ongoing" from the third sentence, the preamble also states, somewhat contradictorily, that "[r]egardless of their 'ongoing' nature, *all* of the consequences of the proposed discretionary operations of the structure are 'effects of the action'," and that the deletion of the term

In sum, the Services' proposed approach to the environmental baseline unlawfully encourages piecemealing of the proposed federal action and allows federal action agencies and the Services to exclude components or aspects of federal activities and facilities from consultation, contrary to the requirements of section 7 and the conservation purposes of the ESA.[159] Therefore, the States *strongly* encourage the Services to go even further and remove the third sentence in the definition of "environmental baseline," regarding discretionary vs. non-discretionary components of agency actions, from the definition entirely.

3. *Additional revisions to the definition of environmental baseline are needed.*

The preamble to the Proposed Consultation Rule inappropriately states that the Services will normally defer to the federal action agency's determination of the scope of its discretion under its governing statutes.[160] But such agencies are often incentivized to conclude that they lack discretion to modify an action or facility to protect species and habitat when this is not actually the case. The Services should retain their independent authority to determine what federal agency actions are subject to section 7 consultation and not unlawfully abdicate their authority to federal action agencies and federal permit and license applicants.[161]

Finally, the rationale for the Services' proposal to use the term "impacts" in the baseline definition but "consequences" in the effects definition needs clarification. The preamble states that the definition uses the term "impacts" to refer to "items that belong in the environmental baseline" and the word "consequences" to refer to "effects that are caused by the proposed action and not included in the environmental baseline."[162] The reason for the distinction and its implications are not clear and needs further explanation.

"ongoing" from the definition of the environmental baseline "remedies a misperception that anything that was a continuation of past and present discretionary practice or operation would be in the environmental baseline." 88 Fed. Reg. at 40,756 (emphasis added). This is the appropriate way to interpret the environmental baseline vis-à-vis the proposed agency action with respect to ongoing agency actions. However, other statements in the preamble indicate the opposite: that the Service will improperly place past and present impacts of ongoing agency actions in the baseline and not consider those to be "effects of the action." *See* 88 Fed. Reg. at 40,755-56.

[159] 16 U.S.C. §§ 1531(b), (c)(1), 1536(a)(1), (a)(2).

[160] 88 Fed. Reg. at 40,756.

[161] *See Cooling Water Intake Structure Coal.*, 905 F.3d at 80 ("The ESA requires the Services to *independently evaluate* the effects of agency action on a species or critical habitat.") (emphasis added).

[162] 88 Fed. Reg. at 40,755.

C. The Proposed Rule Allowing Use of Reasonable and Prudent Measures for Off-Site Mitigation Needs Significant Clarification (new 50 C.F.R. § 402.14(i)(2) & (3))

The Proposed Consultation Rule would allow reasonable and prudent measures ("RPMs") that are included in an incidental take statement accompanying a biological opinion (16 U.S.C. § 1536(b)(4)) to include off-site mitigation measures.[163] Specifically, the Services propose to add language in section 402.14(i)(2) (re: incidental take) that RPMs "may include measures implemented inside or outside of the action area that avoid, reduce, or offset the impact of incidental take."[164] In addition, the Services propose a new section 402.14(i)(3) stating that "[p]riority should be given" to RPMs "that avoid or reduce the amount or extent of incidental taking anticipated to occur within the action area."[165] However, "[t]o the extent it is anticipated that the action will cause incidental take that cannot feasibly be avoided or reduced in the action area," the Services may include in the incidental take statement "additional" RPMs "that serve to minimize the impact of such taking on the species inside or outside the action area."[166]

The States generally support the concept behind the proposed changes and the availability of off-site mitigation as a means of last resort to minimize and mitigate any adverse effects of the federal action on listed species and critical habitat that cannot be avoided and reduced in the action area. The States also agree with the Services that, if applied judiciously, the changes could provide additional conservation benefits for certain listed species and their habitat, particularly highly migratory species.[167] However, the States believe that certain clarifications and tightening of the fairly open-ended proposed standards for off-site RPMs is necessary to avoid the potential for misinterpretation and misapplication of this new rule, which will apply to a broad range of activities and species and their habitat, each with very different life cycles and in highly fact-specific circumstances.

First, the Services should clarify the circumstances under which it will determine that the impacts of the agency action "cannot feasibly" be "avoided or reduced" within the action area so as to warrant off-site mitigation.[168] In particular, the Services should specify that conclusory assertions of economic infeasibility are insufficient to avoid implementation of RPMs in the action area. The feasibility

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[163] *Id*. at 40,763.
[164] *Id.* (proposed revised 50 C.F.R. § 402.14(i)(2)).
[165] *Id.* at 40,763 (proposed new 50 C.F.R. § 402.14(i)(3)).
[166] *Id*.; *see also id.* at 40,758-59 (explaining that "after considering measures that avoid or reduce incidental take within the action area, the Services may consider for inclusion as RPMs measures that offset any remaining impacts of incidental take that cannot be avoided" and that "[s]uch 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").
[167] *See id.* at 40,758.
[168] *See id*. at 40,763 (proposed new 50 C.F.R. § 402.14(i)(3)).

standard must set a high bar in order to comply with the Services' and the federal action agencies' duties to insure no jeopardy and no adverse modification of critical habitat under section 7.[169]

Second, the Services should clarify what metrics they will use to quantify or measure the extent to which the effects of the proposed federal agency action will be avoided or reduced in the action area vs. the remaining effects that will need to be implemented outside of the action area. The Services also should explain how they will determine that the off-site measures actually will reduce or minimize incidental take caused by the agency action in the action area and to what extent. This is necessary to ensure that the off-site mitigation is in fact necessary and will benefit the affected sub-populations and habitat at issue.

The preamble to the Proposed Consultation Rule states that off-site mitigation 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 or reduce incidental take are implemented.[170] The preamble also refers to these as "offsetting measures" to reduce "residual" impacts of the action.[171] But it is not clear what is meant by "additional" or "offsetting" measures to address "residual impacts" and how the "residual impacts" will be measured and accurately accounted for. The Services should provide for robust identification and analysis of "remaining" or "residual" impacts and clarify that, in every instance, all such impacts will be addressed.

Third, as a related point, the initial determination of what constitutes the appropriate "action area" for a proposed federal action often involves difficult determinations of line-drawing.[172] As such, the determination whether offsetting RPMs are or are not reasonably available in the action area may depend in part on whether the action area is broadly or narrowly defined and how well the site-specific effects of the proposed federal action are identified and analyzed in the biological opinion.[173] The Services should clarify how it will ensure that an action

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[169] *See, e.g.*, *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987) (explaining that, under section 7, the risk that mitigation measures may not occur "must be borne by the project, not by the endangered species").
[170] 88 Fed. Reg. at 40,759 (emphasis added).
[171] *Id.*
[172] *See* 50 C.F.R. § 402.02 (defining "action area" as "all areas to be affected directly or indirectly by the Federal action"); *cf. Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 901-02 (9th Cir. 2002) (invalidating the FWS' arbitrary definition of "action area" in a biological opinion, finding no attempt to correlate the action area with the actual direct and indirect effects of the agency action on listed species); *Sierra Club v. U.S. Dep't of the Interior*, 990 F.3d 909 (5th Cir 2021) (upholding FWS' determination that "action area" excluded an area adjacent to the project area).
[173] *See, e.g.*, *Appalachian Voices*, 25 F.4th at 271-275 (invalidating biological opinion for failure to adequately describe site-specific effects of the action in the action area); *see also Pacific Coast I*, 265 F.3d at 1035-37 (finding that biological opinion could not ignore site-specific degradations within broader action area).

area is properly drawn and keyed to the actual impacts of the agency action and that the effects of the action are properly analyzed at a site-specific level, to minimize the potential for arbitrary determinations that off-site mitigation is necessary.

Fourth, the States recommend the Services clarify three other more minor aspects of the proposed RPM rule. It is not clear what the Services mean when they state in the preamble that the offsetting measures "do not modify the action subject to consultation."[174] Relatedly, it is not clear how the existing regulatory limitation that RPMs "cannot alter the basic design, location, scope, duration or timing of the action and may involve only minor changes" will or can be applied in the context of off-site mitigation.[175] Lastly, the Services likewise should clarify how they plan to address off-site mitigation that is proposed as part of the federal agency action even before an analysis of the feasibility of on-site and off-site mitigation has been performed.[176]

Finally, while the Services appropriately acknowledge that the proposal to allow off-site mitigation reflects a significant change in position,[177] in the Proposed Consultation Rule, the Services should further explain the reasons for their change, as required by the Administrative Procedure Act.[178] In particular, the Services should clarify their newly identified and confusing distinction between minimizing the *impacts of* incidental take versus minimizing the *level of take*.[179]

D. The 2019 Consultation Rule's Revised Definition of "Destruction or Adverse Modification" of Critical Habitat Should Be Rescinded (50 C.F.R. § 402.02)

As many of our States explained in commenting on the proposed 2019 Consultation Rule and challenging the final 2019 Consultation Rule in court,[180] this rule unlawfully revised the regulatory definition of "destruction or adverse modification" of critical habitat to add a requirement that the federal agency action must appreciably diminish the value of the critical habitat "as a whole" for the

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[174] 88 Fed. Reg. at 40,759.
[175] *See* 50 C.F.R. § 402.14(i)(2).
[176] *See* 88 Fed. Reg at 40,759 (the proposed new rule "would not affect" action agencies' "existing ability … to incorporate mitigative (sic) measures voluntarily as part of the proposed action being evaluated").
[177] *Id*. at 40,758 (citing FWS and NMFS, *Final Endangered Species Act Consultation Handbook*, 4–53 (1998)).
[178] *See Federal Comm'cns. Comm'n v. Fox Television Stations*, 556 U.S. 502, 513-15 (2009).
[179] *See* 88 Fed. Reg. at 40,759 (claiming the Services no longer believe that RPMs are statutorily "limited to measures that avoid or reduce *levels of* incidental take") (emphasis added)) and *id*., ((citing 16 U.S.C. § 1536(b)(4)(i)-(ii), referring to measures that "minimize" the "*impact of* such incidental taking on the species" that is caused by the proposed action (emphasis added)).
[180] *See States' 2018 Proposed ESA Rules Comments* at pp. 23-25; *see also California et al. v. Haaland et al.*, Case No. 4:19-cv-06013-JST, State Plaintiffs' Re-Filed Notice of Motion and Motion for Summary Judgment; Memorandum in Support, Dkt. 162 at pp. 14-15.

conservation of the species in order for the action to trigger the "destruction or adverse modification" standard.[181] The 2019 Consultation Rule also deleted the second sentence of the previous definition of "destruction or adverse modification" (*id.*), which further defined what constitutes destruction or adverse modification of critical habitat.[182]

Under this new "as a whole" standard, a proposed federal agency action triggers consultation only if the effects of the action would "diminish the conservation value of the critical habitat *in such a considerable way* that the *overall value of the entire critical habitat designation* to the conservation of the species is appreciably diminished."[183] Thus, now, "[i]t is only when adverse effects from a proposed action rise to this *considerable level* that the ultimate conclusion of 'destruction or adverse modification' of critical habitat can be reached."[184] The "as a whole" requirement unlawfully undermines the purpose of critical habitat and restricts the scope the statutorily required section 7 analysis.

First, the Services' "as a whole" approach to assessing impacts on critical habitat directly undercuts federal agencies' and the Services' key section 7 duty to "insure" no destruction or adverse modification of critical habitat, as well as their duty to "utilize their authorities" to conserve—i.e. recover[185]—listed species.[186] Specifically, the "as a whole" language allows destruction of portions or features of designated critical habitat that were deemed "essential for" listed species' conservation in the initial critical habitat designation.[187] Under this provision, a

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[181] 84 Fed. Reg. at 45,016 (codified at 50 C.F.R. § 402.02).

[182] Prior to 2019, this second sentence to the definition of adverse modification read as follows: "Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features." *See* former 81 Fed. Reg. 7214, 7225-26 (Feb. 11, 2016) (codified at 50 C.F.R. § 402.02, definition of "destruction or adverse modification" in effect prior to Sept. 26, 2019).

[183] 84 Fed. Reg. at 44,986 (emphasis added); *see also id*. at 44,981 (adverse modification analysis is performed "at the scale of the *entire* critical habitat designation") (emphasis added).

[184] *Id*. at 44,986 (emphasis added); *see also id*. at 44,983 (Services must "determine if the overall value of the critical habitat is likely to be appreciably reduced"); *id.* at 44,984 ("the ultimate determination applies to the value of the critical habitat designation as a whole").

[185] 16 U.S.C. § 1532(3) defines the term "conserve" for purposes of the ESA "as to use, and the use of all methods and procedures … necessary to bring any endangered … or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary," *e.g.*, to the point of full recovery.

[186] *Id.* §§ 1531(b), (c)(1), 1536(a)(1), (a)(2); *see Alaska v. Lubchenco*, 723 F.3d 1043, 1054 (9th Cir. 2013) ("recovery considerations are an important component of both the jeopardy and adverse modification determinations"); *see Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1322 (10th Cir. 2007) (finding that section 7(a)(2) requires consideration of the effect of impairment of critical habitat on the species' recovery).

[187] 16 U.S.C. § 1532(5)(A) (defining critical habitat as "specific areas" both within and outside the current geographic area occupied by the listed species which contain physical, biological or other features that the Services find are "essential to the conservation of the species"); *see Ctr. for Native Ecosystems*, 509 F.3d at 1321-22 ("Critical habitat is impaired when features essential to its

federal action agency and the Services may ignore site-specific, localized, and cumulative impacts on critical habitat, directly contrary to courts' repeated admonitions that federal agencies' consideration of such impacts is critical to ensure that their section 7 duties are met.[188] For example, most recently, the Fourth Circuit Court of Appeals invalidated a biological opinion for a natural gas pipeline for its failure to consider the site-specific impacts of the project within the action area.[189] The court held that the FWS was "attempting to pass off its summary of range-wide conditions and threats as an action-area analysis. But vaguely referring to the 'destruction or modification of habitat' within the action area, without explaining the specific causes or extent of this local degradation," was wholly improper, the court explained.[190]

The "as a whole" standard also can be used to dilute the short-term effects on species and critical habitat against a backdrop of long-term impacts, which the courts also have repeatedly held unlawful. For example, in *Pacific Coast I,* 265 F.3d at 1037-38, the Ninth Circuit invalidated biological opinions for 23 proposed timber sales on federal lands in Oregon based in part on the failure to consider short-term effects on critical habitat. Under the biological opinions' approach, "only degradations that persist more than a decade and are measurable at the watershed scale will be considered to degrade aquatic habitat."[191] "This generous time frame ignores the life … and migration cycle of anadromous fish," and also ignores that "even a low level of additional impact" to a species that is at "critically low levels, may reduce the likelihood of survival and recovery."[192]

For all these reasons, the Services' 2019 amended definition of "destruction or adverse modification" is contrary to section 7, the conservation purposes of ESA, and the definition of critical habitat.[193] Once again, just as in *Gifford Pinchot Task Force*, the FWS "could authorize the complete elimination of critical habitat

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conservation are impaired… [i]t follows that critical habitat is adversely modified by actions that adversely affect a species' recovery").

[188] *See Pacific Coast I*, 265 F.3d at 1036-37 (finding NMFS was required to consider site-specific and cumulative effects of logging projects, both at the project and watershed levels); *Gifford Pinchot Task Force*, 378 F.3d at 1075 ("Focusing solely on a vast scale can mask multiple site-specific impacts that, when aggregated, do pose a significant risk to a species."); *cf. Alaska v. Lubchenco*, 723 F.3d at 1052-53 (emphasizing similar importance of examining local impacts of agency actions and "sub-regional declines" in species' populations in jeopardy analysis).

[189] *See Appalachian Voices*, 25 F.4th 259 (4th Cir. 2022).

[190] *Id*. at 272.

[191] *Pacific Coast I*, 265 F.3d at 1037.

[192] *Id*. at 1037-38; *see also Pacific Coast II*, 426 F.3d at 1092-94 (invalidating biological opinion for operation of Klamath Dam that contained "no analysis of the effect on" coho salmon for the first eight years of implementation of project operations, despite three-year life cycle of the salmon); *see also Wild Fish Conservancy*, 628 F.3d at 521-25 (invalidating biological opinion that only considered the effects of ongoing hatchery operations for a five-year period);*NWF v. NMFS*, 524 F.3d at 934-35 (finding NMFS violated ESA by failing to consider short-term effects of dam operations on critical habitat for listed salmon species).

[193] 16 U.S.C. §§ 1531(b), (c)(1), 1532(3), 1532(5)(A), 1536(a)(1)-(2).

necessary only for recovery, and so long as the smaller amount of critical habitat necessary for survival is not appreciably diminished," then there is no "destruction or adverse modification."[194] The States therefore urge the Services to remove the unlawful "as a whole" language added by the 2019 Consultation Rule, to the detriment of species recovery.[195]

E. The 2019 Consultation Rule's Provision Regarding Mitigation Measures Should Be Rescinded (50 C.F.R. § 402.14(g)(8))

The 2019 Consultation Rule also added a new unlawful provision to section 402.14(g)(8) that "[m]easures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action *and do not require any additional demonstration of binding plans*."[196] The Services claimed in 2019 that this text merely "simplifies" the prior regulation and "avoids potential confusion" between measures that are included as part of the proposed agency action versus those that are considered after consultation is initiated.[197]

Contrary to the Services' assertions in 2019, however, section 7 and the cases interpreting it, plainly requires that mitigation measures that are part of the proposed agency action must be clear, specific, binding and enforceable. If the federal action agency does not ensure that proposed mitigation measures—whether included within the project description or developed during consultation—will be implemented, then the Services' jeopardy and adverse modification determinations will be based on a project description that may or may not be accurate, contrary to the federal action agencies' and the Services' section 7 duties to "insure" no jeopardy to listed species and no adverse modification of critical habitat under section 7(a)(2).[198] Whether mitigation measures will in fact be implemented also will affect the level of likely incidental take for purposes of a section 7 incidental take statement and its accompanying "reasonable and prudent measures."[199] Finally, enforceability of mitigation is important to establish clear and determinable triggers for re-initiation of consultation if these mitigation measures are not implemented, and to ensure federal agency compliance with the terms and

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[194] 378 F.3d at 1069-70.

[195] *See id.* at 1069-70 (invalidating 1986 regulations defining "destruction or adverse modification" as an alteration that "appreciably diminishes the value of the critical habitat for *both* the survival *and* recovery of a listed species") (emphasis added); *accord Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441-43 (5th Cir. 2001); *see also NWF v. NMFS*, 524 F.3d at 934 (regulatory definition of, and NMFS' analytical approach to, adverse modification analysis "reads the 'recovery' goal out of the adverse modification inquiry").

[196] 84 Fed. Reg at 45,017 (emphasis added).

[197] *Id.* at 44,979; *see also id.* (noting that, because there is already a presumption that the proposed federal action will occur, there is no need to further require that mitigation measures included as part of the proposed action be clear, specific or binding).

[198] *NWF v. NMFS*, 524 F.3d at 935-36.

[199] 16 U.S.C. § 1536(b)(4).

conditions of incidental take statements and other requirements in biological opinions.[200]

Accordingly, numerous courts have confirmed that binding mitigation is indeed necessary to satisfy the requirements of section 7.[201] For example, directly contrary to the 2019 regulatory language at issue, the Ninth Circuit has held that a "general commitment to future improvements" that is included in the proposed action is insufficient "to offset its certain immediate negative effects, absent specific and binding plans" and a "clear, definite commitment of resources for future improvements."[202] Further, the measures must be "under agency control or otherwise reasonably certain to occur."[203]

Contrary to the Services' 2019 rationale, the accompanying 2019 changes to section 402.14(c)(1), requiring more specificity in the action agency's description of the proposed action, do not address the mitigation specificity or enforceability issue.[204] These requirements do not specifically address mitigation measures included as part of a proposed agency action, let alone require that these measures be clear, specific, binding, and enforceable. Nor does the general requirement to reinitiate consultation on a changed agency action address these mitigation concerns unless the action agency's failure to implement one or more mitigation measures is specifically identified as a trigger for re-initiation in the biological opinion's incidental take statement.[205] As the Ninth Circuit recently stated, "[a]n indefinite mitigation measure is less likely to trigger re-consultation because it will be difficult to know at [what] point or whether the action agency has failed to comply."[206] Therefore, measures must "be *made* enforceable … by incorporation into the terms and conditions of an incidental take statement."[207]

Finally, it also is no answer to say—as the Services repeatedly have claimed—that the duty to comply with section 7's substantive obligations to "insure" no jeopardy and no adverse modification lies primarily with the action agency, and therefore any failure to implement mitigation measures is at the action agency's

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[200] *See CBD v. BLM*, 698 F.3d at 1115-16; *CBD v. Bernhardt*, 982 F.3d at 743-44.
[201] *See Western Watersheds Project v. Haaland*, 69 F.4th 689, 714 (10th Cir. 2023); *CBD v. Bernhardt*, 982 F.3d 723, 743-47; *CBD v. BLM*, 698 F.3d at 1115-17; *NWF v. NMFS*, 524 F.3d at 935-36; *see also Rock Creek All. v. U.S. Fish & Wildlife Serv.*, 663 F.3d 439, 444 (9th Cir. 2011); *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 955-56 (9th Cir. 2003).
[202] *NWF v. NMFS*, 524 F.3d at 935-36.
[203] *Id.* at 936 n.17; *see also CBD v. Bernhardt*, 982 F.3d at 746 (invalidating undefined and vague future mitigation measures in biological opinion because agency's "non-committal assurances" to undertake "possible" strategies "cannot shoulder the government's burden to identify a 'clear, definite commitment of resources" (*quoting NWF v. NMFS*, 524 F.3d at 936)).
[204] 84 Fed. Reg. at 45,003-04.
[205] *Id.* at 45,003-05; *see* 50 C.F.R. § 402.16(a)(3).
[206] *CBD v. Bernhardt*, 982 F.3d at 744
[207] *Id.* (emphasis added).

own risk of subsequent Service or citizen enforcement.[208] This ignores the Services' affirmative duties to ensure no jeopardy and no adverse modification, as well as a duty to conserve listed species.[209] It also ignores potential enforceability issues with an agency's failure to implement a non-specific and non-binding mitigation measure.

Thus, for all these reasons, section 402.14(g)(8) is contrary to section 7 and well-established case law. It should be rescinded and the longstanding regulatory language in effect prior to 2019 reinstated.[210]

F. The 2019 Consultation Rule's Provisions Regarding Service Adoption of Action Agencies' Biological Analyses Should Be Rescinded (50 C.F.R. § 402.14(h)(3))

The 2019 Consultation Rule unlawfully amended 50 C.F.R. section 402.14(h)(3)(i) to allow the Services to adopt, as their own biological opinions, all or part of a federal action agency's consultation initiation package.[211] But 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.[212] As the Second Circuit recently explained: "[t]he ESA requires the Services *to independently evaluate* the effects of agency action on a species or critical habitat."[213] While the Services claimed in 2019 that their independence would not be compromised and that they did not intend to "indiscriminately adopt" federal action agencies' or applicants' analyses or documents,[214] the rule on its face unlawfully permits the Services to abdicate their statutory consultation duty to inexpert, non-biological agencies and non-federal entities in violation of section 7(b)(3)(A).[215] It therefore should be rescinded and the pre-2019 rules reinstated.[216]

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[208] *See* 84 Fed. Reg. 45,002-07.
[209] *See* 16 U.S.C. §§ 1531(c)(1), 1536(a)(1), (a)(2).
[210] 51 Fed. Reg. 19,926, 19,958 (June 3, 1986).
[211] 84 Fed. Reg at 45,017.
[212] 16 U.S.C. § 1536(b)(3)(A); *Karuk Tribe*, 681 F.3d at 1020 ("The purpose of consultation is to obtain the expert opinion of wildlife agencies."); *Turtle Island Restor. Network*, 340 F.3d at 974 ("The purpose of the consultation procedure is to allow *either [NMFS] or the FWS* to determine whether the federal action is likely to jeopardize the survival of a protected species or result in the destruction of its critical habitat.") (emphasis added); *see also Ctr. for Biol. Diversity v. Env't Prot. Agency*, 847 F.3d 1075, 1084 (9th Cir. 2017) ("Consultation allows agencies to draw on the expertise of wildlife agencies.").
[213] *Cooling Water Intake Structure*, 905 F.3d at 80 (emphasis added).
[214] 84 Fed. Reg. at 45,007-08.
[215] *See* 50 C.F.R. § 402.14(h)(3) (Services "may adopt all or part of: (i) a Federal agency's initiation package," including biological assessments); *id.* § 402.08 (allowing federal permit or license applicant and other designated "non-federal representative" to prepare biological assessment on behalf of federal action agency).
[216] *See* 51 Fed. Reg. at 19,962 (June 3, 1986).

G. The 2019 Addition of a Definition of "Programmatic Consultation" Should Be Tightened (50 C.F.R. § 402.02)

The 2019 Consultation Rule also added a new definition of "programmatic consultation" to section 402.02 to provide for "a consultation addressing an agency's multiple actions on a program, region or other basis," including but not limited to: (1) "[m]ultiple similar, frequently occurring, or routine actions expected to be implemented in particular geographic areas," and (2) "[a] proposed program, plan, policy, or regulation providing a framework for future proposed actions."[217]

Although programmatic consultation may be appropriate in some cases, this vague and broad definition authorizes such consultations in circumstances where it may not be appropriate under section 7. For example, if used for multiple different projects occurring in the same region, the site-specific impacts of individual proposed federal agency actions on listed species and critical habitat would not necessarily be separately addressed or adequately considered. But section 7 requires that consultations on large-scale and programmatic actions may not ignore or minimize the site-specific and short-term effects of these actions.[218] Moreover, programmatic biological opinions are permissible only when the analysis is "supplemented by later project-specific environmental analysis."[219]

The problems with programmatic consultation are compounded by the fact that the 2019 Consultation Rule authorizes federal action agencies to include non-binding and unenforceable mitigation measures in their proposals, as discussed in Part E above.[220] And the Proposed Consultation Rule would add off-site mitigation measures to this mix, as discussed in Part C above.[221] Both of these provisions increase the risks to listed species and critical habitat if project proponents are allowed to rely on nonbinding mitigation measures outside of the action area. In these types of circumstances, there is simply no guarantee that mitigation measures will be adequate to: (1) avoid jeopardy to listed species and adverse modification of critical habitat, and (2) reduce the adverse effects of the action on species and habitat. The States thus urge the Services to tighten the definition of programmatic consultation to ensure all federal action agencies and the Services will satisfy their mandatory section 7 obligations to ensure no jeopardy to listed species and no adverse modification of critical habitat.

H. The 2019 Addition of an "Expedited Consultation" Procedure Should Be Rescinded (50 C.F.R. § 402.14(*l*))

The 2019 Consultation Rule added a new § 402.14(*l*) authorizing "expedited consultations" as an "optional formal consultation process that a Federal agency

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[217] 84 Fed. Reg. at 45,016 (Aug. 27, 2019).
[218] *See, e.g., Pacific Coast II*, 426 F.3d at 1091-95; *Pacific Coast I*, 265 F.3d at 1035-38.
[219] *Gifford Pinchot Task Force*, 378 F.3d at 1068.
[220] 50 C.F.R. § 402.14(g)(8).
[221] *See* 88 Fed. Reg. at 40,763 (proposed 50 C.F.R. § 402.14(i)(2) & (3)).

and the Service may enter into upon mutual agreement" depending on "the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat and other relevant factors."[222]

This expedited consultation procedure could authorize an unlawful end-run around some of the most fundamental requirements of the ESA: to comprehensively analyze and mitigate the effects of federal agency actions on listed species and their critical habitat.[223] And whether a particular action is subject to the expedited consultation procedure will be based on a determination by the Services and the federal action agency following no ascertainable criteria, without any public review and oversight.[224]

Similar to the added definition of programmatic consultation, this language affords the Services unduly broad discretion and does not ensure that expedited consultations will adequately evaluate the full range of effects of federal actions, contrary to the requirements of section 7. The language also is vague and open-ended regarding what actions may be subject to expedited consultation and offers no criteria or process to guide expedited consultation, providing only one example of "[c]onservation actions whose primary purpose is to have beneficial effects on listed species."[225] Worse still, the preamble to the 2019 Consultation Rule states that "the Services do not agree that the expedited consultation provision should be limited to only these types of beneficial actions," but provides no further guidance in this regard.[226]

The Services also provided no justification for their 2019 statements that the expedited process will meet the "same information and analysis standards as the normal process," and will merely "improve efficiencies" by reducing the amount of staff time spent on consultations "while still ensuring full compliance with the Act."[227] Nor did the Services explain the need for an expedited consultation procedure when the existing informal consultation framework already provides a streamlined consultation process for proposed federal agency actions deemed "not likely to adversely affect" listed species or critical habitat.[228]

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[222] 84 Fed. Reg at 45,017.
[223] 16 U.S.C. § 1536(a)(2), (b)(3)(A), (b)(4).
[224] 84 Fed. Reg. at 45,008.
[225] *Id*. Federal restoration and recovery actions already were subject to a streamlined consultation process since 2016. *See* FWS, *Streamlined Consultation Guidance for Restoration/Recovery Projects* (Nov. 16, 2016), available at https://www.fws.gov/endangered/esa-library/pdf/Final%20RRP%20Guidance%20w%20memo%2011012016.pdf
[226] 84 Fed. Reg. at 45,009.
[227] *Id*.
[228] 50 C.F.R. § 402.13(c). The 2019 Consultation Rule also added a 60-day time period for conclusion of informal consultation in most circumstances, even further streamlining this process. *Id.* § 402.13(c)(2).

The States therefore respectfully request that section 402.14(*l*) be rescinded in its entirety.

I. The Exemptions for the Bureau of Land Management from Requirement to Reinitiate Consultation Should Be Rescinded (50 C.F.R. § 402.16(b))

The 2019 Consultation Rule added a new section 402.16(b), which exempts BLM and the U.S. Forest Service ("USFS") from having to reinitiate consultation on their land management plans when a new species is listed or new critical habitat is designated within the plan area.[229] As mentioned, the section 7 consultation requirement applies on an ongoing basis to all federal agency actions over which the agency retains discretionary involvement or control.[230]

The key issue in determining whether reinitiation is warranted is whether the federal agency has authority and discretion to modify its ongoing implementation of the action "for the benefit of a protected species."[231] In *Cottonwood Environmental Law Center v. U.S. Forest Serv*ice, 789 F.3d 1075, 1087 (9th Cir. 2015), the Ninth Circuit held that a federal agency "has a continuing obligation to follow the requirements of the ESA" where it has continuing regulatory authority and control over the action. Thus, contrary to the preamble to the 2019 Consultation Rule,[232] the Court expressly stated that the responsibility to reinitiate consultation "does not terminate when the underlying action is complete."[233]

With regard to land management plans in particular, the Ninth Circuit has twice held that reinitiation of consultation is required when a new species is listed or new critical habitat is designated in the plan area following initial plan approval, because the agency retains continuing authority over plan implementation for the benefit of listed species and habitat.[234] As the court explained in *Cottonwood,* requiring reinitiation whenever a new species is listed or critical habitat designated in the plan area "comports with the ESA's statutory command that agencies consult to ensure the '*continued* existence' of listed species."[235] "[N]ew [critical habitat]

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[229] 84 Fed. Reg at 45,017-18. Because Congress has expressly authorized the exceptions to reinitiation for the USFS, these comments focus on the BLM. *See* 2018 Omnibus Act, H.R. 1625, Pub. Law 115-141; 132 Stat. 1065-66 (Mar. 23, 2018).
[230] *Home Builders*, 551 U.S. at 666 (*citing* 50 C.F.R. § 402.03).
[231] *Karuk Tribe*, 681 F.3d at 1021; *see also id*. at 1024-25; *Nat. Res. Defense Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014).
[232] 84 Fed. Reg. at 45,009-10.
[233] *Cottonwood*, 789 F.3d at 1086 & fn.12.
[234] *See id.* at 1086-88 (USFS was required to reinitiate consultation on a land management plan where Service had revised a previous critical habitat designation to include National Forest lands); *Pacific Rivers Council*, 30 F.3d at 1053-55 (Service was required to reinitiate consultation on land management plan when new species was listed in the plan area because such plans "have an ongoing and long-lasting effect even after adoption … and represent ongoing agency action").
[235] 789 F.3d at 1087 (emphasis in original) (citing 16 U.S.C. §§ 1536(a)(2), (4)).

protections triggered new obligations," the court explained, and the Forest Service could not "evade its obligations by relying on an analysis it completed before the protections were put in place."[236]

In the 2019 Consultation Rule, the Services admitted that the new exemptions from the reinitiation requirement were designed to "address issues arising under" the Ninth Circuit's holding in *Cottonwood*.[237] But, because *Cottonwood* interpreted the requirements of section 7(a)(2) itself, the Services do not have authority to overrule this case by regulation.[238]

The Services also claimed that the rule still would enable cumulative effects on newly listed species and newly designated critical habitat to be adequately addressed during project-specific consultations, and when the land management plans theoretically are updated every five to fifteen years.[239] But that contention ignores that land management plans contain substantive criteria governing the nature and extent of permissible land uses and impacts to species and habitat on an ongoing basis, at a programmatic, watershed scale.[240] Failing to revisit these criteria and standards when new imperiled species and their habitat are identified in plan area renders those plans immediately outdated, and may more rapidly lead to jeopardy to listed species or adverse modification of their critical habitat in the plan area.[241]

For all of these reasons, the rule limiting BLM's obligations to reinitiate consultation on land management plans is contrary to section 7's requirements that the BLM and Services "insure" no jeopardy to listed species and no adverse modification of critical habitat, and evaluate all effects of ongoing agency actions on listed species and habitat.[242] The rule also is contrary to the BLM's and Services' separate obligations to further the ESA's overarching conservation mandate. The

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[236] *Id*. at 1088.
[237] *See* 84 Fed. Reg. at 44,980, 45,009.
[238] Additionally, the fact that Congress expressly authorized a statutory exemption from the requirement to reinitiate consultation for USFS land management plans, but not BLM plans, in the 2018 Omnibus Act lends further weight to the argument that the Services' attempt to expand these exemptions by regulation to include the BLM is unlawful. *See, e.g., Bittner v. United States*, 143 S. Ct. 713, 720 (2023) (Congress' explicit authorization of per-account penalties for only some willful violations implies that Congress meant to exclude analogous non-willful violations from the statute).
[239] 84 Fed. Reg. at 44,980, 45,009-11.
[240] *See Pacific Rivers Council*, 30 F.3d at 1051-53, 1055 (management plans "have an ongoing and long-lasting effect even after adoption" and set forth overall criteria for timber harvesting, grazing, road building, and other activities on federal lands); *Turtle Island Restoration Network*, 340 F.3d at 977 (approving of the statement in *Pacific Rivers Council* that management plans "may have 'an ongoing and long-lasting effect' on the forest").
[241] *See Cottonwood*, 789 F.3d at 1088 (The Service's position that no reinitiation is required "would relegate the ESA . . . to a static law that [only] evaluates and responds to the impact of an action before [it] takes places, but does not provide any further evaluation or response when new information emerges that is critical to the evaluation.").
[242] 16 U.S.C. §§ 1536(a)(2), (b)(3)(A).

States therefore request that section 402.16(b) be rescinded as it applies to the BLM.[243]

CONCLUSION

We commend the Services for their proposals to undo some of the most damaging changes wrought on the ESA by the 2019 ESA Rules. Our imperiled species depend on effective, efficient, and robust implementation of the ESA for their very survival. Our States are concerned about existing and growing threats to imperiled species in our States, including the existential threats posed by the climate crisis. Accordingly, we urge the Services to adopt the 2023 proposed changes as well as to strengthen some of these proposals, as outlined above, and to rescind all of the unlawful 2019 ESA Rules. This is necessary to ensure the Services are adequately protecting our priceless natural heritage and meeting all of their mandatory conservation and other obligations under the ESA.

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[243] *Id.* §§ 1531(b), (c)(1), 1536(a)(1).

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