# Comments of the Attorneys General of California, Maryland, Massachusetts, Connecticut, Illinois, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, and City of New York

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***Via electronic submission to http://www.regulations.gov***

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**Re: Comments on the Proposed Rule: Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, FWS-HQ-ES-2019-0115, 85 Fed. Reg. 55,398 (Sept. 8, 2020)**

Dear Mr. Wallace:

The undersigned Attorneys General of California, Maryland, Massachusetts, Connecticut, Illinois, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, and the City of New York (hereinafter, "the States and Cities") respectfully submit these comments on the proposed rule by the U.S. Fish & Wildlife Service ("FWS") entitled, "Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat," 85 Fed. Reg. 55,398 (Sept. 8, 2020) (hereinafter, the "Proposed Rule"). The Proposed Rule would establish a new process for excluding areas from critical habitat designations made by FWS pursuant to section 4(b) of the Federal Endangered Species Act of 1973, 16 U.S.C. §§ 1531 *et seq*. (the "Act" or "ESA").

FWS's proposed critical habitat exclusion process is contrary to the plain language and broad conservation purposes of the ESA, lacks any reasoned basis, and would arbitrarily limit FWS's duty and authority to recover imperiled species by improperly requiring it to defer to outside sources of information and reducing—potentially drastically—the amount of critical habitat ultimately designated and protected under the Act. FWS also failed to comply with the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq*. ("APA"), and the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*. ("NEPA"), in issuing the Proposed Rule. There are at least three major legal flaws with FWS's proposal.

First, the Proposed Rule's critical habitat exclusion process is contrary to both the plain language of section 4(b)(2) and the Act's overarching conservation purposes, and fundamentally undermines the section 7 consultation process in several ways. The proposal unlawfully: (1) weights the required economic analysis *against* critical habitat designation for species conservation and in *favor* of excluding both Federal and non-Federal lands from such designations; (2) *mandates* an exclusion analysis in any case where the proponent of an exclusion puts forth "credible information" supporting an economic or other impact, regardless of information proffered by the proponents of critical habitat inclusion; and (3) *requires* FWS to defer to such outside sources of information in most cases.

These changes conflict with both the text and structure of the ESA's critical habitat designation provisions and fundamental principles of administrative law, and they are likely to result in a dramatic reduction in the amount of critical habitat ultimately designated, to the detriment of species' survival and recovery as required by the ESA. Furthermore, by reducing the extent of critical habitat designations, particularly on Federal lands, the Proposed Rule also will reduce the number, type, and scope of inter-agency consultations required under section 7 of the Act to ensure that Federal agency actions do not adversely modify or destroy such habitat. This undermines the very "heart of the ESA" and the primary purpose of critical habitat designations. *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011).

Second, the Proposed Rule is arbitrary and capricious under the APA because FWS has failed to provide any reasoned explanation for this proposal. FWS claims that the Proposed Rule responds to the U.S. Supreme Court's recent decision in *Weyerhaeuser Co. v U.S. Fish & Wildlife Serv*., 139 S. Ct. 361 (2018), that determinations *not* to exclude critical habitat areas are subject to judicial review. But the U.S. Supreme Court did not, and, indeed, could not, authorize FWS to abdicate its statutory authority and discretion regarding whether and how to conduct a critical habitat exclusion analysis under section 4(b)(2) of the Act in the first instance. Moreover, FWS altogether fails to explain the Proposed Rule's dramatic departure from FWS's 2016 "Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act," 81 Fed. Reg. 7,226 (Feb. 11, 2016) (hereinafter, the "2016 Policy").

Finally, FWS's suggestion that the Proposed Rule is subject to a categorical exclusion under NEPA, or that it may complete NEPA review at a later date, is contrary to that statute because the proposal is a major substantive change in the law which will likely have significant environmental effects for imperiled species and their habitat. As a result, FWS must conduct NEPA review before promulgating a final rule.

The States and Cities have significant interests in the conservation of the natural heritage within their borders and are uniquely qualified to evaluate, and demand withdrawal of, FWS's Proposed Rule. Indeed, in many jurisdictions, the States and Cities hold these wildlife resources in trust for the benefit of their people. Within the States' and Cities' boundaries, there are hundreds of species listed as endangered or threatened under the ESA, as well as millions of acres of Federal public lands, and numerous Federal facilities and infrastructure projects that are subject to the ESA's section 7 consultation requirements. The ESA thus specifically directs FWS to "cooperate to the maximum extent practicable with the States" in implementing the Act

and also gives states a unique seat at the table in ensuring the faithful and fully informed implementation of the Act's species-conservation mandates. 16 U.S.C. § 1535(a). Moreover, States and Cities seeking to protect their natural resources would need to devote significant resources and institutional capacity to make up for FWS's failure to properly implement the purposes of the ESA. And, as the U.S. Supreme Court has recognized, states are entitled to "special solicitude" in seeking to remedy environmental harms within their territories. *See Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 519-22 (2007).

For these reasons, the States and Cities urge FWS to withdraw this misguided, unlawful, and destructive Proposed Rule and instead fulfill its longstanding statutory obligations under the ESA to protect and ensure the recovery of endangered and threatened species and their habitat.

## BACKGROUND

### I. The Endangered Species Act.

Congress enacted the ESA nearly forty-five years ago in a bipartisan effort "to halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978); *see* 16 U.S.C. § 1531. The ESA accordingly 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." *Hill*, 437 U.S. at 177, 194 (internal quotation omitted). "[T]he language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Id.* at 174; *see also id.* at 194. That pervasive goal "is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id*. at 184; *see also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698-99 (1995) (describing broad purposes of Act).

The Act declares that endangered and threatened species of "fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). The 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 [their] conservation." *Id*. § 1531(b).

The Act defines "conservation" broadly as "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*." *Id*. § 1532(3) (emphasis added); *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 the extinction of species … but to allow a species to recover to the point where it may be delisted"); *Sierra Club. v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001) ("[T]he objective of the ESA is to enable listed species not merely to survive, but to recover from their endangered or threatened status"). Further, "*every agency of government is committed* to see that those purposes are carried out." *Hill*, 437 U.S. at 184 (quoting 119 Cong. Rec. 42913 (1973)) (emphasis in original); *see also* 16 U.S.C. §§ 1531(c), 1536(a)(1).

As particularly relevant here, section 4 of the ESA, 16 U.S.C. § 1533, prescribes the process for FWS to list a species as "endangered" or "threatened" within the meaning of the statute, and to designate "critical habitat" for each such species. The Act defines "critical habitat" as areas within and outside the geographic area occupied by the species that are "essential for the conservation of the species." *Id.* § 1532(5)(A). With regard to the exclusion of areas from critical habitat designations, section 4(b)(2) of the Act provides that FWS:

> [S]hall designate critical habitat … on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. [FWS] may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

*Id*. § 1533(b)(2).

Areas designated as critical habitat are provided with significant protections to ensure that species have the ability to expand their ranges and recover to sustainable population levels so they no longer need to be listed. In particular, section 7 of the ESA, 16 U.S.C. § 1536, requires all Federal agencies 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, *id*. § 1536(a)(2).

If a Federal agency action "may affect" any listed species or such species' critical habitat, the Federal action agency must initiate consultation with FWS, make changes to the action to avoid any such destruction or adverse modification, and implement mitigation measures to minimize any remaining impacts to critical habitat. *See id*. §§ 1536(b)(3), (b)(4), (c)(1). Specifically, if the Federal action agency or FWS determine that the action is "likely to adversely affect" a listed species and/or designated critical habitat, FWS must prepare a biological opinion regarding the effects of the action on the species and/or critical habitat. *Id.* § 1536(b)(3)(A). FWS's biological opinion must determine whether the action is likely to jeopardize the continued existence of any listed species or likely to destroy or adversely modify any designated critical habitat. *Id*.

If FWS finds jeopardy or adverse modification, the biological opinion must include "reasonable and prudent alternatives" to the agency action that "can be taken by the Federal agency or applicant in implementing" the action which would avoid such jeopardy or adverse modification. *Id*. Finally, the biological opinion must include a written statement (referred to as an "incidental take statement") specifying the impacts of any incidental take on the species, any "reasonable and prudent measures that [FWS] considers necessary or appropriate to minimize such impact," and the "terms and conditions" that the action agency must comply with in implementing those measures. *Id*. § 1536(b)(4).

## II. The Proposed Rule.

FWS's Proposed Rule would establish a new, unlawful process for excluding areas of critical habitat under section 4(b)(2) of the Act, thereby limiting the reach of section 7's consultation requirement, even though any excluded areas of critical habitat are by definition "essential to the conservation of the species" 85 Fed. Reg. 55,398 (Sept. 8, 2020); *see* 16 U.S.C. § 1532(5)(A) (defining critical habitat).[1] While claiming that this "exclusion analysis" remains discretionary as provided under section 4(b)(2), in fact, the Proposed Rule would impose a new *mandatory obligation* on FWS to undertake such an analysis when a "*proponent of excluding* a particular area … has presented credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion." 85 Fed. Reg. at 55,407 (emphasis added). In conducting such an analysis, FWS would defer to outside "experts" and "sources" with "firsthand information" regarding "nonbiological impacts" that allegedly are "outside the scope of [FWS'] expertise." *Id*. In some cases, FWS may even defer to such outside experts and sources as to *biological* impacts that are expressly within FWS's expertise. If FWS determines that the benefits of excluding a particular area outweigh the benefits of including that area as critical habitat, FWS "*shall* exclude" that area, unless it will result in the extinction of a species. *Id*. (emphasis added).

In addition, FWS explicitly proposes to reverse its 2016 Policy of prioritizing Federal lands for critical habitat designation. *Id*. at 55,402. The 2016 Policy provides that "Federal lands should be prioritized as sources of support in the recovery of listed species," and that FWS should "focus designation of critical habitat on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands." 81 Fed. Reg. at 7,231-32. But under the Proposed Rule, FWS would now specifically consider information supporting the exclusion of Federal lands based on "impacts" such as ESA consulting costs borne by federal agencies and costs borne by applicants to modify a project to avoid habitat impacts. 85 Fed. Reg. at 55,402. And the Proposed Rule further provides that FWS may exclude critical habitat on *non-federal* lands based on ill-defined "community impacts" that purportedly would result from the designation of critical habitat, such as disruption of "planned community development projects" like a school or hospital. *Id*. at 55,403.

FWS claims that the Proposed Rule responds to the U.S. Supreme Court's recent decision in *Weyerhaeuser Co. v U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018), wherein the Court stated that a decision not to exclude a particular area of critical habitat is judicially reviewable under the APA. *Id*. at 371.[2] FWS also claims that the Proposed Rule will "provide greater

[1] The Proposed Rule states that this process would only apply to critical habitat designations made by FWS and not to designations by the National Marine Fisheries Service, which would continue to be governed by the existing regulatory process in 50 C.F.R. § 424.19. 85 Fed. Reg. at 55,398-99.

[2] The draft economic analysis accompanying the Proposed Rule states in section 1.2, "Need for the Proposed Rule," that the Supreme Court "found that the Service's decision not to exclude a particular area from critical habitat for the dusky gopher frog 'did not appropriately consider all of the relevant factors that the statute sets forth to guide the agency in the exercise of its

transparency and certainty for the public and stakeholders," and carries out the current administration's regulatory reform agenda pursuant to Executive Order 13777. 85 Fed. Reg. at 55,398-99.

Finally, FWS states that the Proposed Rule is "likely" subject to a categorical exclusion under section 46.210(i) of the Department of the Interior's NEPA implementing regulations. 85 Fed. Reg. at 55,406. This regulation provides an exemption for "[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case." 43 C.F.R. § 46.210(i). FWS also states, somewhat inconsistently, that it "invite[s] public comment regarding our initial determination under NEPA and we will complete our analysis, in compliance with NEPA, before finalizing this regulation." 85 Fed. Reg. at 55,406.

## COMMENTS ON THE PROPOSED RULE

Under the APA, courts will set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). An agency action is arbitrary and capricious where the agency: (i) has relied on factors which Congress has not intended it to consider; (ii) entirely failed to consider an important aspect of the problem; (iii) offered an explanation for its decision that runs counter to the evidence before the agency; or (iv) offered an explanation so implausible that it could not be ascribed to a difference of view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"). In addition, an agency does not have authority to adopt a regulation that is "manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

Where an agency changes its prior approach, it "must display awareness that it is changing position" and "show that there are good reasons for the new policy," including providing "a reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fed. Communications Comm'n v. Fox Television Stations, Inc*. ("*FCC v. Fox*"), 556 U.S. 502, 515-16 (2009). Furthermore, when "its new policy rests upon factual findings that contradict those which underlay its prior policy," an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id*. at 515; *see also American Fuel & Petrochemical Mfrs. v. E.P.A.*, 937 F.3d 559,

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discretion.'" Industrial Economics, Inc., *Economic Analysis of the Proposed Revision of U.S. Fish and Wildlife Service's Regulations Defining the Process for Conducting Section 4(b)(2) Exclusion Analysis in Designating Critical Habitat*, Draft Report, Aug. 24, 2020, at 1-3 (quoting *Weyerhaeuser*) (hereinafter, "Economic Analysis"). The quoted language, however, reflects only the position of Petitioner Weyerhaeuser, not a finding by the Court. *See Weyerhaeuser*, 139 S. Ct. at 371.

577 (D.C. Cir. 2019) (agency "was required to provide a more detailed justification" for rulemaking that abandoned former policy) (internal quotations and citation omitted).

Here, for the reasons explained below, FWS's Proposed Rule is contrary to the plain language and conservation purposes of the ESA, is arbitrary and capricious in violation of the APA, and fails to consider the significant environmental impacts of this action in violation of NEPA.

## I. FWS'S PROPOSED ECONOMIC ANALYSIS AND CRITICAL HABITAT EXCLUSION PROCESSES ARE CONTRARY TO THE PLAIN LANGUAGE AND CONSERVATION PURPOSES OF THE ESA.

### A. The Proposed Rule's Process for Conducting Economic Impact Analyses Is Contrary to Section 4(b)(2), Section 7, and the Conservation Purposes of the ESA.

As noted above, section 4(b)(2) of the Act provides that FWS "shall designate critical habitat … on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Thus, in all cases critical habitat designations must be based on the best scientific information available. *Id.*; *Center for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 938 (9th Cir. 2006). And only *after* FWS considers the best scientific data available and the economic and national security impacts of critical habitat designation may it *then* opt to analyze whether to exclude any areas from critical habitat as a second step in the process. *See* 16 U.S.C. § 1533(b)(2); *Weyerhaeuser*, 139 S. Ct at 371.

In addition, all critical habitat designations must satisfy the statutory definition and fundamental purpose of critical habitat and the ESA's overarching purposes to conserve endangered and threatened species and their habitat. 16 U.S.C. §§ 1531(b), (c), 1532(3), 1536(a)(1). The statutory definition of critical habitat in section 3(5)(A) specifically requires that critical habitat be sufficient to provide for the "conservation" (*i.e.*, recovery) of listed species. *Id*. § 1532(5)(A). Courts accordingly have interpreted the ESA's definition of "critical habitat" broadly, consistent with the ESA's plain text and the basic purposes of critical habitat designation, to provide for listed species' recovery. As the Fifth Circuit has explained:

> The ESA defines "critical habitat" as areas which are "essential to the conservation" of listed species. "Conservation" is a much broader concept than mere survival. The ESA's definition of "conservation" speaks to the recovery of a threatened or endangered species.

*Sierra Club*, 245 F.3d at 441-42 (citing 16 U.S.C. § 1532(5)(A)) (emphasis added); *see also Gifford Pinchot Task Force*, 378 F.3d at 1070 (noting the "purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery").

The Proposed Rule's process for assessing the economic impacts of a proposed critical habitat designation runs afoul of these court-confirmed statutory requirements on both procedural and substantive fronts. First, as a procedural matter, the Proposed Rule unlawfully conflates the initial economic impact analysis with the subsequent, discretionary critical habitat exclusion analysis, and appears to unlawfully presume that such an exclusion analysis will occur in every case. In particular, proposed section 17.90(a) provides that:

> At the time of publication of a proposed rule to designate critical habitat, the Secretary will make available for public comment the draft economic analysis of the designation … Based on the best information available regarding economic, national security and other relevant impacts, *the proposed designation of critical habitat will identify the areas that the Secretary has reason to consider for exclusion* and explain why. *The identifications of areas in the proposed rule that the Secretary has reason to consider for exclusion* is neither binding nor exhaustive.

85 Fed. Reg. at 55,406 (emphasis added). In short, the Proposed Rule compresses the two-step process outlined in the statute into one single step that places an undue emphasis on the exclusion analysis (and makes such analysis mandatory in nearly every case, also contrary to the statute, as discussed further in Part I.B below).

In contrast to the Proposed Rule, the statute clearly provides that the exclusion analysis is both secondary to the economic impact analysis, as well as discretionary. 16 U.S.C. § 1533(b)(2). Indeed, in *Weyerhaeuser*, 139 S. Ct. 361, the U.S. Supreme Court recognized that "Section 4(b)(2) requires the Secretary to consider the economic impact and relative benefits *before* deciding whether to exclude an area from critical habitat or to proceed with designation." *Id*. at 371 (emphasis added); *accord Building Industry Assn. of the Bay Area v. U.S. Dept. of Commerce*, 792 F.3d 1027, 1033 (9th Cir. 2015) ("[W]e read the statute to provide that, *after* the agency considers economic impact, the entire exclusionary process is discretionary") (emphasis added). And in *Building Industry Association*, the Ninth Circuit expressly rejected the argument that the relevant Service (in that case, the National Marine Fisheries Service) is required "to assess whether the economic benefits of excluding an area from designation outweigh the conservation benefits of including the area" in the first step of the analysis. *Id*. at 1032-33. Rather, that analysis is limited to situations in which the Service has first considered the best available science and economic and national security impacts, and then exercises its discretion to undertake such an analysis. *Id*. at 1033. By integrating the exclusion analysis into the first step of the process, FWS disregards the ESA's plain text and effectively places a heavy thumb on the scale of exclusion.

Second, as a substantive matter, the Proposed Rule sets forth an unlawfully broad laundry list of new "economic impacts" and "other relevant impacts" that FWS must now consider in the economic impact analysis. These include, but are not limited to, "opportunity costs arising from the critical habitat designation (*such as those anticipated from reasonable and prudent alternatives* that may be identified through a section 7 consultation)," and (2) "impacts to …

*federal lands … .*" 85 Fed. Reg. at 55,406-07 (proposed 50 C.F.R. §§ 17.90(a), (d)(1)) (emphases added).

With regard to Federal lands, the Proposed Rule states that it is "reversing the 2016 Policy's prior position that we generally do not exclude Federal lands from designations of critical habitat." 85 Fed. Reg. at 55,402. Notwithstanding its statutory duties to utilize all of its authorities to conserve listed species and their habitat, FWS claims that "there is nothing in the Act that states that Federal lands shall be exempted" from an exclusion analysis "simply because land is managed by the Federal government." *Id*. The Proposed Rule further states that, "[w]ith regard to consideration of an exclusion based on economic or other relevant considerations," in contrast to FWS's 2016 Policy, it "will consider the avoidance of the administrative and transactional costs as a benefit of exclusion of a particular area of Federal land." *Id.* These avoided "administrative and transactional costs" include the costs of undertaking the section 7 consultation process as well as the costs to Federal agencies, permittees and other affected parties of undertaking "any project modifications" or conservation measures "necessary to avoid destruction or adverse modification of critical habitat." *Id*.

With regard to areas on non-Federal lands, the Proposed Rule states that:

> In some circumstances, the Secretary may exclude particular areas based on specific 'community impacts' as a result of the designation of critical habitat. FWS wants to ensure, through weighing the benefits of exclusion against the benefits of inclusion, that the designation of critical habitat in areas where community development projects are expected or planned does not unnecessarily disrupt those projects. ... In this instance, the benefits of exclusion may include avoidance of additional permitting requirements, time delays, or additional cost requirements to the community development project … due to the designation of critical habitat.

85 Fed. Reg. at 55,403.

This unnecessarily expansive and unprecedented approach to assessing the economic impacts of critical habitat designation is contrary to the conservation purposes of critical habitat and the ESA in general, as well as FWS's and other federal agencies' overarching duty to conserve listed species and provide sufficient habitat to enable their recovery. 16 U.S.C. §§ 1531(b), (c)(1), 1532(3), 1536(a)(1). In particular, the alleged "opportunity costs" of designating an area as critical habitat, as well as the economic benefits of "avoidance of administrative and transactional costs" or "permitting requirements" if an area is excluded from critical habitat, are utterly routine regulatory costs that will exist for most areas of proposed critical habitat.

These costs are especially likely for critical habitat areas designated on Federal lands. Indeed, designated critical habitat *only* has a regulatory effect on proposed Federal agency actions, including the issuance of Federal permits and licenses. *Id*. § 1536(a)(2); *see* 81 Fed. Reg. at 7,231 ("Under the Act, the only direct consequence of critical habitat designation is to require Federal agencies to ensure, through section 7 consultation, that any action they fund, authorize, or carry out does not destroy or adversely modify designated critical habitat").

Section 7(a)(2) of the ESA requires each Federal agency to ensure that any proposed Federal agency action will not destroy or adversely modify any designated critical habitat, and to consult with FWS if any such action "may affect" such critical habitat. *Id.*; *see Karuk Tribe of Calif. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012). Thus, this consultation requirement inherently is triggered more often for actions undertaken on Federal lands, and less often for Federal permits and licenses issued for non-Federal actions on other lands, such as permits for dredging and filling waters of the United States pursuant to section 404 of the Clean Water Act. 33 U.S.C. § 1344(a).

Under FWS's new proposed approach to the economic impact analysis, many more areas—including, apparently, Federal lands where "non-Federal entities have a permit, lease, contract or other authorization for use" on those lands—would be deemed too costly to include in a critical habitat designation in the first instance. 85 Fed. Reg. at 55,402-03. In fact, it appears that, under FWS's approach, all critical habitat except the remaining habitat necessary to prevent *extinction* could potentially be excluded. *See* 85 Fed. Reg. at 55,407 (proposed 50 C.F.R. § 17.90(e)). That result would not only reduce the number, type and extent of critical habitat designations, but also necessarily would reduce the number, type and scope of section 7 consultations that would otherwise occur as a result of those avoided designations.

These avoided or reduced consultations, in turn, will result in many more Federal projects going forward without FWS biological review, and without development of project alternatives to avoid the destruction and adverse modification of areas essential to species conservation or the implementation of measures to mitigate any remaining impacts to such habitat. This result is directly contrary to FWS's and Federal action agencies' duties under section 7, the fundamental purposes of critical habitat designation, and the overriding conservation purposes of the ESA. 16 U.S.C. §§ 1531(b), (c)(1), 1532(3), 1532(5), 1536(a)(1), (a)(2). In this way, the Proposed Rule undercuts one of the Act's most fundamental tools for achieving its overarching goal of recovering endangered and threatened species—the designation and protection of species' critical habitat.

Finally, FWS states that its proposed economic analysis will only consider the impacts "attributable to the incremental effect of" the critical habitat designation, and not the economic effects of the initial listing, which, FWS claims, is consistent with its prior "baseline approach" previously upheld by the courts. 85 Fed. Reg. at 55,401; *see also id*. at 55,403. But the Proposed Rule's extremely broad view of the types and extent of economic impacts that FWS now will consider could be applied in a contrary manner to section 4(b) by allowing the consideration of a wide range of economic impacts that also are attributable to, and co-extensive with, the listing of the species in the first instance. *See* 16 U.S.C. § 1533(b)(1)(A); *Arizona Cattle Growers Ass'n v. Salazar*, 606 F.3d 1160, 1172-74 (9th Cir. 2010) ("[T]he economic analysis of the critical habitat designation … is not intended to incorporate the burdens imposed by listing the species" and the economic burdens of such designation can "be subsumed by the burdens imposed by listing the species."); *Homebuilders Assn. of Northern Calif. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 992 (9th Cir. 2010) ("[T]he plain language of the ESA directs the agency to consider only those impacts caused by the critical habitat designation itself"); *but see*

*New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1283-85 (10th Cir. 2001) (disapproving of the "baseline" approach to economic impact analysis of proposed critical habitat designations).

### B. The Proposed Rule Unlawfully Makes a Critical Habitat Exclusion Analysis Mandatory Rather Than Discretionary, and Forfeits the Agency's Statutory Discretion as to When the Benefits of Exclusion Outweigh the Benefits of Inclusion, Contrary to Section 4(b)(2).

The Proposed Rule also conflicts with section 4(b)(2)'s plain language by making a critical habitat exclusion analysis mandatory rather than discretionary in any circumstance where the "proponent of excluding a particular area … has presented credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area." 85 Fed. Reg. at 55,406-07 (proposed 50 C.F.R. § 17.90(c)(2)(i)).[3] As the Proposed Rule explains: "we propose to *always enter* into a discretionary exclusion analysis to compare the benefits of inclusion and the benefits of exclusion of particular areas for which credible information supporting exclusion is presented." *Id*. at 55,401 (emphasis added); *see also id*. at 55,400 (FWS "will conduct" an exclusion analysis "when a proponent of excluding the area has presented credible information in support of the request"). Proposed section 17.90(e) then goes on to provide that FWS "*shall* exclude" an area if it "determines that the benefits of excluding a particular area from critical habitat outweigh the benefits of specifying that area as part of critical habitat." *Id*. at 55,407 (emphasis added); *see also id*. at 55,400 ("FWS will exclude areas whenever it determines that the benefits of exclusion outweigh the benefits of inclusion").

The proposed language in sections 17.90(c)(2) and (e) contradicts section 4(b)(2) of the Act, which clearly states that FWS "*may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat *will* result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2) (emphasis added). Courts have uniformly held that an exclusion analysis is discretionary. For example, in *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Ninth Circuit held that section 4(b)(2) "cannot be read to say that the FWS is *ever* obligated to exclude habitat that it has found to be essential. Such a decision is *always* discretionary." *Id*. at 990 (emphasis added). And in *Building Industry Association*, 792 F.3d 1027, the Ninth Circuit again held that "we read [section 4(b)(2)] to provide that, after the agency considers the economic impact, the entire exclusionary process is discretionary." *Id*. at

[3] The Proposed Rule confusingly states that "'credible information' refers to information that constitutes a reasonably reliable indication regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for a particular area." 85 Fed. Reg. at 55,401. Similar to the costs on Federal lands, this definition is so broad that it could conceivably apply to all but the flimsiest of information submissions and to nearly every proposed critical habitat designation, rendering what was a discretionary analysis mandatory under the Proposed Rule.

1033; *see also id*. at 1035 (section (4)(b)(2)'s "second sentence, with the use of the word 'may,' establishes a discretionary process by which the Secretary may exclude areas from designation, but does not set standards for when areas must be excluded from designation"); *Arizona Cattle Growers Assn.*, 606 F.3d at 1173 ("[T]he decision to exclude an area from critical habitat for economic reasons is discretionary").[4]

Because, in certain circumstances, proposed section 17.90(c)(2) makes a critical habitat exclusion analysis a mandatory procedure, and proposed section 17.90(e) substantively mandates that FWS make an exclusionary finding, whereas under ESA section 4(b)(2) an exclusion analysis and finding is *always* discretionary, the proposed regulations are "manifestly contrary to the statute" and therefore must be rejected. *See Chevron*, 467 U.S. at 844.

### C. The Proposed Rule Unlawfully Requires FWS to Defer to Outside Experts.

Proposed section 17.90(d) states that, when FWS conducts an exclusion analysis under section 17.90(c), it "shall weigh the benefits of including or excluding particular areas in the designation … according to the following principles." 85 Fed. Reg. at 55,407. These principles include requiring FWS to defer to outside "experts in," or those with "firsthand knowledge of," areas that purportedly are "outside of the scope of the [FWS'] expertise," unless FWS has specific evidence rebutting that information. *Id*. (proposed 50 C.F.R. § 17.90(d)(1)(i)-(iv)).

The Proposed Rule then lists several impacts that are deemed to be "outside the scope" of FWS's expertise, including "non-biological impacts" identified by any "permittee, lessee, or contractor applicant for a permit, lease, or contract on Federal lands." *Id*. Although the language of the Proposed Rule itself is not entirely clear on this point, the preamble to the Proposed Rule states that evidence concerning impacts deemed to be "outside the scope" of FWS's expertise will be entitled to controlling weight unless FWS has specific information to the contrary. 85 Fed. Reg. at 55,401. The preamble explains that "we propose to assign weights of benefits of inclusion and exclusion based on who has the relevant expertise (e.g., a commenter on the proposed designation of critical habitat or FWS)." *Id*. With respect to benefits that purportedly "are outside of FWS's expertise," FWS "would assign weights to benefits consistent with expert or firsthand information, unless the [FWS] has knowledge or material evidence that rebuts that information." *Id.*

[4] It is true that the Ninth Circuit's holdings in *Bear Valley* and *Building Industry Association* that the Services' ultimate decisions not to exclude an area from critical habitat are judicially unreviewable as "committed to agency discretion by law" under the APA were reversed by the U.S. Supreme Court's decision in *Weyerhaeuser*, 139 S. Ct. at 371; *cf. Bear Valley Mut. Water Co.*, 790 F.3d 990; *Building Industry Assn.*, 792 F.3d at 1034-35. But the question as to whether FWS's *exercise* of its discretion, once it determines to act, is judicially reviewable, is an entirely different question from whether the statute provides for a mandatory or discretionary agency *duty* to exercise that discretion.

While this deference would mostly occur with regard to purported outside expertise or "firsthand knowledge" regarding "non-biological impacts," the Proposed Rule also allows that "many sources outside FWS also have information and expertise regarding biological impacts," and that FWS also would consider that information and expertise in weighing the benefits of inclusion or exclusion of particular areas. *Id*. at 55,402. As to these biological and other impacts that are "within the scope" of FWS's expertise, the Proposed Rule vaguely states that FWS will "assign weight" to the benefits of inclusion or exclusion "in light of" its expertise. *Id*. at 55,407 (proposed 50 C.F.R. § 17.90(d)(2).[5]

These provisions are unlawful and misguided for two reasons. First, they contradict the ESA's requirement that FWS base critical habitat determinations on its own independent professional judgment using the best available science. 16 U.S.C. § 1533(b)(2); *Center for Biological Diversity,* 450 F.3d at 938. Second, and as a related point, the proposal effectively delegates FWS's statutory duty, authority, and discretion to undertake the economic and critical habitat exclusion analyses to third parties who do not have the requisite biological expertise and who are not statutorily authorized to perform these duties. 16 U.S.C. § 1533(b)(2). FWS is the expert biological agency charged with making critical habitat determinations and weighing both biological considerations and economic impacts, not federal permit applicants. *See Karuk Tribe*, 681 F.3d at 1020; *Center for Biological Diversity v. U.S. Envtl. Protection Agency*, 847 F.3d 1075, 1084 (9th Cir. 2017) (both stating that the Services are the expert biological agencies charged with determining impacts to species and habitat under the ESA). The Proposed Rule thus unlawfully delegates FWS's statutory duty and expert judgment to third parties.

### D. The Proposed Rule Conflicts with Established Case Law Regarding Exclusions of Conservation Plan Areas from Critical Habitat.

Finally, the Proposed Rule would codify a modified and weakened version of the 2016 Policy's criteria governing potential critical habitat exclusion for lands subject to a habitat conservation plan or other conservation agreement or partnership authorized by an incidental take permit under section 10 of the Act. 85 Fed. Reg. at 55,407 (proposed 50 C.F.R. § 17.90(d)(3)). Similar to the 2016 Policy, FWS states that it "anticipate[s] consistently excluding such areas from a designation of critical habitat if incidental take caused by the activities in those areas is covered by the permit under section 10 of the Act." *Id*. at 55,403. The Proposed Rule also would largely codify the 2016 Policy's general approach to evaluating exclusions of lands covered by conservation plans, agreements, and partnerships that are *not* authorized under section 10 of the ESA. *Id*. at 55,407 (proposed 50 C.F.R. § 17.90(d)(4)).

But, contrary to FWS's statements in the Proposed Rule, whether a "take" of individual species members pursuant to section 9 will be authorized in a section 10 conservation plan or agreement area is *not* the same standard as whether a proposed Federal agency action may destroy or adversely modify designated critical habitat under section 7 of the statute. *Compare* 16 U.S.C. §§ 1536(a)(2) and (b)(4), *with id.* §§ 1538(a)(1)(B), 1539(a)(1)(B); *see also Karuk*

[5] The preamble to Proposed Rule lists the areas that are deemed to be "within the scope" of FWS' FWS's expertise at 85 Fed. Reg. at 55,403.

*Tribe*, 681 F.3d at 1028 ("Whether mining activities effectuate a 'taking' under Section 9 of the ESA is a distinct inquiry from whether they 'may affect' a species or its critical habitat under Section 7"). Moreover, the Proposed Rule fails to recognize that plant species *are* covered by section 7, but are not subject to the take prohibition under section 9. *Compare* 16 U.S.C. § 1536(a)(2) *with id.* § 1538(a)(2).

In addition, to the extent that the Proposed Rule authorizes FWS to exclude lands subject to a conservation plan or agreement from critical habitat based simply on the fact that the plan covers the same species and habitat, it is inconsistent with applicable case law which demonstrates that while such plans and agreements are important for species conservation, they are not a substitute for critical habitat designation. For example, in *Natural Resources Defense Council v. United States Department of the Interior*, 113 F.3d 1121, 1126-27 (9th Cir. 1997), the Ninth Circuit rejected FWS's argument that the agency did not need to designate critical habitat for the coastal California gnatcatcher because such lands were already covered by a Natural Community Conservation Plan ("NCCP"), which FWS had approved through a special take rule under section 4(d) the ESA. The Court held that "the NCCP alternative cannot be viewed as a functional substitute for critical habitat designation" because such designation "triggers mandatory consultation requirements for Federal agency actions involving critical habitat." *Id.* at 1127. "The NCCP alternative, in contrast, is a purely voluntary program that applies only to non-Federal land-use activities." *Id.*

In sum, the Proposed Rule flouts the plain language and conservation purpose of the ESA, as well as longstanding judicial precedents, and must be withdrawn.

## II. FWS HAS FAILED TO JUSTIFY THE PROPOSED RULE UNDER THE APA.

### A. The Proposed Rule Is Not Compelled or Otherwise Justified by Either the Supreme Court's Opinion in *Weyerhaeuser* or the Deregulatory Principles of Executive Order 13777.

FWS claims that the Proposed Rule responds to the Supreme Court's decision in *Weyerhaeuser* and Executive Order 13777, but neither ruling directed the agency to take the approach it seeks to establish here. Since FWS offers no additional or alternative justification for the Proposed Rule, it therefore fails to provide any reasoned basis in violation of the APA.

FWS first claims that the Proposed Rule is required by the Supreme Court's opinion in *Weyerhaeuser*, 139 S. Ct. 361. *See* 85 Fed. Reg. at 55,399. But the Court's holding in that case narrowly addressed whether FWS's decision not to exclude an area under 4(b)(2) was subject to judicial review. *Id*. at 370-72. It offered no commentary on the sufficiency of FWS's existing process for making such determinations. *Id*.

*Weyerhaeuser* involved a challenge by private landowners to FWS's decision not to exclude a particular area from critical habitat designation for the dusky gopher frog. Consistent with the Ninth Circuit's approach and the Department of the Interior's prior position in Solicitor Opinion M-37016 (2008), both the district court and the Fifth Circuit had held that such a determination was not subject to judicial review because section 4(b)(2) left such decisions

solely to the agency's discretion. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744 (E.D. La. 2014), *aff'd*, 827 F.3d 452 (5th Cir. 2016); *see also Bear Valley*, 790 F.3d at 990; *Building Industry Assn.*, 792 F.3d at 1034-35.

In an opinion that did not touch on the merits of FWS's exclusion analysis in that case, the Supreme Court reversed. The Court started with the basic presumption that agency actions are subject to judicial review except where a statute specifically precludes review or where the action "is committed to agency discretion by law." *Weyerhaeuser*, 139 S. Ct. at 370 (*quoting* 5 U.S.C. § 701(a)(2)). But as the Court noted, the limitation on judicial review of actions committed to agency discretion by law has always been narrowly limited to "those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id*. (*quoting Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). The Court then turned to the ESA, and found that section 4(b)(2) offered sufficient guidance to allow a reviewing court to evaluate an exclusion decision under the APA's abuse of discretion standard of review. *Id*. at 371-72.

But the Court went no further and did not opine on the virtues of FWS's longstanding approach to conducting 4(b)(2) analyses or the merits of its specific analysis of the parcel at issue in that case. As such, *Weyerhaeuser* at most stands for the proposition that a section 4(b)(2) analysis is reviewable under an abuse of discretion standard. The decision therefore does not justify FWS's proposed significant departures from its past practice and the 2016 Policy, as discussed further below, or the sheer abdication of agency authority envisioned by the Proposed Rule.

Nor can FWS justify the proposed rule by reference to Executive Order 13777. *See* 85 Fed. Reg. at 55,399 ("This proposed rule carries out Executive Order 13777… and is part of a larger effort by DOI to identify regulations for repeal, replacement, or modification"). Executive Order 13777 establishes a broadly deregulatory agenda and instructs agencies to establish regulatory reform task forces to identify areas for targeted deregulation. Executive Order 13777, 82 Fed. Reg. 12,285 (Mar. 1, 2017). But it does not compel specific actions and cannot provide any independent justification for departing from prior agency practice in implementing specific statutory mandates, particularly where the proposed new agency approach is directly contrary to the requirements of the governing statute, as discussed in Part I above.

### B. **FWS Fails to Explain or Justify the Proposed Rule as Required by the APA**.

#### 1. **FWS fails to justify the abdication of its statutory authority in favor of deferring to outside information provided by third-party proponents (but not opponents) of critical habitat exclusions.**

As discussed in Part I.C above, in section 17.90(d)(1) of the Proposed Rule, FWS proposes to give unwarranted weight to non-biological information provided by outside "experts" or "sources" with "firsthand knowledge" when conducting critical habitat exclusion analyses. 85 Fed. Reg. at 55,401-02. Moreover, the preamble to the Proposed Rule proposes to give undue weight to outside *biological* "information or expertise in the weighing of benefits of

inclusion or exclusion of particular areas," which is expressly within FWS's area of expertise. *Id*. at 55,402.

This new proposal, which is a dramatic change in approach from the 2016 Policy, is neither justified nor explained. While the Proposed Rule attempts to distinguish between areas within and outside of FWS's expertise, it provides no reasoned explanation for why FWS is not itself suited to evaluate economic or other non-biological or biological information submitted by third parties, particularly when it is charged by statute with undertaking an economic analysis and has been doing so since at least 1978. *See* Pub L. 95–632, 92 Stat. 3751 (Nov. 10, 1978) (amending ESA to add language requiring FWS to consider economic impacts in critical habitat designations). In fact, FWS operates a Branch of Economics which has several decades of experience assisting the agency with its ESA obligations, including critical habitat designations.[6]

Providing such unquestioned weight to information presented by unspecified and undefined outside "experts" and "sources" with claimed "firsthand knowledge" is inconsistent with a Federal agency's fundamental obligation under basic principles of administrative law to exercise its own independent judgment based on the law and the record before it. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962) (decision must reflect basis on which agency "exercised its expert discretion" within bounds set by Congress).

Moreover, the Proposed Rule's deferential approach to evaluating outside "expertise" contains significant ambiguities and raises a number of unanswered questions regarding its implementation. In particular, FWS's attempt to limit the degree of deference provided to such third-party information by requiring that a proponent for exclusion present "credible information" supporting its position suffers from its own set of flaws. 85 Fed. Reg. at 55,401. This "credible information" threshold is both an inherently amorphous term, notwithstanding FWS's proffered definition, and is an extremely low bar to meet for triggering such a high level of deference to third party information. On its face, the definition is plainly and unfairly biased in favor of evidence supporting the exclusion of areas from critical habitat: constraining its consideration of outside "credible information" to only that information which supports "a benefit of exclusion," but not a benefit of inclusion, unlawfully and arbitrarily tips the scales *against* inclusion of such habitat. *Id.* (emphasis added). For example, under this standard, FWS could ignore biological information supporting critical habitat designation, including information submitted by expert state agencies, but weigh more heavily information supporting exclusion submitted by a project proponent with no such expertise. This is arbitrary and non-sensical.

Second, FWS's "credible evidence" threshold is fatally ambiguous and subjective. FWS has not explained what will rise to the level of a "meaningful economic or other relevant impact" or what will constitute a "reasonably reliable indication" that one exists. *Id*. Without any meaningful regulatory definition, the Proposed Rule's "credible information" standard would appear to mean nothing more than information that FWS believes may be trustworthy. *See*

[6] *See* FWS, Branch of Economics (ECN) (last updated May 1, 2020), https://www.fws.gov/economics/index.asp.

Black's Law Dictionary (11th ed. 2019) (defining "credible evidence" as "evidence that is worthy of belief; trustworthy evidence").

As such, FWS has failed to provide a reasonable and cogent justification for deferring to third party information, in violation of the APA.

### 2. FWS fails to justify the Proposed Rule's other significant departures from the 2016 Policy.

FWS further fails to explain and justify several other significant differences between the Proposed Rule and its 2016 Policy, as required by the APA. *FCC v. Fox*, 556 U.S. at 515-16.

First, the Proposed Rule appears to make mandatory what, under the 2016 Policy (and the ESA itself, as discussed in Part I.B above), has always been discretionary. Specifically, section 17.90(c)(2) of the Proposed Rule states that the "Secretary *will conduct* an exclusion analysis" under specified circumstances. 85 Fed. Reg. at 55,406-07. Further, section 17.90(e) states that critical habitat *shall* be excluded if FWS finds that the benefits of exclusion outweigh the benefits of inclusion. *Id.* at 55,407. In contrast, the 2016 Policy states that, "[t]he decision to exclude any particular area from a designation of critical habitat is *always* discretionary, as the Act states that the Secretaries 'may' exclude any area. *In no circumstances* is an exclusion of any particular area required by the Act." 81 Fed. Reg. at 7,247 (emphasis added); *see also id*. at 7,228-29, 7,233. And, as discussed above, it is particularly troubling that FWS has created an apparent mandate to conduct an exclusion analysis based on a vague concept of "credible information" submitted by anyone who is a "proponent" of exclusion (but not a "proponent" of *inclusion*)—a term that is also vague, undefined, and unsupported. Mandating exclusion under the circumstances set forth in the Proposed Rule is both an unexplained and unjustified change from the 2016 Policy, and therefore arbitrary and capricious.

Second, FWS has failed to provide a reasoned explanation for directly contradicting its previous approach to evaluating Federal lands under the ESA's discretionary section 4(b)(2) exclusion analysis. As discussed, the Proposed Rule specifically admits that it is "reversing the 2016 Policy's prior position that we generally do not exclude Federal lands from designations of critical habitat," and will now consider all Federal lands eligible for exclusion based on the increased transactional, permitting, project mitigation, and other costs imposed by the section 7 consultation process on Federal lands. 85 Fed. Reg. at 55,402.

The 2016 Policy came to precisely the opposite conclusion, however, explicitly rejecting the prospect that Federal lands could be excluded from critical habitat designations on a large scale. 81 Fed. Reg. at 7,231. The 2016 Policy stated that the benefits of excluding non-Federal lands "do not generally arise with respect to Federal lands, because of the independent obligations of Federal agencies under section 7 of the Act," and that, conversely, "the benefits of including Federal lands in a designation are greater than non-Federal lands because there is a Federal nexus for projects on Federal lands." *Id*.; *see also id*. at 7,238, 7,248. Furthermore, the 2016 Policy states that "Federal lands should be prioritized as sources of support in the recovery of listed species," and that to the extent possible, FWS "will focus designation of critical habitat

on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands." *Id*. at 7,231-32. FWS has not even attempted to justify its 180-degree course reversal.

Finally, under section 17.90(d)(4) of the Proposed Rule, in determining whether to exclude areas covered by conservation plans or agreements, FWS again proposes to consider the "degree to which the record of the plan, or information provided by *proponents* of an exclusion, supports a conclusion [that the area should be excluded]." 85 Fed. Reg. at 55,407 (emphasis added). The phrase "or information provided by proponents of an exclusion" is new, and is neither discussed nor justified. Under the 2016 Policy, FWS relied on the entire record of the conservation plan or agreement as the basis for its exclusion determination. 81 Fed. Reg. at 7,229, 7,247. The new language improperly provides an opportunity for proponents of an exclusion—but not proponents of an inclusion—to provide relevant information to inform critical habitat designations. This approach unjustifiably and impermissibly places the thumb on the scale in support of critical habitat exclusions. FWS did not and cannot provide any reasoned basis for that change.

Furthermore, in *Bear Valley*, the Ninth Circuit held that FWS properly designated critical habitat that was also included in the San Diego Multi-Species Habitat Conservation Plan. The Court upheld FWS's finding that "the partnership benefits of exclusion do not outweigh the regulatory and educational benefits afforded as a consequence of designating critical habitat in this area." 790 F.3d at 992 (internal quotations and ellipses omitted). Yet FWS has now inexplicably reversed its position, stating that "the unhindered, continued ability to maintain existing partnerships, as well as the opportunity to seek new partnerships with potential plan participants," generally outweighs the benefits of designating areas subject to conservation plans as critical habitat. 85 Fed. Reg. at 55,404

Consequently, the proposed changes with regard to areas covered by conservation plans or agreements, like the other proposed changes from the 2016 Policy, are arbitrary and capricious under the APA, in addition to being directly at odds with the statutory purpose of critical habitat designation, and the ESA as a whole, to conserve species and their habitat.

## III. FWS CANNOT CATEGORICALLY EXCLUDE THE PROPOSED RULE FROM ENVIRONMENTAL REVIEW UNDER NEPA.

### A. Statutory Background.

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a).[7] Congress enacted NEPA in 1969 to "establish a national policy for the environment

[7] On July 16, 2020, the Council on Environmental Quality ("CEQ") finalized an update to its 1978 regulations implementing NEPA, which took effect on September 14, 2020. 85 Fed. Reg. 43,304 (July 16, 2020). According to this rule, for NEPA reviews that have already begun "before the final rule's effective date, agencies may choose whether to apply the revised regulations or proceed under the 1978 regulations and their existing agency NEPA procedures. Agencies should clearly indicate to interested and affected parties which procedures it is applying for each proposed action." *Id*. at 43,340. Here, FWS does not indicate which

... and to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4321. NEPA has two fundamental purposes: (1) to guarantee that agencies take a "hard look" at the consequences of their actions before the actions occur by ensuring that "the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts;" and (2) to ensure that "the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989).

To achieve these purposes, NEPA requires the preparation of a detailed environmental impact statement ("EIS") for any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA's implementing regulations broadly define such actions to include "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18. In taking a "hard look," NEPA requires Federal agencies to consider the direct, indirect, and cumulative impacts of their proposed actions. *Diné Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831, 837 (10th Cir. 2019); 40 C.F.R. §§ 1508.7, 1508.8(a)–(b).

Only in "certain narrow instances" is an agency excused from preparing a preliminary environmental assessment or an EIS by invoking a categorical exclusion. *See Coal. of Concerned Citizens to Make Art Smart v. Fed. Transit Admin.*, 843 F.3d 886, 902 (10th Cir. 2016) (citing 40 C.F.R. § 1508.4). Agencies may invoke a categorical exclusion only for "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of [NEPA] regulations." 40 C.F.R. § 1508.4; *see also id.* § 1507.3(b)(2)(ii). When adopting such procedures, an agency "shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect," *id.* § 1508.4, in which case an environmental assessment or EIS is required.

### B. The Proposed Rule Does Not Qualify for a Categorical Exclusion from NEPA.

In its Proposed Rule, FWS states that it "anticipate[s]" that the categorical exclusion in 43 C.F.R. § 46.210(i) "applies to the proposed regulation changes." 85 Fed. Reg. at 55,406. As noted above, that categorical exclusion only covers "[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature." 43 C.F.R. § 46.210(i). At the same time, FWS states that it "invite[s] public comment regarding our initial determination under NEPA," and "will complete [its] analysis, in compliance with NEPA, before finalizing this regulation." 85 Fed. Reg. at 55,406.

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procedures it is applying, but cites only to regulatory language that follows the requirements of the 1978 regulations. *See* 85 Fed. Reg. at 55,406. Consequently, the 1978 regulations are cited here.

The suggestion that the Proposed Rule is subject to a categorical exclusion is contrary to the requirements of NEPA and its implementing regulations. In particular, FWS's new proposed process for excluding areas from critical habitat designations is not a regulation "of an administrative, financial, legal, technical, or procedural nature."[8] Instead, this substantive proposal would significantly reduce the amount of critical habitat that will be protected for endangered and threatened species. It therefore indisputably qualifies as a "major federal action significantly affecting the quality of the … environment." 42 U.S.C. § 4332(2)(C).

Among the factors an agency must consider in determining whether an action may significantly affect the environment, thus warranting the preparation of an EIS, is "[t]he degree to which the action may adversely affect an endangered or threatened species or its [critical] habitat" under the ESA. 40 C.F.R. § 1508.27(b)(9). And, as the Ninth Circuit has stated, the presence of just "one of these factors may be sufficient to require the preparation of an EIS in appropriate circumstances." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005). And even if the Proposed Rule could properly be categorized as an administrative or technical change (which it cannot), "extraordinary circumstances," including significant impacts on listed species and critical habitat and violations of the ESA, preclude the application of a categorical exclusion from NEPA in this case. *See* 43 C.F.R. § 46.215(h)-(i).

As discussed above, the Proposed Rule will have significant, adverse environmental impacts on endangered and threatened species and their habitat in several ways. In particular, the Proposed Rule's new process for excluding areas of critical habitat will severely restrict FWS's discretion to recover imperiled species as mandated by the ESA by, *inter alia*: (1) requiring the agency to defer to outside sources of "nonbiological" information, and (2) mandating that it exclude areas if it finds that the benefits of exclusion outweigh the benefits of designation, thereby reducing the amount of critical habitat that will be protected under the Act.

As the Economic Analysis for the Proposed Rule acknowledges:

> *The proposed rule is likely to result in additional areas being excluded from future critical habitat designations*. This is due to 1) the additional considerations regarding community impacts and non-Federal activities on Federal lands; 2) the clarification for stakeholders regarding what constitutes "credible information" that will trigger a 4(b)(2) exclusion analysis; and 3) the provision that the Service will weight information in impacts based on who has the relevant expertise.

Economic Analysis at ES-6, 4-14 (emphasis added). In fact, the Economic Analysis then goes on to consider both a 5 percent and a 20 percent "reduction in costs of critical habitat rules each year," *id*. at ES-7, 4-14, and even acknowledges a reduction in conservation and recovery benefits to listed species. *See id*. at 2-4 – 2-5 ("[I]f areas are excluded from critical habitat, there may be some reduction in biological benefit of some critical habitat rules (e.g., reduced contribution to conservation and recovery of the species)"); 4-7 ("If additional exclusions lead to reductions in the geographic scope of critical habitat, then the additional costs associated with

[8] Indeed, the Office of Information and Regulatory Affirms determined that the Proposed Rule is a "significant regulatory action" under Executive Order 12866. *See* 85 Fed. Reg. at 55,404.

considering adverse modification of critical habitat in section 7 consultations in excluded areas would not be incurred"); 4-12 ("[A]ny areas excluded from critical habitat due to the proposed rule may therefore reduce the biological benefit of the critical habitat to the species"); *id*. at 4-15 ("[F]or exclusions made due to the magnitude of impacts (e.g., economic or community impacts) being weighted more than the biological benefits of the particular area, there may be some reduction in biological benefits to the species").

The reduction in areas designated as critical habitat in turn will further reduce protections for endangered and threatened species and their habitat by reducing the number, type, and scope of section 7 consultations for Federal projects and activities that may destroy or adversely modify critical habitat, and by reducing or limiting the reasonable and prudent alternatives and measures that would be imposed on such projects and activities through the section 7 consultation process. *See* Economic Analysis at 2-5 ("[A]bsent critical habitat designation, the compliance requirements associated with the adverse modification standard of section 7 of the ESA would no longer be relevant to the area"). Because of these significant environmental impacts on imperiled species and their habitat, the Proposed Rule does not qualify for a categorical exclusion from NEPA.

Finally, NEPA requires that an agency consider the full scope of activities encompassed by its proposed action, as well as any connected, cumulative, and similar actions. *See* 40 C.F.R. § 1508.25. "Connected actions" means actions that "are closely related and therefore should be discussed in the same impact statement." *Id*. § 1508.25(a)(1). Connected actions must be considered together in order to preclude an agency from "divid[ing] a project into several smaller actions, each of which might have an insignificant environmental impact when considered in isolation, but which taken as a whole have a substantial impact." *Northwest Resource Info. Ctr., Inc. v. National Marine Fisheries Serv.*, 56 F.3d 1060, 1068 (9th Cir. 1995). Similarly, "cumulative actions" are those "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. § 1508.25(a)(2). Moreover, "similar actions" are those "which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." *Id*. § 1508.25(a)(3). "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (internal quotation marks omitted).

Here, FWS violates NEPA by failing to consider the impacts of this Proposed Rule in combination with its August 5, 2020 proposal that would add a new, restrictive definition of "habitat" to FWS's regulations for making critical habitat designations under section 4 of the ESA. *See* 85 Fed. Reg. 47,333 (Aug. 5, 2020) (Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat;

Proposed Rule).[9] As with its current Proposed Rule, FWS has stated that it anticipates applying the same categorical exclusion to that proposed definition. *See* 85 Fed. Reg. at 47,336. However, the proposed "habitat" definition will severely restrict FWS's ability to designate critical habitat for endangered and threatened species by imposing new conditions that limit the frequency, extent, location, and type of habitat that may be designated. And, as discussed, this in turn also will limit the number, type, and scope of section 7 consultations for proposed Federal agency actions that may destroy or adversely modify such habitat, and the associated avoidance, minimization, and mitigation measures required for such actions. In combination with the Proposed Rule, these two rulemakings will have significant adverse direct, indirect, and cumulative impacts on endangered and threatened species and their habitat.

In sum, if FWS desires to proceed with this rulemaking, it must first prepare and circulate a draft EIS for public review and comment that considers the cumulative environmental impacts of both the Proposed Rule and its proposed definition of "habitat."

[9] The States and Cities also submitted comments on September 4, 2020 opposing this proposed definition of "habitat." *See* Docket ID: FWS-HQ-ES-2020-0047-47523.

## CONCLUSION

The Proposed Rule is yet another attempt by FWS to severely undercut the ESA's foundational protections for endangered and threatened species and their habitat. FWS must abandon this unlawful and misguided proposal and instead focus on addressing the significant threats posed by habitat destruction and degradation and climate change in order to fulfill the ESA's fundamental purposes of affording imperiled species the "highest of priorities" and providing for their full recovery. *Hill*, 437 U.S. at 174, 194.

Sincerely,


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