EARTHJUSTICE

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Dockets:
FWS-HQ-ES-2018-0006 (ESA § 4)[1]
FWS-HQ-ES-2018-0007 (ESA § 4(d))[2]
FWS-HQ-ES-2018-0009 (ESA § 7)[3]

Re: Comments Regarding Proposed Changes to Endangered Species Act §§ 4 and 7 Regulations: 83 Fed. Reg. 35,174; 83 Fed. Reg. 35,178; 83 Fed. Reg. 35,193 (July 25, 2018)

Dear Secretary Zinke and Secretary Ross:

These comments are filed by Earthjustice on behalf of Cascadia Wildlands, Columbia Riverkeeper, Environmental Protection Information Center, Hui Hoʻomalu i Ka ʻĀina, Klamath-Siskiyou Wildlands Center, Oceana, Ocean Conservancy, Oregon Wild, Pacific Coast Federation of Fishermen's Associations/Institute for Fisheries Resources, Save our Wild Salmon Coalition, Sierra Forest Legacy, Washington Environmental Council, Western Environmental Law Center, Western Watersheds Project, and WildEarth Guardians ("Organizations"). The Organizations each work to protect and preserve the environment, including the preservation of threatened and endangered species and their designated critical habitat. We submit these comments in order to ensure the continued effectiveness of the Endangered Species Act ("ESA") and continued protections to species and habitat long-afforded by the ESA.

On July 25, 2018, in three separate Federal Register notices, your agencies proposed changes to regulations governing (1) species' listing and delisting and designation of critical habitat under ESA § 4; (2) removal of default protections given to threatened species under ESA § 4(d); and (3) interagency cooperation and consultation under ESA § 7. These comments are submitted in response to those proposed changes.

I. BACKGROUND

Congress enacted the ESA "to provide a program for the conservation of … endangered species and threatened species" and "to provide a means whereby the ecosystems upon which

[1] *Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation*, 83 Fed. Reg. 35,193 (July 25, 2018).
[2] *Endangered and Threatened Wildlife and Plants; Revision of Regulations for Prohibitions to Threatened Wildlife and Plants*, 83 Fed. Reg. 35,174 (July 25, 2018).
[3] *Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation*, 83 Fed. Reg. 35,178 (July 25, 2018).+

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endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). As the first step in the protection of these species, section 4 of the ESA, 16 U.S.C. § 1533, requires the Secretary to list species as endangered or threatened when they meet the statutory listing criteria.

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

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

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

Id. § 1533(a)(1).

Once a species is listed, various safeguards apply to prevent activities that will cause harm to members of the species or that will jeopardize the survival and recovery of the species in its native ecosystem. *See id*. §§ 1536, 1538. The ESA's ultimate goal is recovery of listed species to the point where they no longer need ESA protection, *id*. §§ 1531(b)-(c); 1532(3).

An "examination of the language, history, and structure [of the ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978). Section 7 of the ESA prohibits agency actions that may jeopardize the survival and recovery of a listed species or adversely modify its critical habitat:

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

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

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

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

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

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

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

In 1978, Congress reiterated the distinct importance of critical habitat and the prohibition on adverse modification:

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

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

II. THE PROPOSED CHANGES TO ESA § 4 REGULATIONS ATTEMPT TO ERECT BARRIERS TO LISTING OF THREATENED AND ENDANGERED SPECIES AND DESIGNATION OF CRITICAL HABITAT.

A. The Proposed Definition of "Foreseeable Future" Invalidly Raises the Bar for Protection of Imperiled Species.

We oppose the administration's proposed definition of the term "foreseeable future," which would impermissibly raise the bar for protecting threatened species, contravening Congress's intent to "give the benefit of the doubt to the species." H.R. Rep. No. 96-697, at 12 (1979) (Conf. Rep.), reprinted in 1979 U.S.C.C.A.N. 2572, 2576. While the Services purport to follow the guidance set forth in a 2009 opinion from the Department of the Interior's Solicitor (M-37021, Jan. 16, 2009), the proposed definition deviates significantly from current practice and could prevent listings where the best available scientific information indicates listing as threatened is warranted.

The 2009 Opinion states that "the foreseeable future extends only so far as the Secretary can explain reliance on the data to formulate a reliable prediction." 2009 Opinion at 8 (emphasis added). The opinion's definition of "the foreseeable future" is animated by a desire to avoid "reliance on assumption, speculation, or preconception." *Id*. To ensure imperiled species receive the benefit of the doubt in listing decisions, as Congress intended, the 2009 Opinion requires only that predictions be reliable, rejecting a definition that would limit "the foreseeable future" to only "predictions that can be made with certainty." *Id*. at 9.

Rather than simply adopt the 2009 Opinion's definition, which the Services affirm is "well-founded," the proposed changes to section 424.11 would add the requirement that potentially dangerous conditions be "probable." 83 Fed. Reg. at 35,195; *see also id.* at 35,201. Demanding probability goes far beyond ensuring against decisions based on assumption, speculation, or preconception (the 2009 Opinion's sole concerns), and could deprive species facing threats from climate change and other future events with scientific uncertainty of the protection under the Act that Congress intended. *See* 2009 Opinion at 3 (noting the importance Congress placed on "extending protections to species that may become endangered in the future," which numerous committee reports identified as "the first item in the list of purposes of

the [ESA]"). The proposed changes would impermissibly flip the Act's presumption in favor of conservation on its head.

The Federal Register notice further states that the Services can rely on their "exercise of professional judgment" to ascertain what the foreseeable future is. 83 Fed. Reg. at 35,195. Invoking "professional judgment" cannot relieve the Services of their statutory duty to make listing determinations "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). Where data permit non-speculative, "quantitative modeling or projections" of future threats to species, the Services cannot lawfully ignore those data. 83 Fed. Reg. at 35,195.

B. The Proposed Deletion of Language Explicitly Forbidding Consideration of Economic Impacts in Listing Decisions Runs Counter to the Requirements of the Act.

The ESA requires that listing decisions be made "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A) (emphasis added). Congress added the word "solely" in the 1982 amendments to the Act to underscore that non-biological considerations should play no role in listing decisions. Pub. L. No. 97-304, 96 Stat. 1411. The administration's proposal to remove from 50 C.F.R. § 424.11(b) the phrase "without reference to possible economic or other impacts" improperly opens the door to cost-benefit analyses and other economic assessments that risk politicizing the listing process. Such assessments would be burdensome, costly, and ultimately irrelevant if listing decisions are to remain wholly scientific determinations, as the law requires. There is simply no rational basis for the proposed modification to 50 C.F.R. § 424.11(b).

C. Dropping the Requirement for Data that Substantiates Delisting Invalidly Reduces Protections for Imperiled Species.

For nearly four decades, the ESA's listing regulations have restricted the delisting of a species to only situations where the best scientific and commercial data available "substantiate" that the species is no longer threatened nor endangered. 45 Fed. Reg. 13,010, 13,023 (Feb. 27, 1980) (promulgating original version of 50 C.F.R. § 424.11(d)). The Services' proposed revisions would drop the requirement that data "substantiate" any delisting decision, placing imperiled species at risk of prematurely losing protections that are essential to avoid extinction. Unless and until the best scientific and commercial data available substantiate that delisting is warranted, stripping listed species of the Act's protections would contravene the policy of "institutionalized caution" Congress adopted in enacting the ESA. *Tenn. Valley Auth. v. Hill*, 437 U.S. at 194. Accordingly, the Services should retain the requirement to "substantiate" delisting decisions.

The proposed revisions to the criteria for delisting based on extinction would improperly open the door to species being declared extinct based on insufficient information. The current regulations specify that the Services either must know the locations and fate of all individuals of

the species or must allow "a sufficient period of time" before delisting to "indicate clearly" the species is actually extinct. 50 C.F.R. § 424.11(d)(1). The Services have insisted for decades on this high bar to ensure that any decision to delist due to extinction is based on "conclusive evidence appropriate for the species in question." 49 Fed. Reg. 38,900, 38,903 (Oct. 1, 1984) (emphasis added). There is no justification for eliminating the vital safeguards provided by the existing regulatory language.

D. The Proposed Changes to Defining When Critical Habitat Designation Is "Not Prudent" Undermine the Importance Congress Gave to Habitat Protection.

The proposed regulations would improperly expand the circumstances under which the Services may decline to designate critical habitat by deeming designation "not prudent." Only one of the proposed provisions represents an appropriate basis for declining to designate critical habitat: its proposal to retain existing § 424.12(a)(1)(i), which allows the Services not to designate critical habitat where doing so would increase harm to species by exposing them to increased taking. The other proposed provisions do not actually have anything to do with whether critical habitat is "not prudent"—that is, could result in actual harm to a species.

First, the proposal to allow the Services not to designate critical habitat where the threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to habitat "stem solely from causes that cannot be addressed through management actions resulting from" section 7 consultations, represents an approach that courts have already deemed unlawful. The court in *Conservation Council for Hawaii v. Babbitt* struck down FWS's decision not to designate critical habitat simply because much of the area it would have designated would not be subject to section 7 consultation—in other words, designation of critical habitat would not result in management actions pursuant to a biological opinion. 2 F. Supp. 2d (D. Haw. 1998). Designation of critical habitat provides important information to the public and scientific researchers regarding an area's importance to listed species. It also provides direction for the affirmative actions that federal agencies are supposed to take under section 7(a)(1) to conserve listed species. Furthermore, the proposed provision reflects yet another blatant and unlawful attempt to avoid addressing effects of large-scale processes like climate change and ocean acidification. Worse yet, it appears to encourage the Services to refuse to designate critical habitat in areas most affected by climate change and most in need of careful management to ensure resilience, such as coral reefs. A FWS representative on the webinar call said that listing of critical habitat may not be prudent when threats to habitat stem solely from causes such as from sea-level rise, which section 7 cannot address. This is problematic for many marine species such as sea turtles, snowy plovers, and Hawaiian monk seals that will see habitat loss from rising sea levels. *See* Deadly Waters: How Rising Seas Threaten 233 Endangered Species (Center for Biological Diversity, Dec. 2013).[4]

[4] Available at https://www.biologicaldiversity.org/campaigns/sea-level_rise/pdfs/Sea_Level_Rise_Report_2013_web.pdf (last visited Sept. 21, 2018).

Second, proposed § 424.12(a)(1)(iii), which would allow the Services not to designate critical habitat if "areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States," is superfluous and open to misuse. The ESA already defines critical habitat as areas occupied by the species at the time of listing that contain physical or biological features essential to the conservation of the species and which may require special management considerations or protection, as well as unoccupied areas that are essential to the conservation of the species. 16 U.S.C. § 1532(5)(A)(i)-(ii). This definition is clear. Neither the definition nor the other provisions of the Act allow the Services to decline to designate critical habitat for a species occurring primarily outside the U.S. based on the notion that it would have a small impact on the species' conservation compared to its overall range. Yet that is what the Services' new "negligible conservation value" provision appears to suggest.

Third, proposed § 424.12(a)(1)(iv), regarding circumstances in which "no areas meet the definition of critical habitat" is also superfluous. The ESA already makes clear that the Services must designate critical habitat "to the maximum extent prudent and determinable" based on the best scientific and commercial data available. 16 U.S.C. §§ 1533(a)(3)(A)(i), 1533(b)(1)(A). The Services must identify critical habitat based on features essential to the species' conservation. Whether or not such features exist in a particular area is a question of science, not prudence.

Finally, § 424.12(a)(1)(v) remains inappropriately open-ended and unhelpful, suggesting an entirely undefined category of bases for determining that critical habitat designation is not prudent. The Services should remove this impermissibly broad provision from the regulations.

E. The Proposed Regulations on Designation of Unoccupied Areas as Critical Habitat Invalidly Place Cost over Conservation and Undercut the ESA's Precautionary Principle.

The ESA defines critical habitat to include "specific areas outside the geographical area occupied by the species at the time it is listed" that "are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Instead of focusing on whether unoccupied areas are essential for conservation—a scientific determination—the proposed regulations focus on whether designating unoccupied areas is "efficient" from a cost-benefit point of view. In doing so, the proposed regulations violate the ESA's purpose of conserving listed species and bringing about their recovery.

In particular, the proposed language states that the Services will only consider unoccupied areas to be essential to conservation if limiting critical habitat to occupied areas would result in less efficient conservation for the species. This approach is unlawful. Determining whether an area is essential for the survival or recovery of a species is an entirely different question than determining whether managing that area would be economically "efficient." The Services must identify essential critical habitat features and areas "on the basis of the best scientific data available." 16 U.S.C. § 1533(b)(2). The ESA directs a separate

consideration of economic impacts of designating areas deemed essential to conservation, and states that the Services "may" exclude an area from designation if they determine "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. § 1533(b)(2).

The proposed regulations would turn the critical habitat process upside down. They would require the Services to identify potential habitat areas based on cost rather than science, and result in biologically essential critical habitat areas being removed from consideration even before the separate step of taking economic impacts into account. Moreover, the proposed regulations unlawfully transform the Services' discretion to exclude areas from critical habitat based on comparing benefits of designation with the benefits of exclusion into an obligation to exclude areas based on cost-benefit analysis.

The factors the Services propose to consider in determining whether an area is essential based on the likelihood it will contribute to the conservation of the species are also unlawful. In particular, the Services may not rely on the likelihood that federal agency actions will be proposed in the area triggering section 7 consultation to determine whether an area is essential for the species' conservation. As noted in the section above, designating critical habitat serves important conservation purposes beyond section 7 consultation.

Overall, the proposed rule's bias against designating unoccupied areas as critical habitat ignores both the end goal of listing a species in the first place—achieving its recovery to robust population levels—and the biological reality that in order to have enough space and resources to achieve recovery, many species will need suitable, protected habitat outside of their current range. The proposed rule also ignores the reality that many species whose habitats are adversely affected by climate change will have to move to new areas in order to survive. Designating biologically appropriate, unoccupied areas as critical habitat is essential to give climate-sensitive species a shot at survival and recovery.

III. REPEALING THE BLANKET ESA § 4(D) RULE WOULD FRUSTRATE CONGRESSIONAL POLICY AND THE INTENT OF THE ESA.

Congress was clear when it enacted the ESA that it intended the Service to take proactive measures to protect threatened species before they become endangered. Repealing the blanket 4(d) rule is utterly contrary to that policy: the Fish and Wildlife Service proposes to affirmatively remove protections for threatened species. As a result, newly listed or reclassified threatened species are more likely to speed towards endangered status.

The ESA's stated purpose includes "to provide a program for the conservation of … threatened species." 16 U.S.C. § 1531(b). Congress also declared "that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the ESA]." *Id.* § 1531(c)(1). And section 7 expressly requires all federal agencies to "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened

species." *Id.* § 1536(a)(1). In other words, Congress intended agencies to take affirmative action to conserve threatened species.

The legislative history similarly demonstrates that Congress intended the Service to take protective measures *before* a species is "conclusively" headed for extinction. As one court explained:

> The purpose of creating a separate designation for species which are "threatened", in addition to species which are "endangered", was to try to "regulate these animals before the danger becomes imminent while long-range action is begun." S. Rep. No. 307, 93d Cong. 1st Sess. 3 (1973), *reprinted in* Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978.1979, and 1980 ("Leg. Hist."), at 302.
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> The legislative history of the ESA contains ample expressions of Congressional intent that preventive action to protect species be taken sooner rather than later. *See, e.g.*, Leg. Hist. at 204 (H.R. Rep. No. 412, 93d Cong., 1st Sess. 5 (1973) ("[i]n the past, little action was taken until the situation became critical and the species was dangerously close to total extinction. This legislation provides us with the means of preventive action.") (remarks of Rep. Clausen); *id.* at 205 ("[i]n approving this legislation, we will be giving authority for the inclusion of those species which . . . might be threatened by extinction in the near future. Such foresight will help avoid the regrettable plight of repairing damages already incurred. By heeding the warnings of possible extinction today, we will prevent tomorrow's crisis") (remarks of Rep. Gilman); *id.* at 144 ("[s]heer self-interest impels us to be cautious," and "the institutionalization of that caution lies at the heart of the [ESA]").

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

The blanket 4(d) rule implements the institutionalized caution embodied by the ESA. It takes a precautionary approach to threatened species, providing them similar levels of protection as endangered species unless and until the Service determines that lower or alternative species-specific protections are appropriate. Repealing the blanket 4(d) rule not only fails to further the Congressional purpose of the ESA but would actively frustrate that purpose by removing protections for threatened species.

And, as a practical matter, the proposed repeal would effectively make it more difficult for threatened species to receive protections in the future. As explained below, newly listed threatened species would receive protections only if and when the Service issues a species-specific 4(d) rule. The Service's listing program already lacks the necessary funding and resources to complete its duties under the Act, even without the added burden of having to develop countless species-specific rules. The Service faces a backlog of more than 300 species awaiting consideration for protection. Adding an additional duty to develop individual rules for

threatened species will only further burden the Service, resulting in significant delays in making needed listing decisions and providing species protections before they become endangered. The proposed repeal of the blanket 4(d) rule is contrary to Congressional intent and would substantially frustrate the purpose and effectiveness of the ESA in preventing threatened species from becoming endangered.

A. There Is No Justification for Repealing the Blanket 4(d) Rule.

The Service has provided no reasonable justification for repealing the blanket 4(d) rule, nor could it. The Service has not identified any problem with the blanket 4(d) rule or any need to eliminate the rule. The only purported bases for the repeal are to align the Service's practices with those of NMFS and to allow the Service to issue species-specific 4(d) rules. Neither justifies the repeal.

The Service promulgated the blanket rule in 1975 to provide for the conservation of threatened species. The agency explained that the blanket rule, along with the authority to supersede the blanket rule with a species-specific rule, formed the "cornerstone of the system for regulating threatened wildlife." 40 Fed. Reg. 44,412, 44,414 (Sept. 26, 1975). The Service now proposes to dismantle that system. The agency provides no good reasons for changing the policy, nor does it offer a reasoned explanation for disregarding the original basis of the blanket rule. Rather, the Service continues to acknowledge that the blanket rule remains a "reasonable approach" to conserving threatened wildlife. 83 Fed. Reg. at 35,175.

The Service makes much of the purported benefits of using species-specific 4(d) rules, apparently to justify repealing the blanket 4(d) rule. Most of the benefits the Service cites, such as removing permitting requirements and making better use of fiscal resources, are impermissible considerations in promulgating regulations under section 4(d), which requires that the regulations be based solely on the species' conservation needs. *See* 16 U.S.C. § 1533(d). Moreover, there is absolutely no need for the Service to repeal the blanket 4(d) rule to be able to promulgate species-specific rules. The existing regulations fully authorize the Service to issue species-specific rules, and expressly stipulate that the blanket 4(d) rule (50 C.F.R. § 17.31(a)) does not apply when the agency does so. 50 C.F.R. § 17.31(c). The blanket 4(d) rule therefore poses no impediment to issuing species-specific rules. And repealing the blanket 4(d) rule would have no effect on the Service's ability to issue species-specific rules or its process for doing so.

This is readily apparent in the proposed rule. The Service explains that it has "gained considerable experience in developing species-specific rules over the years" and provides examples of two such instances. 83 Fed. Reg. at 35,175. Yet while the Service has promulgated species-specific 4(d) rules with the blanket rule in place, fewer than half of threatened species have specific rules. The Service also indicates that repealing the blanket 4(d) rule would not change its practices in issuing species-specific rules. *See id.* (noting "if the proposed rule is finalized, we would continue our practice of explaining in the preamble the rationale for the species-specific prohibitions included in each 4(d) rule"). The ability or need to use species-

specific rules simply cannot justify repealing the blanket 4(d) rule when the Service already possesses and utilizes that ability.

The Service also states that the proposed repeal would align its regulatory approach for threatened species with that of NMFS. But there is no apparent reason why such alignment is necessary or even beneficial. And the Service identifies no downside to the fact that the approaches differ. The Service and NMFS have employed different 4(d) approaches for decades with no apparent conflict or problem. Indeed, to align regulatory approaches in keeping with the plain language of section 4(d) and purposes of the ESA, NMFS should adopt a blanket 4(d) rule, as opposed to FWS dispensing with the default protective rule.

NMFS' 4(d) approach does not even provide the model of efficacy sufficient to justify the Service's alignment with that approach. Even though NMFS has a substantially smaller caseload of threatened and candidate threatened species than the Service, NMFS still has failed to promulgate necessary species-specific 4(d) regulations for more than 40% of the threatened species under its purview.[5] These failures have left threatened species without important protections. For example, NMFS recently listed the oceanic whitetip shark as a threatened species, but did not issue a 4(d) rule, suggesting it might do so at a later date. 83 Fed. Reg. 4153, 4163 (Jan. 30, 2018). The oceanic whitetip currently receives no greater protections as a threatened species than it did before it was listed. In the meantime, NMFS continues to authorize targeted fishing of the species: individuals are permitted to continue hunting a threatened species for sport. *See, e.g.*, 50 C.F.R. § 65.22(c)(2). NMFS similarly continues to allow targeted take of threatened scalloped hammerhead sharks after declining to issue a 4(d) rule for that species. *See* 79 Fed. Reg. 38,214, 38,238–39 (July 3, 2014). And NMFS still has failed to promulgate species-specific 4(d) rules for the 20 species of coral it listed as threatened in 2014. *See* 79 Fed. Reg. 53,851 (Sept. 10, 2014).

The Service's much larger caseload makes it much more difficult—if not impossible—for the Service to devote similar time and resources as NMFS to a given species-specific 4(d) rule; it is unlikely the Service could achieve even the same, inadequate proportion of species-specific rules as NMFS. It makes much more sense for the Service to apply the blanket 4(d) rule to all threatened species, and focus its limited resources and personnel on developing specific 4(d) rules for the subset of species that would most benefit. In fact, the Service's contention that species-specific rules make "better use of [its] limited personnel and fiscal resources" than applying the blanket 4(d) rule is illogical, given that developing a species-specific 4(d) rule requires substantially more resources than applying the blanket rule. *See* 83 Fed. Reg. at 35,175.

NMFS's vast shortcomings in implementing species-specific 4(d) rules severely undermines the rationale that the Service should align its approach with that of NMFS. If anything, the comparison of the agencies demonstrates that NMFS should adopt the Service's

[5] The proportion of NMFS-managed species with a specific 4(d) rule is not much greater than it is for Service-managed species, providing further evidence that the existence of a blanket 4(d) rule does not affect an agency's ability to promulgate species-specific 4(d) rules.

approach and issue its own blanket 4(d) rule. The Service's goal of aligning its 4(d) approach with one that regularly fails to implement the ESA's conservation mandate provides no rational justification to repeal the blanket 4(d) rule.

B. Section 4(d) Requires that Each Threatened Species Receives Regulatory Protection from the Date It Is Listed.

The plain text of section 4(d), as well as the structure and intent of the ESA, requires the Service to issue protective regulations at the time it lists a species as threatened. To date, the blanket 4(d) rule has satisfied that statutory duty. If the Service repeals that rule, it will be required to issue new section 4(d) regulations each time it lists or reclassifies a species as threatened. Not only will this significantly increase the burdens on the Service's personnel and resources, but it will inevitably result in even greater delays in listing many of the species awaiting protection and will place hundreds of species at greater risk of extinction. Retaining the blanket 4(d) rule will enable the Service to timely list species as threatened without waiting for the development of a species-specific 4(d) rule, and still will maintain the Service's ability to promulgate specific 4(d) rules for the species when or after they are listed.

Section 4(d) requires that, "Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d) (emphases added). Under the statute's plain text, the duty to issue protective regulations at the time of listing is nondiscretionary.

The ESA's legislative history also is clear that Congress intended that the Service must issue some sort of protective regulation every time it lists a species as threatened. The Senate Report stated that section 4(d) "requires the Secretary, once he has listed a species of fish or wildlife as a threatened species, to issue regulations to protect that species." S. Rep. No. 93-307, at 8 (1973) (emphasis added). Similarly, the sponsor of the Senate ESA bill testified, "whenever the Secretary lists a species as threatened, he is required to issue regulations to protect such species." 119 Cong. Rec. 25,675 (1973) (statement of Sen. Williams) (emphasis added); *see also* H. Rep. No. 93-412, at 11 (1973) (indicating that species should be listed as threatened when Secretary determines he can issue regulations that "would serve to conserve, protect, or restore the species").

The structure of the ESA similarly demands that the Service issue appropriate protective regulations when it lists a species as threatened. The ESA's provisions, read together, prohibit the Service from taking regulatory action under section 4(d) that authorizes take, unless the take promotes the conservation of the species. *Sierra Club v. Clark*, 755 F.2d 608, 612-13 (8th Cir. 1985) (citing 16 U.S.C. §§ 1531(c)(1); 1532(3); 1533(d)). Listing a species as threatened without simultaneously issuing protective regulations would effectively allow take of that species. The blanket 4(d) rule currently prevents that result. Repealing the blanket rule, on the other hand, would constitute regulatory action under section 4(d) that affirmatively authorizes take of threatened species listed in the future, in violation of the ESA.

We urge the Service to retain the blanket 4(d) rule. If the Service does repeal the blanket 4(d) rule, it must ensure that it issues species-specific 4(d) rules concurrent with listing any species as threatened; the ESA does not permit the Service to wait to finalize initial species-specific rules until after a final listing or reclassification determination. The Service also must ensure that switching from the current regime to issuing species-specific rules for each listing will not delay future listing determinations.

IV. THE ESA SECTION 7 REGULATIONS UNDERMINE JEOPARDY ANALYSIS AND USE OF THE BEST AVAILABLE SCIENCE.

A. ESA § 7 Establishes a Science-Based Protection Scheme Grounded in Precautionary Measures and Directives for Protecting Species and their Habitat.

Section 7 consultation is an integral part of the protections afforded by the ESA. Consultation is not just a study in a vacuum, but rather the mechanism for ensuring agencies understand the impact of their actions and discharge their duty to avoid contributing to extinction. Section 7 consultation includes three essential components: (1) the wildlife agencies ensure the best available science is used; (2) the independent scientific review serves as a check on agencies that might seek to advance their primary mission rather than protect endangered species; and (3) the wildlife agencies develop alternatives and mitigation to protect species and their habitat. The ESA makes the best science, at any point in time, the determinant of whether an action must undergo consultation or is likely to cause jeopardy or degrade critical habitat, and the ESA requires that uncertainty be resolved in favor of protection.

Section 7 and current regulations regarding its application, when properly interpreted and applied, can provide direction, tools, and flexibility for the protection of listed species and critical habitat from threats such as global warming without the need for significant new exemptions, thresholds, or limitations.

B. The Proposed Changes Undermine the Requirement to Avoid Jeopardy to Listed Species by Preventing the Services from Identifying or Applying a Point at which an Activity May Appreciably Reduce the Likelihood of Survival or Recovery.

The Services spend several pages of the preamble discussing terms in the existing regulations defining "destruction or adverse modification" and "jeopardize the continued existence of." While the Services do not propose or provide any notice of their intent to revisit these definitions, this discussion is riddled with erroneous legal conclusions. Section 7 of the ESA requires all federal agencies to ensure that their actions do not jeopardize listed species' survival and recovery. Consistent with the Act, the ESA regulations for decades have prohibited those actions that would appreciably reduce a species' chances of surviving and eventually recovering. Whether an action will reduce the likelihood of survival or recovery is a forward-looking inquiry requiring the agency to have some idea what the actual survival and actual recovery will look like and some idea of when they will be achieved in order to determine

whether the proposed action will appreciably reduce the likelihood that the species will attain these conditions. The courts have upheld this requirement when the government has failed to abide by it. For example, in 2008, the Ninth Circuit rejected an agency's argument that, in order to avoid jeopardy, it needed only to avoid making the listed species' *current* condition worse, without regard to whether the species could ever actually survive or recover. The court said:

> Under this 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.

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 930 (9th Cir. 2008). As this decision makes clear, the statutory command to avoid jeopardy requires the government to ensure that it is not allowing "death by a thousand cuts" for species already on the brink of extinction.

Making a jeopardy determination in the context of ongoing action and baseline conditions that, if left unmodified, could lead to the extinction of a species may require affirmative improvements in the likelihood of the species' survival and recovery in order to meet the forward-looking purpose that is fundamental to a proper jeopardy analysis.

In addition, this discussion of jeopardy and adverse modification is inexplicably at odds with past agency positions and practice because it omits any meaningful consideration of the species' condition. As the Services have explained, "the longer a species remains at low population levels, the greater the probability of extinction from chance events, inbreeding depression, or additional environmental disturbance." ESA Consultation Handbook at 4-21. Similarly, NMFS has emphasized that "impeding a species' progress toward recovery exposes it to additional risk" and "in order for an action to not 'appreciably reduce' the likelihood of survival, it must not prevent or appreciably delay recovery." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 891(D. Or. 2016) (quoting 1999 NMFS memorandum; emphasis added).

Most fundamentally, the proposed new definition of jeopardy is contrary to the language and purpose of the ESA itself. The aim of the statute is to bring listed species to the point where protection under the Act is no longer required—a future condition that a listed species, as evidenced by its listing, does not currently meet. Allowing federal agency actions under the new definition so long as they do not appreciably reduce a listed species' current prospects of survival and recovery would allow any federal action so long as it does not erode the species' current chance of survival and recovery by more than an appreciable amount. Federal action could by small incremental steps lead to exactly what the Act is aimed at avoiding—eventual extinction—frustrating the fundamental conservation goal of the statute. The suggestion that the agencies need not identify what would constitute survival and recovery in order to determine whether an action would appreciably reduce the likelihood of attaining those conditions is contrary to the forward-looking nature of the jeopardy and adverse modification analyses. Indeed, these are benchmarks against which the Services must determine how "appreciable" the effects of the

action will be. In order to meaningfully assess (and determine the degree) of an action's effects on survival and recovery, the agencies must have some sense of how these conditions are satisfied/what they look like.

Nor does requiring a forward-looking jeopardy analysis, as the current regulatory definition requires in accordance with the statute, conflate the requirements of ESA section 7 with the recovery planning requirements of section 4. Nothing in the Act suggests that the section 4 recovery planning process is the only forward-looking provision of the Act and given the Act's overall purpose, such a reading is not sustainable. In addition, nothing in section 4 addresses impacts to a listed species' survival. Section 7 is and always has been a requirement for federal agencies to take a forward-looking approach to the impacts of their action on listed species. The proposed new definition of jeopardy fundamentally fails to do this.

C. New Regulation § 402.14(g)(8) Would Require Blind Reliance on Promises of Mitigation, in Violation of the ESA's Precautionary Principle.

The Services propose a new provision, 50 C.F.R. § 402.14(g)(8), that would require the Services to presume the implementation and effectiveness of any measures proposed by an action agency to offset or mitigate the harmful effects of the proposed action. The Service attempts to justify its proposal by asserting that "judicial decisions have created confusion" about the need for certainty for these actions. But the decisions the agencies cite (and many more) are a symptom of agencies' consistent failures to take a precautionary approach to activities that jeopardize listed species, not a cause of confusion. The Services' proposed change would render the Services unable to even question outlandish speculation about the likelihood of implementation or beneficial effects of proposed mitigation measures when they evaluate a proposed action to determine whether it will jeopardize the continued existence of a species or destroy or adversely modify critical habitat.

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

Providing the "benefit of the doubt" to federal action agencies' promises to implement beneficial/mitigation measures as part of the action also creates an irrational double standard for evaluating the effects of the action. While federal beneficial proposals enjoy a favorable presumption in the Services' analysis, harmful effects and activities must meet far more rigorous test before they will be considered. The definition of "effects" in § 402.02 and the proposed language in § 402.17 establishes criteria to determine whether activities or effects are certain enough to occur to warrant consideration in the consultation process. As § 402.17(b) makes clear however, these criteria would not apply to mitigation measure included in an agency's proposed action. There is simply no justification for creating two different tests for activities and effects based on whether they harm listed species or offset harm to listed species.

The Services' reliance on proposed language of § 402.14(c) does not alleviate these shortcomings. The information listed in that section does not include any requirement that an agency or applicant demonstrate with any level of detail or certainty that particular measures will take place or that they would have their intended effect. Relying on after-the-fact-reinitiation of consultation is a similarly empty gesture. At the point that consultation is reinitiated, the harm to listed species has been done and, where the Services relied on incomplete or ineffective mitigation measures to avoid jeopardy, may be jeopardizing the species. Simply reinitiating consultation (especially when the same favorable assumptions about the action agencies' promises will be applied the second time around) does nothing to alleviate that harm, let alone satisfy the substantive duty to ensure that the action does not cause jeopardy.

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

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

- In a series of legally invalid biological opinions, NMFS relied heavily on the action agencies' promise to complete habitat improvement projects in the Columbia River to conclude that the operation of federal dams on the Snake and Columbia Rivers would avoid jeopardy. But the promised actions never materialized. Despite a series of holdings in successive court opinions that the actions were not likely to occur, the action agencies continued to rely on them such that near the end of a ten-year biological opinion, the action agencies had implemented no more than 18 percent of the promised projects and fell far short of their own wildly optimistic predictions of benefits. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 184 F. Supp. 3d at 903-909.

There is nothing in the track record that would justify the Services' blind faith that federal action agencies must be taken at their word that they will accomplish promised mitigation

measures necessary to avoid jeopardy or undue harm to listed species simply because they say they will. *See, e.g.*, *Tenn. Valley Auth. v. Hill*, 437 U.S. at 194 ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'").[6]

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

The Services' proposal to define "destruction or adverse modification" only on the scale of the impacts relative to the value of critical habitat "as a whole" conflicts with the ESA's focus on recovery and invites a comparative analysis that could easily lead to a "death by a thousand cuts." This is a special concern for highly migratory or wide-ranging species that, by definition, require large amounts of designated critical habitat. The comparative approach of the proposed regulation prejudices any meaningful analysis of individual or cumulative effects to these species' critical habitat simply because these species have more habitat to serve as the "denominator" in this comparison. The Services should, as they did in 2016, exclude this unnecessary language from any final rule.

First, Congress wrote and enacted the ESA without requiring destruction or adverse modification of critical habitat as a whole. The Services' attempt to add that language – and to limit what qualifies as destruction or adverse modification – not only contradicts congressional intent but invades Congress's legislative sphere. In fact, inserting "as a whole" threatens to render section 7's jeopardy provisions meaningless surplus, as any federal action that would destroy or adversely modify a species' critical habitat as a whole would almost assuredly jeopardize the continued existence of that species.

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

[6] The proposed regulations contain no definitions or standards for the material or assertions coming from the federal action agencies. In order for the Services to truly be an independent check on impacts to species and habitat, to meet the best available science requirement, and to avoid even more confusion and uncertainty, the proposed regulations, if adopted, should include clear language requiring the Services to make independent analysis for accuracy, reliability, and assure that the best available science is employed.

modification of one type of designated critical habitat, even if loss of that habitat would harm the species or forestall its recovery.

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

Finally, the proposed change also fails to account for the role that critical habitat plays in the recovery of species. "[T]he ESA was enacted not merely to forestall the extinction of species (i.e., promote a species['s] survival), but to allow a species to recover to the point where it may be delisted." *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004). Moreover, "the purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery." *Id*. Recovery and survival are distinct, though complementary, goals. Critical habitat promotes both: "Congress said that 'destruction or adverse modification' [of designated critical habitat] could occur when sufficient critical habitat is lost so as to threaten a species' recovery even if there remains sufficient critical habitat for the species' survival." *Id*. (emphasis added). "[I]t is logical and inevitable that a species requires more critical habitat for recovery than is necessary for the species' survival… ." *Id*. at 1069. Treating some areas or parcels of critical habitat as somehow "expendable" simply because they are small by comparison would erode the potential for the habitat as a whole to provide for recovery. The Services have provided no standards or sideboards to ensure that habitat necessary for a species' recovery (as opposed to its mere continued existence) is not discounted or more permissibly adversely modified when conducting a range-wide analysis.

E. The Services' Attempt to Clarify ESA § 402.02's Definitions of Environmental Baseline and Ongoing Action Is Unneeded and Sows Confusion.

The Services' proposed new definition of the "environmental baseline" creates similar confusion and uncertainty. There is no need to "clarify" the existing definition. The proposed language carves out and defines a special category of "ongoing" actions.

This is particularly problematic for federal ongoing actions. Trying to segregate from a proposed action those aspects and effects that are ongoing is inconsistent with the definition of "action" as anything a Federal agency authorizes, funds, or carries out. 50 C.F.R. § 402.02. For example, where the past and present effects of an on-going federal action hasten or continue a species' decline to extinction, carrying that action forward necessarily means carrying forward

those effects. In other words, a decision to continue an ongoing action (even if modified to be slightly less harmful than it was previously) is as much a decision to carry forward the harmful effects as it is a decision to continue the action in a slightly less detrimental fashion. The entire action is something that the agency authorizes, funds, or carries out. Consultation on a proposed modification and continuation of that action must ensure that the entire ongoing action does not appreciably reduce the likelihood of survival and recovery and/or destroy or adversely modify critical habitat. As detailed above, these are forward-looking inquires, not comparative exercises in determining whether the ongoing action has been improved to be slightly less harmful than what was happening before. The proposed definition invites that improper comparison between the past and present impacts of an ongoing federal action (the "world absent the action under review") and the effects of the action.

F. The Services Should Not Revise ESA § 402.03 – Applicability.

The Services seek comment on whether to revise this section to limit the actions that trigger the consultation requirement. 83 Fed. Reg. at 35185. While the Services justify these proposed changes as "clarifications," they would in practice severely undercut the Services' pivotal role as the expert agency tasked with protecting species from the harmful effects of federal actions. The Services should abandon this proposal.

First, the proposed changes are a solution in search of a problem. Even if the Services were correct that these activities are typically "far removed" from jeopardy, then the informal consultation process should efficiently deal with such actions while retaining some oversight role from the Services. The Services provide no evidence or reason to believe that the proposed exemptions would result in any meaningful savings in time or resources. In fact, experience shows that just the opposite is true. Time and again, we have seen the need for involvement from the Services with biological/wildlife expertise in agency decision-making. For example, after a district court ordered the Federal Emergency Management Agency ("FEMA") to consult with NMFS on its implementation of the National Flood Insurance Program, *Nat'l Wildlife Fed'n v. FEMA*, 345 F. Supp. 2d 1151 (W.D. Wash. 2004), NMFS issued a biological opinion finding jeopardy on that program. In another context, although EPA initially concluded that the continued uses of several toxic pesticides would have either "no effect" or were "not likely to adversely affect" Pacific salmon and steelhead (conclusions that lead to either no consultation or informal consultation), once involved, NMFS concluded not only that formal consultation was necessary but that these pesticides jeopardized their continued existence and adversely modified their critical habitats. *See* Biological Opinion on EPA's Registration of Pesticides Containing Carbaryl, Carbofuran, and Methomyl (Apr. 20, 2009) at 7, 485 (Table 81).[7]

As these examples make clear, many federal agencies do not possess the necessary expertise in wildlife biology to make the determinations required by section 7. Encouraging additional unilateral determinations by action agencies with no oversight role by wildlife experts

[7] Available at https://www.fisheries.noaa.gov/national/consultations/pesticide-consultations (last visited Sept. 21, 2018).

at the Services will lead to unwarranted harms to listed species and additional uncertainty and work, not less. The Services should be looking for ways to increase efficient oversight, not trying to divest themselves of involvement.

Second, the particular categories the Services propose compound these concerns. For example, the proposal to exclude from consultation actions with effects that are "manifested through global processes" would add unneeded confusion and uncertainty to the analysis of activities that contribute to the single greatest threat to species' survival and recovery—climate change. The conditions the Services have proposed do not correct this problem. To begin with, it is difficult to understand how action agencies can be expected to determine the species range and access and interpret the best available downscaled climate modeling, much less analyze and conclude whether the effects are significant or not. Much of the best available scientific information about each of these topics resides, as it should, with the Services, who are continually updating and applying this information in consultation processes. Moreover, it is the Services, not action agencies, who are best positioned to make scientific judgments about the significance of effects and the degree of risk posed to species or their habitats. The idea that the Services would not be involved in the determination of whether an action has "wholly beneficial" or undetectable effects is equally problematic. These are judgments that the Services are not only better qualified to make, but can make with far less investment of time and resources than action agencies with far broader mandates. Again, to the extent that an action truly has beneficial or undetectable results, the existing informal consultation process provides a readily available and efficient way to make that determination without the investment of resources in formal consultation, but with the Services' essential oversight and expertise.[8]

Finally, the Services seek comment on whether to limit consultation to "only the activities, areas, and effects within the jurisdictional control and responsibility of the regulatory agency." 83 Fed. Reg. at 35185. This brief proposal is the tip of a troubling iceberg. Artificially limiting and attempting to draw bright lines around some elements of a proposed action to cabin—or exclude an action entirely from—the consultation process is both unwise and unnecessary. For example, in 2004, the National Marine Fisheries Service and the action agencies responsible for operation of the dams on the Columbia and Snake Rivers produced a biological opinion for those operations that was swiftly and comprehensively rejected by the courts. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008). A core component of the Service's analysis was an attempt to parse which elements of the proposed continued dam operations were within the agencies' authority and discretion and which were not. The result was a confusing hypothetical "reference operation" the Service then compared to the proposed action to determine and analyze whether the differential effects resulted in jeopardy or adverse modification of critical habitat. This exercise was not only riddled with legal errors and erroneous interpretations of other statutes concerning the agencies' authority and jurisdiction, it sought to absolve the action agencies from the vast majority of the harm caused by the dams. Attempting to implement this across the board would introduce yet

[8] The third category of proposed excluded actions—those with no effect—is already permitted, and there is no need to revise § 402.03 to repeat it. *See* 50 C.F.R. § 402.14(a).

another confusing and uncertain element into the consultation process and, more importantly, would result in far greater risk to species listed as endangered and threatened. The Service should abandon this proposed change.

G. Exempting Programmatic Land Management Plans from ESA § 7(a)(2) Consultation Risks Placing Newly Protected Species and Habitat in Peril from Out-of-Date Plans.

The proposal to exempt programmatic land management plans suffers from three flaws. It is hard to square this proposed exemption with the Services' encouragement, elsewhere in the proposed rule, for agencies to use the programmatic consultation process more frequently and for more actions. *See* 83 Fed. Reg. 35185. While pushing more actions into programmatic consultation and then locking the resulting biological opinion in place may reduce workload, administrative convenience cannot justify a proposal that could lead to cementing plans and activities that harm listed species simply because they were listed after the initial programmatic consultation was completed. The Act, as interpreted in the existing regulations, provides for flexibility to address this situation precisely because newly listed species require the same protections as those listed when the land management plan consultation took place.

Nor can the agencies adequately address harm to newly listed species though later site-specific consultations. 83 Fed. Reg. at 35189. Consultation on programmatic actions provides a full picture of all relevant impacts in order to determine whether the combination of activities in the program/plan will avoid jeopardy and adverse modification of critical habitat. These determinations are appropriately made at the programmatic level, where the agency is best able to consider the aggregate impacts of all the proposed activities, together with other activities taking place in the same area. Deferring this analysis to project-specific consultations risks masking or missing these collective impacts. Indeed, courts have rejected agencies' attempts to "defer [programmatic-level] analysis to future site-specific consultations" for precisely these reasons. *Pac. Coast Fed'n of Fishermen's Ass'ns v. NMFS*, 482 F. Supp. 2d 1248, 1267 (W.D. Wash. 2007).

In addition to abandoning the exemption for land management plans, the Services should not extend the proposed exemption to other programmatic actions. For example, Fishery Management Plans ("FMP") developed under the Magnuson-Stevens Fishery Conservation and Management Act provide the framework for regulating fisheries to prevent overfishing and minimize bycatch. There are numerous species listed that are affected by the fisheries managed under these FMPs. In many cases, those species are listed because they are threatened by overfishing and subject to inadequately regulated fishing governed by the FMP. In just the past several years, for example, NMFS has listed oceanic whitetip sharks, scalloped hammerhead sharks, manta rays, and Nassau grouper as threatened species either solely or primarily because they are being overfished directly or as bycatch in other fisheries. The proposed rule would have the nonsensical effect of exempting the FMPs governing the direct and indirect catch of these species—the very activity causing or contributing to their decline and need for listing—from the need to consult. The same is true for a host of species that are not targeted, but are directly

harmed by fisheries, such as sea turtles, false killer whales, and North Atlantic right whales. Freezing programmatic consultation on FMPs that affect any of these species is flatly contrary to the purpose and goals of the Act.[9]

H. There Is No Need To Create a 60-Day Limit on Informal Consultation.

The proposal to limit the informal consultation process to 60 days is yet another solution in search of a problem. According to the information included in the preamble, only 3% (n=46) of informal consultations are taking more than three months to complete. 83 Fed. Reg. 35185. There is no rational justification to adopt a rule to address this low number of informal consultations. Nor is there any reason to believe that any of the small number of informal consultations are causing a problem for the action agencies. Rather than establishing deadlines and determining how and to what elements of the process they would apply, the Services' focus would be better directed to addressing the small percentage of informal consultations that it highlights as the reason for this proposal.

V. ASPECTS OF THE SERVICES' PROPOSED RULE VIOLATE THE APA.

Several of the Services' proposals are no more than vague announcements that the Service may change certain provisions and soliciting input on those provisions. Indeed, in the preambles to the proposed rules amending both sections 4 and 7, the Services make clear that they view these rulemakings as applying to "all of part 402" and "all of part 424" and assert that the "final rule[s] may include revisions to any provisions in [Parts 402 and 424] that are a logical outgrowth of this proposed rule…." 83 Fed. Reg. at 35,179; *id.* at 35,194. Such broad strokes may be proper in an advance notice of public rulemaking, but the Administrative Procedure Act ("APA") requires that an agency engaged in rulemaking give the public adequate notice of the substance of a new rule so that the public has a meaningful opportunity to comment on the agency's plans. 5 U.S.C. § 553. "The object, in short, is one of fair notice." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007); *see also Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (D.C.Cir.1994) (agency "must 'describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making.'" (internal citations omitted)).

"[A]n agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977). A notice "must disclose in detail the thinking that has animated the proposed rule and the data upon which the rule is based." *Id.* at 35; *see also Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-

[9] The same is true for a number of other programmatic actions that currently require programmatic consultations, including five-year (or seven-year in the case of military activities) take regulations under the Marine Mammal Protection Act and five-year plans and area-wide oil and gas development activities governed by the Outer Continental Shelf Lands Act.

93 (D.C. Cir. 1973) (requiring EPA to disclose for comment the "test results and procedures" supporting proposed rule). "Such disclosure is necessary because it is this detail and data that allow the public to generate meaningful criticism, which serves as the basis for meaningful comment." *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 674 F. Supp. 2d 783, 802 (S.D.W. Va. 2009) (citing *Home Box Office*, 567 F.2d at 35-36). The Services' requests for comments on topics or potential additional changes, disconnected from any specific proposals, do not provide fair notice of how the agency actually plans to amend those provisions.

There is no way for the public to know what specific issues or changes the Service has in mind, or what outside ideas it might adopt, during its "comprehensive" review of the entire suite of ESA listing and critical habitat regulations. The public cannot comment on proposals that the Services have not explicitly put before it. Nevertheless, in response to these general statements, we provide some general comments above. Should the Services come up with additional changes they desire to make, they will have to re-publish the proposed rule and provide the public adequate opportunity to comment on any additional changes.

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

As detailed in these comments, the Services' proposed changes to the regulations would significantly undermine existing safeguards for current and future ESA-listed species and their critical habitat. NEPA requires the Services to prepare an environmental impact statement, including a robust consideration of alternatives, to evaluate this major federal action with significant effects on the environment.

* * * *

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

Sincerely,

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