Comments of the Attorneys General of California, Maryland, Massachusetts, Illinois, Minnesota, New Jersey, New Mexico, New York, Pennsylvania, and Washington

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

Public Comments Processing
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Re: Comments on the Proposed Rule: Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, FWS-HQ-ES-2020-0102, 86 Fed. Reg. 2373 (Jan. 12, 2021)

Dear Mssrs. Frazer and Rauch:

The undersigned Attorneys General of California, Maryland, Massachusetts, Illinois, Minnesota, New Jersey, New Mexico, New York, Pennsylvania, Washington, (hereinafter, "the States") respectfully submit these comments on the proposed rule published jointly by the U.S. Fish & Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively, the "Services") and entitled, "Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation," 86 Fed. Reg. 2373 (Jan. 12, 2021) (hereinafter, the "Proposed Rule").

Hastily finalized in the last days of the Trump Administration, the Proposed Rule would drastically and unlawfully expand exemptions from the U.S. Bureau of Land Management ("BLM") and U.S. Forest Service ("USFS") requirement to reinitiate consultation with the Services on federal land and resource management plans ("management plans") under section 7 of the Federal Endangered Species Act of 1973, 16 U.S.C. §§ 1531 *et seq*. (the "ESA" or

"Act").[1] As the Services note, BLM and USFS are "responsible for the administration, management and protection of approximately 438 million surface acres of federal lands" in the United States. 86 Fed. Reg. 2373. Congress has directed that both BLM and USFS "develop land management plans that provide for management of these federal lands." *Id*. "[M]anagement plans are broad planning documents that guide long-term natural resource management," setting forth substantive criteria and guidelines, and designating appropriate locations, for multiple types of land uses and activities on federal lands, such as logging, grazing, energy transmission, road construction, operation of ski resorts, and use of off-highway vehicles. *Id*. at 2374; *see Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir. 1994).

The States have significant interests in the conservation of the natural heritage within their borders and are uniquely qualified to evaluate, and demand withdrawal of, the Services' Proposed Rule. Indeed, in many jurisdictions, the States hold these wildlife resources in trust for the benefit of their people. Within the States' 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 the Services 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 seeking to protect their natural resources would need to devote significant resources and institutional capacity to make up for the Services' failure to properly implement the plain language and 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, 520 (2007).

The Proposed Rule would do three things. First, it would continue to exempt the BLM from the ESA's requirement to reinitiate consultation with the Services on an approved management plan if a new species is listed or new critical habitat is designated in the plan area, an approach that the Services first adopted in August 2019 that is contrary to the ESA and controlling case law. Second, it would *permanently* exempt the USFS from the ESA's requirement to reinitiate consultation with the Services on an approved management plan if a new species is listed or new critical habitat is designated in the plan area. The current regulations recognize that the USFS has a *time-limited* statutory exemption from this

[1] The Proposed Rule further revises the same provision of the section 7 regulations that the Trump administration revised just a year and a half ago, on August 27, 2019. 84 Fed. Reg. 44,976, 45,017-18 (Aug. 27, 2019) (revising 50 C.F.R. § 402.16(b)). That final section 7 rule, which includes some of the same aspects as the Proposed Rule, is subject to three related pending legal challenges, the first of which is brought by many of the same signatories to this letter. *See State of California et al. v. Bernhardt et al.*, N.D. Cal. Case No. 4:19-cv-06013-JST; *Center for Biological Diversity et al. v. Bernhardt et al.*, N.D. Cal. Case No. 4:19-cv-05206-JST; *Animal Legal Defense Fund et al. v. Bernhardt et al.*, N.D. Cal. Case No. 4:19-cv-06812-JST.

requirement, pursuant to Public Law 115-141. The proposed rule would delete references to those time limits, making the exemption permanent under the regulations, contrary to the statute.[2] Third, the Proposed Rule would add an entirely new regulatory exemption from the requirement to reinitiate consultation on an approved BLM *or* USFS management plan if there is *new information* revealing that plan implementation may affect listed species or critical habitat "in a manner or to an extent not previously considered." 86 Fed. Reg 2379. The regulatory exemptions are conditioned on the proviso that "any authorized action" that may affect listed species or critical habitat "will be addressed through a separate action-specific consultation." *Id*.

Taken together, these exemptions would essentially mean that the BLM and USFS would only be required to initiate consultation on the management plan as a whole when it is first adopted and if and when it is formally amended years later.

The Proposed Rule is contrary to the plain language and purposes of section 7 as well as the overarching conservation purposes of the ESA as a whole, lacks any reasoned basis, and would arbitrarily limit BLM, USFS, and the Services' duties and authorities under the ESA to avoid jeopardizing listed species or destroying or adversely modifying designated critical habitat, and to conserve listed species, in violation of the ESA and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq*. ("APA"). These legal infirmities render the Proposed Rule unlawful, and it should be withdrawn, for the reasons set forth below.[3]

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[2] Both the USFS-specific statutory exemption for new species listings and critical habitat designations and the time limits—which are in effect exceptions to the statutory exemption from the requirement to reinitiate consultation—were first enacted by Congress in a 2018 omnibus appropriations bill. The time limits provide that the exemption from the requirement for the USFS to reinitiate consultation on a management plan for new species listings and new critical habitat designations *does not apply* to the USFS if: (1) the management plan is more than fifteen years old, and (2) five years have passed since the date of enactment of Public Law 115-141, or since the date of species listing or designation of critical habitat, whichever is later. *See* Pub. Law. 115-141, 132 Stat. 1065-66 (Mar. 23, 2018) (amending 16 U.S.C. § 1604(d)(2)). This statutory exemption, as well as the time-limited exceptions to exemption, are mirrored in the existing regulations but missing from the proposed revisions. *See* 50 C.F.R. § 402.16(b)(1)-(2).

[3] Indeed, the Services are currently reviewing the Proposed Rule to determine if it must be rescinded as contrary to policies set forth in Executive Order 13,990, including the protection and conservation of the environment and sound federal agency decision making based on the best available science. *See* Executive Order 13,990, *Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis*, 86 Fed. Reg. 7037 (Jan. 25, 2021) ("The heads of all agencies shall immediately review all existing regulations . . . promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, the policy set forth in section 1 of this order . . . [and], as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions.").

First, the Proposed Rule's expanded exemptions—which will have significant and wide-ranging adverse effects on listed species and critical habitat on federal lands—is directly contrary to both the procedural and substantive requirements of section 7 and the broad conservation purposes of the ESA. The section 7 consultation requirement applies to all federal agency actions that "may affect" listed species or critical habitat and over which the federal agency retains continuing discretionary involvement or control, 16 U.S.C. § 1536(b)(3)(A), (c)(1); *Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1020, 1027 (9th Cir. 2012) (*en banc*), and this mandate extends to the BLM and the USFS's ongoing implementation of management plans. *Pacific Rivers Council*, 30 F.3d at 1054-56; *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1086-88 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 293 (2016). The Proposed Rule's expanded exemptions also are contrary to the Services and federal agencies' substantive duties to conserve and avoid jeopardy to listed species and to avoid destruction or adverse modification of critical habitat under the ESA. 16 U.S.C. §§ 1531(b), (c)(1), 1536(a)(1), (a)(2); *see Oregon Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1122-23 (9th Cir. 2010) (management plans "set[] the basic pattern" of land uses on federal lands "well into the future"); *see also Pacific Rivers Council*, 30 F.3d at 1053 (management plans "have an ongoing and long-lasting effect even after adoption").

Second, the Services failed to consider how exempting USFS and BLM management plans from section 7 consultation requirements in certain instances would adversely affect listed species and critical habitat, and failed to provide any reasoned explanation for this change, as required by the APA.

Finally, the Services also failed to evaluate the significant environmental impacts of the Proposed Rule in violation of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*. ("NEPA"). The proposal indisputably qualifies as a "major Federal action[] significantly affecting the quality of the … environment" because it will certainly reduce the number, type and scope of section 7 consultations on ongoing management plans and the associated alternatives and mitigation measures for listed species and critical habitat that result from this process. 42 U.S.C. § 4332(2)(C). Thus, the Services cannot lawfully invoke a categorical exclusion from the EIS requirement which was intended for merely procedural rules. *See* 86 Fed. Reg. at 2378.

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

BACKGROUND

I. Statutory Background.

Congress enacted the ESA nearly fifty 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 is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Hill*, 437 U.S. at 180. In enacting the ESA, "Congress was concerned about the *unknown* uses that endangered species

might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet." *Id*. at 178-79 (emphases in original). 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." *Id*. at 177, 194 (emphasis in original). "[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 (emphasis added); *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 ESA 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 primary purposes of the Act are to conserve endangered and threatened species and their habitat and to ensure that all federal agencies utilize their authorities in furtherance of these purposes. *Id*. §§ 1531(b), (c)(1); *see also id*. § 1536(a)(1). The Act defines "conservation" broadly as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary," *i.e*., to the point of full recovery. *Id*. § 1532(3).[4] 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. 42,913 (1973)) (emphasis in original); *see* 16 U.S.C. §§ 1531(c)(1), 1536(a)(1).

Section 4 of the ESA, 16 U.S.C. § 1533, prescribes the process for the Services to list a species as "endangered" or "threatened", and for the designation of critical habitat for listed species, *id*. § 1533(a)(3)(A)(i), (b)(6)(C).[5] The ESA provides listed species and areas designated as critical habitat with significant protections to ensure that species expand their ranges and recover to sustainable population levels so that they no longer need to be listed. In particular, section 7 of the ESA 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

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[4] *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) ("the ESA was enacted not merely to forestall the extinction of species (i.e., to promote a species' survival) 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) ("the objective of the ESA is to enable listed species not merely to survive, but to recover from their endangered or threatened status").

[5] The Act defines an endangered species as one "in danger of extinction throughout all or a significant portion of its range," while a threatened species is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id*. § 1532(6), (20). In general, FWS is responsible for listing and managing terrestrial and inland aquatic fish, wildlife, and plant species, while NMFS is responsible for marine and anadromous 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).

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 the FWS or NMFS. *See id*. §§ 1536(b)(3)(A), (c)(1); *Karuk Tribe*, 681 F.3d at 1020, 1027.

If the federal action agency or the relevant Service determines that the action is "likely to adversely affect" a listed species or designated critical habitat, the Service must prepare a biological opinion regarding the effects of the action on the species or critical habitat. 16 U.S.C. § 1536(b)(3)(A). The 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 the relevant Service 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 that would avoid such jeopardy or adverse modification. *Id*. Finally, the biological opinion must include an "incidental take statement" specifying the impacts of any incidental take on the species, any "reasonable and prudent measures … necessary or appropriate to minimize such impact," and other relevant terms and conditions. *Id*. § 1536(b)(4)(ii).

The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 *et seq*., and the National Forest Management Act, 16 U.S.C. §§ 1600 *et seq*., require BLM and USFS, respectively, to develop, implement, and revise management plans for federal lands under their jurisdictions and to coordinate such planning with other Federal agencies. *See* 43 U.S.C. § 1712; 16 U.S.C. § 1604. These plans provide standards, criteria and guidelines that govern individual project decisions and associated permits, contracts, and other actions within the planning areas. *See* 43 U.S.C. § 1712(a), (e); 16 U.S.C. § 1604(a), (i). In developing, implementing, and amending management plans, BLM and USFS must consider the effects on biological resources, among other things. 42 U.S.C. § 1712(c); 16 U.S.C. § 1604(b), (e)(1), (g)(3). While these plans are required to be reevaluated and revised at least every fifteen years (*see, e.g.,* 16 U.S.C. § 1604(f)(5)), many such plans are decades old.

II. The Proposed Rule.

The Proposed Rule, if finalized, would amend the ESA's regulations to exempt USFS and BLM land management plans from the requirement to reinitiate section 7 consultation with the Services in certain circumstances. 86 Fed. Reg. 2373-79. Specifically, consultation would not be required when new information reveals that a plan may affect listed species or critical habitat "in a manner or to an extent not previously considered," or when a new species is listed or critical habitat is designated that may be affected by the plan, provided any effects on listed species or critical habitat "will be addressed through a separate action-specific consultation." *Id*. at 2379. The Proposed Rule also would eliminate the current regulatory language implementing statutory exceptions to the USFS's use of the new listing and new critical habitat exemption if: (1) fifteen years have passed since the date the USFS adopted the applicable management plan; and (2) five years have passed since the date of enactment of Public Law 115-141, or since the

date of the new species listing or new critical habitat designation, whichever is later. *Compare id*., *with* 50 C.F.R. 402.16(b)(1)-(2).

As with their other recent revisions to the ESA's implementing regulations, the Services once again claim that these changes are designed merely to "improve and clarify the interagency cooperation procedures by making them more efficient and consistent." 86 Fed. Reg. at 2373. The preamble to the Proposed Rule also states that it is specifically designed to subvert the Ninth Circuit's holding in *Cottonwood,* 789 F.3d 1075 (9th Cir. 2015), which held that the USFS was required to reinitiate consultation on an approved management plan when the FWS designated new critical habitat in the plan area. *Id*. at 1086-88; 86 Fed. Reg. 2374-75. The Services contend that approved land management plans "do not result in any immediate on-the-ground effects," and that they need only consult on plan approval or amendments, or on any subsequent, site-specific actions implementing the plan, but do not need to consult on any changed circumstances or new information concerning the plan. 86 Fed. Reg. 2374. The Services base this claim on their position that management plans are purportedly "complete" upon approval, and that "the duty to consult under section 7 is limited to affirmative agency actions, which include prospective or ongoing actions authorized, funded, or carried out by Federal agencies—but not to completed actions or agency inaction." *Id*.

Finally, as with prior ESA regulations, the Services again "anticipate" that the Proposed Rule will be subject to a categorical exclusion under the Department of Interior and NOAA's NEPA implementing regulations and procedures. 86 Fed. Reg. at 2378. This exclusion applies to "[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature." 43 C.F.R. § 46.210(i); *see also* NOAA Companion Manual, *Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities* (Jan. 13, 2017), Cat. Ex. G7, App. E.

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 has: (i) "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 that it "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, 843-44 (1984) ("*Chevron*").

Furthermore, where a federal 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. Commc'ns Comm'n v. Fox Tel. Stations, Inc*., 556 U.S. 502, 515-16 (2009) ("*FCC v. Fox*") (emphasis in original). When an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id*. at 515.

Here, for the reasons explained below, the 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 the rule in violation of NEPA.

I. THE PROPOSED RULE IS CONTRARY TO THE PLAIN LANGUAGE OF SECTION 7 AND THE CONSERVATION PURPOSES OF THE ESA.

A. The Proposed Rule Violates Federal Agencies and the Services' Procedural Duties to Engage in Consultation on Ongoing Implementation of Discretionary Agency Actions That May Affect Listed Species or Critical Habitat.

"Section 7 imposes on all agencies a duty to consult with either the [FWS or NMFS] before engaging in any *discretionary* action that may affect a listed species or critical habitat." *Karuk Tribe*, 681 F.3d at 1020 (emphasis added). The inquiry whether section 7 applies to a given federal agency action "is two-fold." *Id*. at 1021. The first question is "whether a federal agency *affirmatively* authorized, funded, or carried out the underlying activity." *Id*. (emphasis added). The second question is "whether the agency had *some discretion* to influence or change the activity for the benefit of a protected species." *Id*. (emphasis added); *see also id*. at 1024-25. In this regard, the "relevant question is whether the agency *could* influence a private activity to benefit a listed species, not whether it *must* do so." *Id*. at 1025 (emphases in original); *accord Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.,* 340 F.3d 969, 977 (9th Cir. 2003).

The Ninth Circuit has repeatedly held that this procedural obligation to initiate section 7 consultation applies to *ongoing or continuing* federal agency actions, such as implementation of management plans, where the federal agency retains discretion to modify the initial action.[6] "An

[6] *See, e.g., Pacific Rivers Council*, 30 F.3d at 1053-56 (management plans are "continuing agency actions" which may adversely affect listed species and critical habitat on an ongoing basis and therefore reinitiation of consultation is required when a new species is listed); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) (section 7 applied to U.S. Bureau of Reclamation's decision to renew ongoing water supply contracts because it retained discretion to alter the contract terms, including the amount of water delivered); *Turtle Island Restoration Network*, 340 F.3d at 977 (NMFS's ongoing program for issuing fishing permits on

'ongoing agency action' exists if the action 'comes within the agency's decisionmaking authority *and remains so.*'" *Wild Fish Conservancy*, 628 F.3d at 518 (*quoting W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1109 (9th Cir. 2006)) (emphasis in original). Indeed, the U.S. Supreme Court itself has held that "it is clear Congress foresaw that § 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act." *Hill*, 437 U.S. at 186. Thus, the key to determining whether a federal agency has a duty to reinitiate consultation on an ongoing or continuing federal agency action is whether the federal agency retains "some discretion" to modify its implementation of the action "for the benefit of a protected species." *Karuk Tribe*, 681 F.3d at 1021; *accord Cottonwood*, 789 F.3d at 1087 (a federal agency "has a continuing obligation to follow the requirements of the ESA" where it has continuing regulatory authority over the action).

Applying section 7's plain terms, the Ninth Circuit in *Cottonwood* held that USFS was required to reinitiate consultation on a management plan where FWS had revised a previous critical habitat designation to include National Forest land. 789 F.3d at 1087-88. The Court reasoned that the USFS retained discretionary control over management plans "throughout their implementation," and that "requiring reinitiation in these circumstances comports with the ESA's statutory command that agencies consult to ensure the '*continued* existence' of listed species." *Id*. at 1087 (citing 1536 U.S.C. § 1536(a)(2)) (emphasis in original). "[N]ew [critical habitat] protections triggered new obligations" under the statute, the Court explained, and the USFS could not "evade its obligations by relying on an analysis it completed before the protections were put in place." *Id*. at 1088; *accord Pacific Rivers Council*, 30 F.3d at 1054-56 (reinitiation required on USFS management plan where new species is listed in the plan area).

Contrary to this well-established law, the Proposed Rule would exempt BLM's and USFS's ongoing implementation of management plans from any duty to reinitiate section 7 consultation if new information, or changed circumstances such as a new species listing or new critical habitat designation, indicates that the plan may affect listed species or designated critical habitat in a manner or to an extent not previously considered. 86 Fed. Reg. 2379.[7] The Services

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the high seas was subject to section 7 consultation because the Service retained sufficient discretion under the program to condition these permits to protect listed species); *National Wildlife Fed'n. v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928-29 (9th Cir. 2008) (section 7 required NMFS to consider the effects of the ongoing operation of a federal dam, where the agencies retained "considerable discretion" as to how to achieve broad operational goals specified in federal law); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 524 (9th Cir. 2010) (section 7 applied to FWS's ongoing operation of fish hatchery); *Cottonwood*, 789 F.3d at 1086-88 (section 7 requires reinitiation of consultation on USFS' ongoing implementation of management plan when new critical habitat is designated).

[7] As previously mentioned, Public Law 115-141, 132 Stat. 1066 (Mar. 23, 2018), did exempt the USFS from the requirement to reinitiate consultation on approved management plans for new species listings and new critical habitat designations (but *not* for new information). 16 U.S.C. § 1604(d)(2)(A). Congress also included an *exception* to this exemption if certain time periods have passed. *Id.* § 1604(d)(2)(B). The Proposed Rule would unlawfully delete this reference in

do not—and indeed cannot—contend that BLM and USFS do not retain sufficient discretionary involvement, authority, or control over their ongoing implementation of management plans to alter these plans "for the benefit of" listed species and critical habitat, as required by section 7. *Karuk Tribe*, 681 F.3d at 1021; *see* 43 U.S.C. § 1712(a), (c); 16 U.S.C. § 1604(a), (b), (e)(1), (g)(3). In fact, as stated, the Services admit that their intent in proposing the rule is to nullify the Ninth Circuit's ruling in *Cottonwood*. 86 Fed. Reg. 2374-75. But *Cottonwood* simply applied the plain language of section 7 to hold that a federal agency has a duty to reinitiate consultation on any ongoing agency action over which the federal agency retains discretionary involvement, authority or control. The Services cannot change that black letter law.

The Services deliberately misread the foregoing case law, arguing that reinitiation of consultation is not required when a federal agency action is "complete" or there is a mere failure to act, citing *California Sportfishing Prot. All. v. Fed. Energy Reg. Comm'n*, 472 F.3d 593, 595, 598 (9th Cir. 2006). 86 Fed. Reg. 2377; *see also id*. at 2374-75. But that case is inapposite, as it involved a federal agency's issuance of a hydroelectric license to a private party, and not a federal agency's ongoing implementation of a federal program or plan. As discussed above, the latter are considered ongoing or continuing affirmative and discretionary federal agency actions, which are subject to section 7 consultation on an ongoing basis if there is new information or changed circumstances that may affect listed species or critical habitat in the program or plan area. *See infra* n.6 and *Calif. Sportfishing Prot. Alliance*, 472 F.3d at 598 (stating that, unlike the plaintiffs in *Turtle Island Restoration Network*, 340 F.3d 969 and *Pacific Rivers Council*, 30 F.3d 1050, plaintiffs in that case were "not challenging an ongoing [federal] program"). Indeed, the Ninth Circuit itself specifically recognized this distinction in *Karuk Tribe*, 681 F.3d at 1022-23, distinguishing *California Sportfishing* and other cases that "involved private-party activities that involved no affirmative act or authorization by the agency."

For all the foregoing reasons, the Proposed Rule is contrary to the ESA and beyond the Service's rulemaking authority. 5 U.S.C. § 706(2)(A), (C); *Chevron*, 467 U.S. at 843-44.

B. The Proposed Rule Violates Federal Agencies and the Services' Substantive Obligations Under Section 7 and the ESA's Conservation Purposes.

The Proposed Rule also is contrary to federal action agencies and the Services' substantive duties under section 7(a)(2) to "insure" that their actions are not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). Section 7(a)(2) is "[t]he heart of the ESA," and "reflects 'a conscious decision by Congress to give endangered species priority over the primary missions of federal agencies.'" *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011), *quoting Hill*, 437 U.S. at 185. The "may affect" trigger for section 7 consultation under section 7(b) is a "relatively low threshold[,]" allowing an agency to "avoid the consultation requirement only if it

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the regulations to the statutory exception to the exemption for the USFS and also add a second unlawful, non-statutory exemption for new information for *both* the USFS and BLM.

determines that its action will have 'no effect' on a listed species or critical habitat." *Karuk Tribe*, 681 F.3d at 1027 (internal quotations and citations omitted).

The Proposed Rule would drive a large hole through the section 7 reinitiation requirements, directly contrary to the substantive mandates of the statute. In *Pacific Rivers Council*, 30 F.3d 1050, for example, the Ninth Circuit expressly held that management plans "have an ongoing and long-lasting effect even after adoption . . . and represent ongoing agency action." *Id.* at 1053; *see Oregon Natural Desert Ass'n*, 625 F.3d at 1123 (BLM management plans "set[] the basic pattern" of land uses on federal lands "well into the future"); *Pacific Rivers Council,* 30 F.3d at 1055-56 ("forest management plans have ongoing effects extending beyond their mere approval" and establish ongoing "resource and land use policies for the forests in question"); *see also Turtle Island Restoration Network*, 340 F.3d at 977 (quoting with approval language from *Pacific Rivers Council*, 30 F.3d at 1053 and 1055-56, that management plans "have an ongoing and long-lasting effect even after adoption"); *Calif. Sportfishing Prot. All.*, 472 F.3d at 598 (same); *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1158-59 (10th Cir. 2007) (same).

The proposed exemptions from the section 7 consultation requirement would unlawfully limit the circumstances under which BLM and USFS are required to reinitiate consultation with the Services on ongoing implementation of management plans, contrary to the plain language and intent of section 7. That limitation, in turn, would narrow the circumstances under which these agencies are required to make substantive changes to these plans through the reinitiation of consultation under section 7 and implement reasonable alternatives and mitigation measures to avoid jeopardy to listed species and destruction or adverse modification of critical habitat.[8] But the Services have no authority to create new regulatory exemptions from their section 7 duties to ensure no jeopardy and no adverse modification. *See Hill*, 437 U.S. at 173 (section 7 "admits of no exception"); *Conner v. Burford*, 848 F.2d 1441, 1455 (9th Cir. 1988) ("Appellants ask us, in essence, to carve out a judicial exception to ESA's clear mandate that a comprehensive biological opinion … be completed ….We reject this invitation to amend the ESA. That is the role of Congress, not the courts.").

The Proposed Rule also subverts the broad conservation purposes of the ESA. Section 2(c) of the Act provides 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. 16 U.S.C. § 1531(c)(1) (emphasis added). Similarly, Section 7(a)(1) provides that "[a]ll … Federal agencies *shall … utilize* their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of" listed species. 16 U.S.C. § 1536(a)(1) (emphasis added). "Conservation" is essentially synonymous with recovery of the species. *See* 16 U.S.C. §§ 1531(b), 1532(3); *Gifford Pinchot*, 378 F.3d at 1070; *Ctr. for*

[8] Such alternatives and mitigation measures could include, for example, prohibiting certain types of land uses in certain areas where listed species or critical habitat is present; placing seasonal, temporal or other restrictions on such uses; or requiring specified best management practices for such uses.

Native Ecosysts. v. Cables, 509 F.3d 1310, 1322 (10th Cir. 2007). These broad statutory purposes leave no room for the Services to exempt specific types of ongoing federal agency actions from consultation. The Proposed Rule thus subverts federal agencies and the Services' duties to do everything in their power to conserve listed species. 16 U.S.C. §§ 1531(c)(1), 1536(a)(1).

Contrary to the Services' contention, the fact that consultation would occur at a later, site-specific level on specific actions, and that a management plan "generally does not authorize any on-the-ground actions," does not save the rule from the foregoing legal infirmities. 86 Fed. Reg. 2374. The Services admit that "management plans are broad planning documents that guide long-term natural resource management." *Id.* Consultation at the scale of the entire plan is the best and perhaps only opportunity to address effects—particularly cumulative effects—on listed species and critical habitat at a programmatic level and at a watershed scale over long time periods. *See, e.g.*, *Pacific Coast Fed'n of Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 426 F.3d 1082, 1092-95 (9th Cir. 2005); *Pacific Coast Fed'n of Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1035-38 (9th Cir. 2001).

In sum, the Proposed Rule's limitations on the BLM and USFS's obligations to reinitiate consultation is contrary to section 7's requirement to insure no jeopardy and no destruction or adverse modification of critical habitat, as well as the ESA's overarching conservation mandate.

II. THE SERVICES VIOLATED THE APA BY FAILING TO EXPLAIN OR JUSTIFY THE PROPOSED RULE.

The Services also violated the APA by failing to adequately justify the basis for the Proposed Rule, relying on factors that "Congress has not intended it to consider," failing to consider "important aspect[s] of the problem," and offering implausible and unsubstantiated explanations for the Proposed Rule. *State Farm*, 463 U.S. at 43.

As they have done with several preceding ESA rule changes, the Services offer as a primary justification for the Proposed Rule that it will "improve and clarify" the consultations that do occur by making them more "efficient" and "consistent." 86 Fed. Reg. 2373-75. But while the Proposed Rule may reduce the Services' workload by reducing the number and extent of consultations that occur on federal management plans, it does nothing to "improve and clarify" these consultations or make them more "consistent." Rather, it simply adds more regulatory roadblocks to species and habitat protection. More importantly, the Services may not elevate their desire for regulatory streamlining over their statutory duties to conserve and ensure no jeopardy to listed species and no destruction or adverse modification of critical habitat under the ESA, as discussed above.

Moreover, the Services failed to consider that consulting only on site-specific actions will necessarily reduce both federal agencies and the Services' consideration of the programmatic and cumulative impacts of plan implementation on listed species and critical habitat over broad areas and longer time frames. As discussed, management plans set forth substantive criteria and

guidelines, and designate appropriate locations, for multiple types of harmful land uses and activities on federal lands, such as logging, grazing, energy transmission, road construction, the operation of ski resorts, and the use of off-highway vehicles. *Pacific Rivers Council*, 30 F.3d at 1055; 86 Fed. Reg. 2374. As the Ninth Circuit has recognized, the effects of these management plans can be "immediate and sweeping." *Or. Nat. Desert Ass'n*, 625 F.3d at 1123; *see also Pacific Rivers Council*, 30 F.3d at 1053 (management plans "have an ongoing and long-lasting effect even after adoption"). The Services offer no support for their conclusory and hollow assertions that indirect and cumulative impacts to species and habitat from such authorized actions will still be adequately considered and protected through site-specific consultations. 86 Fed. Reg. 2374-75.

The Services also fail to support their bald claim that reinitiation of consultation on management plans as a whole, either when a new species is listed or critical habitat is designated, or when new information becomes available, "does little to further the goals of the Act" and results in "little benefit to listed species or critical habitat." 86 Fed. Reg. 2375. As mentioned, management plans are typically not formally revised or updated for many years; the USFS, for example, is only required to update its plans every fifteen years. *Id*. Finally, the Services fail to explain why they are revising and expanding the same regulation they only just recently revised in August 2019. *Fox*, 556 U.S. at 515-16.

In sum, the Proposed Rule would exclude the *overall* management plan criteria, guidelines, land use designations, and authorizations from further interagency review upon the listing of a new species or designation of new critical habitat within the plan area, or upon the discovery of new information indicating that a plan may affect a previously- listed species or designated critical habitat in a manner or to an extent not previously considered. In so doing, the Proposed Rule would render the protections for listed species and critical habitat in those plans outdated and inadequate well before they are required to be revised and would needlessly risk species' survival and recovery in favor of regulatory "efficiency," directly contrary to the ESA and APA. *See Hill*, 437 U.S. at 174, 185, 194 (the ESA reflects "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies" and to give endangered species protection "the highest of priorities").

III. THE PROPOSED RULE VIOLATES NEPA.

The Services "anticipate" that the Proposed Rule will be categorically excluded from NEPA review under their regulations and policy directives because it is of an "administrative, financial, legal, technical, or procedural nature." *See* 86 Fed. Reg. at 2378, citing the Interior Department's categorical exclusion at 43 C.F.R. § 46.210(i) and the NMFS NEPA policy manual. For the reasons set forth below, the Services cannot lawfully invoke a categorical exclusion intended for merely procedural rules. Indeed, the Proposed Rule is a "major federal action significantly affecting the quality of the … environment" because it will certainly reduce the number, type, and scope of section 7 consultations on ongoing management plans and the

associated alternatives and mitigation measures for listed species and critical habitat that result from this process. 42 U.S.C. § 4332(2)(C).

A. The Proposed Rule Is a Major Federal Action Significantly Affecting the Human Environment and thus Requires NEPA Review.

Congress enacted NEPA in 1969 to "establish a national policy for the environment ... 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). Major federal actions may include "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.1(q)(2)[9]

As described in Part I above, the Proposed Rule will have significant, adverse environmental impacts on endangered and threatened species and their habitat by: (1) reducing the number, type, and scope of section 7 consultations for BLM and USFS projects and activities that may affect listed species or destroy or adversely modify critical habitat; and (2) avoiding or limiting the number, type and scope of reasonable and prudent alternatives and mitigation measures that would be imposed on such projects and activities through the section 7

[9] On July 16, 2020, the Council on Environmental Quality ("CEQ") finalized an update to its 1978 regulations implementing NEPA, 85 Fed. Reg. 43,304 (July 16, 2020), which took effect on September 14, 2020. *See* 40 C.F.R. § 1506.13. These new NEPA regulations are subject to multiple legal challenges, including one brought by twenty-one states (including all of the undersigned States), the District of Columbia, the territory of Guam, Harris County, Texas, and the City of New York, *see State of California et al. v. CEQ et al*., N.D. Cal. Case No. 3:20-cv-06057, and a related case, *Alaska Community Action on Toxics et al. v. CEQ et al*., N.D. Cal. Case No. 3:20-cv-5199. In addition to other changes, the new NEPA regulations unlawfully dilute and narrow the definition of major federal actions significantly affecting the environment to dramatically limit and reduce the number and types of projects subject to NEPA review, constrain and narrow the scope of impacts, alternatives, and mitigation measures considered, and drastically curtail the duty to consider cumulative impacts. But whether assessed under the prior regulations or the current, unlawful regulations, the Services have violated NEPA in failing to conduct any environmental review of the Proposed Rule.

consultation process to reduce their significant effects. Accordingly, the Proposed Rule is a major federal action significantly affecting the environment for which an EIS must be prepared before the Proposed Rule can be finalized.

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

In its Proposed Rule, the Services state that they "anticipate that the categorical exclusion found at 43 C.F.R. § 46.210(i) applies to the proposed regulation changes." 86 Fed. Reg. at 2378. As noted above, this 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, the Services state that they "are continuing to consider the extent to which this proposed regulation may have a significant impact on the human environment or fall within one of the categorical exclusions," and that they therefore "invite the public to comment on these or any other aspects of NEPA compliance." 86 Fed. Reg. at 2378. The Services claim that they "will comply with NEPA before finalizing this regulation." *Id*.

The claim that the Proposed Rule is subject to a categorical exclusion is contrary to the requirements of NEPA. In particular, the Services' revised and expanded the unlawful exemption for management plans from the requirement to reinitiate consultation when new listings or new critical habitat designations occur or new information is discovered is not a regulation "of an administrative, financial, legal, technical, or procedural nature." 43 C.F.R. § 46.210(i). This substantive proposal would significantly reduce the protections that listed species and critical habitat receive during implementation of large-scale management plans that cover a wide array of damaging activities over hundreds of millions of acres of federally-owned lands nationwide. 86 Fed. Reg. 2373. This significant impact triggers the requirement for detailed environmental review under NEPA, and the Services cannot bypass this statutory requirement by relying on an inapposite categorical exclusion. *See* 16 U.S.C. 4332.

Furthermore, even if the Proposed Rule could properly be categorized as an administrative or technical change (which it cannot), "extraordinary circumstances," including the significant effects on and unknown risks to listed species and critical habitat and violations of the ESA discussed in Part I above, preclude the application of a categorical exclusion from NEPA. *See* 40 C.F.R. § 1501.4 (b); 43 C.F.R. § 46.215(h)-(i). Given these extraordinary circumstances, the Services cannot rely on a categorical exclusion where the Services have made no attempt to show that circumstances would lessen the significant impacts of this rulemaking. *See id.* Indeed, such circumstances do not exist. Because of these significant environmental impacts on imperiled species and their habitat, the Proposed Rule does not qualify for a categorical exclusion from NEPA.

In sum, if the Services proceed with this rulemaking, they must first prepare and circulate a draft EIS for public review and comment that considers the direct and indirect environmental impacts of the Proposed Rule in combination with other recently finalized section 7 rules.

CONCLUSION

The Proposed Rule is yet another unlawful and misguided attempt by the Services to severely undercut the ESA's foundational protections for endangered and threatened species and the habitat upon which they depend. The Services therefore must abandon this ill-conceived proposal and instead focus on addressing the significant threats posed by habitat destruction and degradation authorized under BLM and USFS management plans 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.

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