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Public Comments Processing
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U.S. Fish and Wildlife Service
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Re: Comments on Endangered Species Act Regulatory Revisions - Dockets FWS–HQ–ES–2021–0104; FWS–HQ–ES–2021–0107; FWS–HQ–ES–2023–0018

The Southern Environmental Law Center ("SELC") submits the following comments on revisions proposed by the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS"), collectively "the Services," to the Endangered Species Act ("ESA") implementing regulations. The Services' proposed revisions respond to rollbacks of the ESA regulations that took effect in 2019 under the Trump administration.[1] We submit these comments on behalf of a broad coalition of more than 40 organizations working to protect the natural resources of the South, including in the States of North Carolina, South Carolina, Tennessee, Georgia, and Alabama, and in the Commonwealth of Virginia.

We are in the midst of a mass extinction event that is primarily fueled by human-caused habitat loss and degradation and compounded by the effects of climate change. The current extinction rate is estimated as roughly 1,000 times higher than the background extinction rate, and future rates are likely to be 10,000 times higher with the effects of climate change.[2] Here in the South, we already have more than 260 different animals and plants on the federal list of threatened and endangered species, with hundreds more awaiting listing. The ESA remains the best tool for extending to species necessary protections, with an impressive 99% success rate at preventing extinction.[3] In order to stave off the worst impacts of the current extinction crisis, we need restored and improved ESA rules, and we need them fast.

[1] Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 88 Fed. Reg. 40,742 (June 22, 2023) (to be codified at 50 C.F.R. pt. 17) [hereinafter "2023 Proposed Rules on Take"]; Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 88 Fed. Reg. 40,753 (June 22, 2023) (to be codified at 50 C.F.R. pt. 402) [hereinafter "2023 Proposed Section 7 Rules"]; Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat, 88 Fed. Reg. 40,764 (to be codified at 50 C.F.R. pt. 424) [hereinafter "2023 Proposed Rules on Listing Species and Designating Critical Habitat"].

[2] Jurriaan M. De Vos et al., *Estimating the normal background rate of species extinction*, 29 CONSERVATION BIOLOGY 452 (Apr. 2015).

[3] Noah Greenwald et al., *Extinction and the U.S. Endangered Species Act*, PEERJ e6803 (Apr. 2019).

As the Services are aware, immediately upon taking office on January 20, 2021, President Biden issued Executive Order 13990,[4] in which he emphasized the urgency of combatting the climate crisis and directed federal agencies and departments to review agency actions taken over the preceding four years. Subsequently, on January 27, 2021, President Biden issued Executive Order 14008, in which he emphasized the need to "increase resilience to the impacts of climate change; protect public health; [and] conserve our lands, waters, oceans, and biodiversity," among other imperatives.[5]

As explained throughout these comments, key revisions must be made in order to further the administration's stated goals in conserving biodiversity and addressing climate change. SELC previously submitted, on behalf of numerous organizations involved in conservation in the South, comments opposing the July 25, 2018, proposal to overhaul the ESA regulations for implementing Sections 4 and 7 of the Act. We attach and incorporate those comments by reference here.[6] As explained below, and as provided in more detail in our prior comments, the Trump-era regulatory changes under the ESA were unnecessary, restrictive, and inconsistent with the clear mandates and underlying purpose of the ESA and should all be reversed. While we appreciate that the Biden administration is taking steps to repeal some of the harmful 2019 regulations, the currently proposed changes fail to address many of those damaging revisions made by the Trump administration. We are encouraged by the proposed restoration of the blanket 4(d) rule and the removal of consideration of economic impacts in listing decisions; however, we are concerned by the inadequate revisions to and proposed retention of many of the 2019 changes to the Section 7 implementing regulations, as well as some of the Section 4 implementing regulations. As species and habitat struggle to adapt to climate change, ensuring federal actions are not exacerbating those impacts becomes even more important—but the current revisions fail to restore the Section 7 regulations to their historic strength to best address such accelerating threats to species.

In the comments below, we highlight the needed areas of improvement in the currently proposed regulations as well as the changes we support, which include the following key points:

- The Services should remove the "as a whole" limiting language, added in 2019, regarding the impacts of federal actions to critical habitat which could allow for piecemeal destruction of habitat essential to a species' conservation.

- The Services should further revise the definitions of "environmental baseline" and "effects of the action" to ensure federal agencies adequately consider the full scope of consequences of actions, including indirect effects.

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[4] Executive Order 13990 of January 20, 2021: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7,037 (Jan. 25, 2021); *see also* Press Release, U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., U.S. Fish and Wildlife Service and NOAA Fisheries to Propose Regulatory Revisions to Endangered Species Act (June 4, 2021), https://www.fws.gov/press-release/2021-06/us-fish-and-wildlife-service-and-noaa-fisheries-propose-regulatory-revisions (announcing upcoming ESA regulation revisions in accordance with Executive Order 13990).

[5] Executive Order 14008 of January 27, 2021: Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7,619, 7,623 (Feb. 1, 2021).

[6] Letter from S. Env't L. Ctr. to U.S. Fish & Wildlife Serv. and Nat'l Marine Fisheries Serv. (Sept. 24, 2018), provided as Attachment 1 and available with all corresponding attachments at https://www.regulations.gov/comment/FWS-HQ-ES-2018-0009-56155 [hereinafter "SELC 2018 Comments"].

- The Services should rescind the 2019 regulation allowing indefinite mitigation plans.
- The Services should maintain their expert agency role in recommending reinitiation of consultation.
- The Services should discard the proposed additions to the regulations governing reasonable and prudent measures because the proposals do not meet the requirements of Section 7 of the ESA or further the purposes of the Act.
- We support the Services' restoration of text confirming that economic factors should not be considered in listing decisions, and we urge the Services to similarly restore the pre-2019 approach to foreseeable future and delisting decisions.
- The Services should ensure their proposed revisions fully abandon the "stepwise" approach to designating unoccupied critical habitat.
- The Services should rescind changes made to the regulation governing when designation of critical habitat is "not prudent."
- We support FWS's restoration of the blanket 4(d) rule, which will extend needed default protections to species FWS determines to be threatened.
- We support FWS's exploration of how to improve the regulations to appropriately recognize and empower Tribes.

I. THE PURPOSES OF THE ENDANGERED SPECIES ACT

Congress passed the ESA in 1973 in recognition of the "esthetic, ecological, educational, historical, recreational, and scientific value" of fish, wildlife and plants, and that species across the United States were being "rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a). Legislative history shows that Congress regarded the threat of habitat loss as a prime driver of species extinction. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 179–80 (1978) (quoting and summarizing legislative history regarding habitat loss and destruction). In particular, the Senate Conference Report recognized that "[o]ften, protection of habitat is the only means of protecting endangered animals which occur on non-public lands." S. REP. NO. 93-307, at 4 (1973); *see also* H.R REP. NO. 93-412, at 9 (1973) ("The protection of habitat of endangered species is clearly a critical function of any legislation in this area."). Congress recognized that "[a]s we homogenize the habitats in which these plants and animals evolved . . . we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable. . . . Sheer self-interest impels us to be cautious." *Tenn. Valley Auth.*, 437 U.S. at 178 (quoting H.R. REP. NO. 93-412, at 4–5 (1973)). To abate the unfettered destruction of habitat driving extinction, the first purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b).

As the Supreme Court has explained, "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*," *Tenn. Valley Auth.*, 437 U.S. at 184 (emphasis added) and "the 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. The Act's ultimate goal is to achieve recovery of listed species through conservation actions, where "conservation" is defined 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." 16 U.S.C. § 1532(3). As the Fourth Circuit recently reaffirmed, "the Endangered Species Act requires federal agencies 'to afford first priority to the declared national policy of saving endangered [or threatened] species'—even when this goal conflicts with agencies' 'primary missions.'" *Appalachian Voices v. U.S. Dep't of Interior*, 25 F.4th 259, 264 (4th Cir. 2022) (quoting *Tenn. Valley Auth.*, 437 U.S. at 185).

Sound science—and "institutionalized caution," *Tenn. Valley Auth.*, 437 U.S. at 194—underpin the ESA's requirements for federal agencies to evaluate the impacts of actions they take, fund, or authorize.[7] Congress has directed agencies to use the best available science throughout the ESA, including in making determinations about which species are protected as well as the contours of the protections those species need to recover. 16 U.S.C. §§ 1533(b)(1)(A), (b)(2), (b)(3); *id.* at § 1536(a)(2). The best available science requirement helps fulfill "Congress' intent to 'give the benefit of the doubt to the species.'" *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988).[8]

II. THE ACT'S IMPORTANCE TO THE SOUTH'S IMPERILED BIODIVERSITY

The South has much at stake when it comes to actions that impact imperiled species and their habitat. Our 2018 comments provided a detailed account of the multitude of imperiled species and unique habitats found throughout the South—from pristine forests to productive coastlines and everything in between.[9] As discussed in those comments, the climate and geography of the region have led to high levels of biodiversity for millions of years,[10] and as such, the South was recognized as the 36th Global Biodiversity Hotspot in 2016.[11] The rivers and streams of the Southeast in particular support an astounding level of biodiversity relative to the

[7] *See* Dan Rohlf & Colin Reynolds, *Restoring the Emergency Room: How to Fix Section 7(a)(2) of the Endangered Species Act* at 32–33 (June 14, 2022) (available at SSRN: https://ssrn.com/abstract=4126387) (describing how "Congress sought to imbue or institutionalize throughout the federal government a cautious approach to its interactions with the environment" through the ESA).

[8] *See also Defs. of Wildlife v. U.S. Dep't of the Interior*, 931 F.3d 339, 351 (4th Cir. 2019) (quoting *Conner v. Burford* favorably); *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 1004 (9th Cir. 2014) ("It is within the agency's discretion to choose a conservative threshold that will afford maximum protection to the species so long as that threshold is fairly supported, which it is."(citations omitted)); *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1166–67 (9th Cir. 2010) ("Where data are inconclusive or where habitat is used on a sporadic basis, allowing the FWS to designate as 'occupied' habitat where the species is likely to be found promotes the ESA's conservation goals and comports with the ESA's policy of 'institutionalized caution.'" (citations omitted)); *Roosevelt Campobello Int'l Park Comm'n v. U.S. E.P.A.*, 684 F.2d 1041, 1048–49 (1st Cir. 1982) ("[T]he legislative intent was that the Act 'continues to give the benefit of the doubt to the species.'" (citations omitted)).

[9] SELC 2018 Comments at 4–13.

[10] *See*, *e.g.*, Reed F. Noss et al., *How Global Biodiversity Hotspots May Go Unrecognized: Lessons from the North American Coastal Plain*, 21 DIVERSITY & DISTRIBUTIONS 236 (Feb. 2015).

[11] Reed F. Noss, *Announcing the World's 36th Biodiversity Hotspot: The North American Coastal Plain*, CRITICAL ECOSYSTEM PARTNERSHIP FUND (Feb. 18, 2016), https://www.cepf net/stories/announcing-worlds-36th-biodiversity-hotspot-north-american-coastal-plain.

rest of the United States, hosting 38 percent of the entire country's freshwater fish species, 43 percent of its snails, 60 percent of its mussels, and 52 percent of its turtles.[12]

Unfortunately, Southern ecosystems are as imperiled as they are diverse. The South's habitats currently face many threats from human activities, with habitat degradation and destruction as the leading causes of extinction.[13] As one of the fastest-growing areas of the country,[14] the South is experiencing many forms of habitat destruction and degradation—including from development, logging, agriculture, pollution, poor land management, and introduction of invasive species, among others. As cities expand, urban sprawl fragments and destroys previously intact natural habitats, introducing a host of threats to wildlife.[15] Habitat fragmentation harms species and their habitats in myriad ways, including by degrading water quality, interrupting predator-prey relationships, decreasing the availability of foraging habitat, and hindering resilience from disturbance.[16]

To further compound these threats, climate change is predicted to significantly transform habitats throughout the South in the near future. Climate change is already causing, and will continue to lead to, habitat degradation and/or loss in the South through a variety of pathways, including: higher temperatures, extreme precipitation, increased drought, more frequent and intense wildfires, rising sea levels, increased flooding, further proliferation of invasive species, shifting ocean currents, and increased storm frequency and intensity.[17] As a result, the South will likely see large shifts in species' ranges in the coming decades; ongoing development and urban sprawl in the South will almost certainly hamper the ability of species to move in response to these threats.[18]

The ESA has been an invaluable tool in conserving the region's stunning biodiversity. There are currently 262 species listed under the ESA as endangered (179), threatened (81), or

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[12] Charles Lydeard & Richard L. Mayden, *A Diverse and Endangered Aquatic Ecosystem of the Southeast United States*, 9 CONSERVATION BIOLOGY 800 (Aug. 1995).
[13] *See*, *e.g.*, Stuart L. Pimm et al., *The biodiversity of species and their rates of extinction, distribution, and protection*, 344 SCIENCE 987 (May 30, 2014); David S. Wilcove et al., *Quantifying threats to imperiled species in the United States: Assessing the relative importance of habitat destruction, alien species, pollution, overexploitation, and disease*, 48 BIOSCIENCE 607 (Aug. 1998).
[14] *See* Press Release, U.S. Census Bureau, Southern and Western Regions Experienced Rapid Growth This Decade (May 21, 2020), https://www.census.gov/newsroom/press-releases/2020/south-west-fastest-growing html.
[15] Adam J. Terando et al., *The Southern Megalopolis: Using the Past to Predict the Future of Urban Sprawl in the Southeast U.S.*, 9 PLOS ONE e102261 (July 23, 2014).
[16] *Id. See also, e.g.,* Nick M. Haddad et al., *Habitat fragmentation and its lasting impact on Earth's ecosystems*, 1 SCI. ADVANCES e1500052 (Mar. 20, 2015), provided as Attachment 2; Maxwell C. Wilson et al., *Habitat fragmentation and biodiversity conservation: Key findings and future challenges*, 31 LANDSCAPE ECOLOGY 219 (Nov. 20, 2015), provided as Attachment 3; Lenore Fahrig, *Effects of habitat fragmentation on biodiversity*, 34 ANNUAL REVIEW OF ECOLOGY, EVOLUTION, & SYSTEMATICS 487 (Aug. 14, 2003), provided as Attachment 4; Ilkka Hanski, *Habitat loss, the dynamics of biodiversity, and a perspective on conservation*, 40 AMBIO 248 (Mar. 18, 2011), provided as Attachment 5.
[17] Lynne Carter et al., *Southeast*, *in* IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT, VOL. II, 734–99 (David Reidmiller et al. eds., 2018).
[18] Lee Hannah, *Climate change, connectivity, and conservation success*, 25 CONSERVATION BIOLOGY 1139 (Dec. 2011), provided as Attachment 6.

experimental populations (30) in SELC's six-state region.[19] More than half of these inhabit freshwater ecosystems, including 105 species of mussels, snails, and crayfish, as well as 44 fish species.[20] In addition to the 262 species already listed under the ESA in our region, 132 additional species are being considered for listing by FWS. As habitat destruction and climate change continue to threaten imperiled Southern species, it is critical to protect remaining habitat and known populations of species and avoid adverse impacts to them.

III. THE AGENCIES SHOULD RESTORE ESA SECTION 7 TO ITS HISTORIC STRENGTH

Section 7 lies at "the heart of the ESA." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011); *see Karuk Tribe of Cali. v. U.S. Forest Serv.*, 681 F.3d 1006, 1019–20 (9th Cir. 2012). It requires federal agencies to insure their actions are "not likely to jeopardize the continued existence of any endangered or threatened species or result in in the destruction or adverse modification" of critical habitat. 16 U.S.C. § 1536(a)(2). Section 7 lays out a process for agencies to consult with FWS and/or NMFS, as the expert resource agencies, in evaluating and minimizing the effects of federal actions. 16 U.S.C. § 1536. Given the broad scope of federal actions affecting the environment, this consultation process is essential to ensuring the conservation and recovery of imperiled species, particularly in an era of accelerating threats from climate change.

Unfortunately, the currently proposed changes fail to address most of the damaging revisions made by the Trump administration to the Section 7 implementing regulations. As we explained in our 2018 comments, those changes were contrary to science and to the conservation purposes of the ESA.[21] We are disappointed that the proposed revisions leave in place most of those changes, and as explained in greater detail below, we urge the Services to undo those 2019 changes in order to align the regulations with the conservation purposes of the ESA.

A. Remove "As a Whole" From the Adverse Modification Definition.

In 2019, the Trump administration revised the regulatory definition of "destruction or adverse modification of critical habitat" to add the words "as a whole." Specifically, the term is now defined as "a direct or indirect alteration that appreciably diminishes the value of critical habitat *as a whole*." 50 C.F.R. § 402.02 (emphasis added). The proposed changes to the ESA regulations would leave this definition unchanged. This language on its face could allow discrete or small areas of critical habitat to be destroyed, piece by piece—without a finding of adverse modification or destruction of critical habitat—ultimately resulting in cumulatively significant losses over time. This apparent sanctioning of the piecemeal destruction of critical habitat—or "death by a thousand cuts"—is contrary to the plain meaning and purposes of the Act. We therefore urge the Services to delete the words "as a whole" from the definition of "destruction or adverse modification" in 50 C.F.R. § 402.02.

[19] SELC's six-state region includes Virginia, North and South Carolina, Georgia, Alabama, and Tennessee. To compile these numbers, SELC reviewed FWS's Environmental Conservation Online System, NMFS's Species Directory, Federal Register notices, and the Code of Federal Regulations. A full list of listed Southeastern species is available upon request.

[20] *Id.*

[21] *See* SELC 2018 Comments at 17–23.

As the Services acknowledge in the proposed revisions to 50 C.F.R. Part 424,[22] "Congress viewed habitat loss as a significant factor contributing to species endangerment."[23] Indeed, under Section 4(a)(1)(A) of the Act, "the present or threatened destruction, modification, or curtailment [of a species'] habitat or range" is one of the listed factors upon which the Services may base a determination that a particular species is threatened or endangered.[24] 16 U.S.C. § 1533(a)(1)(A). As noted above, the purposes of the Act recognize the necessity of protecting ecosystems, including habitat. *See id.* at § 1531(b).

The addition of "as a whole" in the regulation's definition of "destruction or adverse modification" of critical habitat is contrary not only to the intent and purposes of the Act but also to the plain language and meaning of Section 7(a)(2) of the Act. Section 7(a)(2) provides in pertinent part that each federal agency "shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification" of critical habitat. *Id.* at § 1536(a)(2). The 2019 addition of "as a whole" to the regulatory definition at issue contravenes the clear directive of Section 7(a)(2): federal agencies must insure that their actions do not result in the destruction or adverse modification of critical habitat—period. There is no qualifying language in Section 7 that would condone the adverse modification of only a portion of designated critical habitat or the destruction of some, but not all, of the designated critical habitat. Rather, Section 7(a)(2) unambiguously commands federal agencies to "insure" that their actions will not result in the destruction or adverse modification of critical habitat.

The regulatory definition of "destruction or adverse modification," however, in effect rationalizes the loss or destruction of relatively small areas of critical habitat as measured against a larger critical habitat designation as a whole. As such, the regulation impermissibly creates the equivalent of a "de minimis exception" to Section 7(a)(2)—an interpretation that is not at all supported by the plain language of the statute.[25] Further, if an action destroyed or adversely modified critical habitat "as a whole," it would necessarily be likely to jeopardize the continued existence of the species, thus collapsing the two separate inquiries under Section 7(a)(2).

The statute's own definition of "critical habitat" provides further support that the words "as a whole" in the regulation are contrary to the language and purposes of the Act. The statutory definition of "critical habitat" encompasses specific areas both within the geographical area occupied by a particular species as well as specific areas outside the occupied geographical area. The defining and common element for both "occupied" and "unoccupied" critical habitat is that

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[22] 2023 Proposed Rules on Listing Species and Designating Critical Habitat, 88 Fed. Reg. at 40,764.
[23] *Id.* at 40,765.
[24] Under Section 4(a)(3)(A) of the Act, the Secretary, also must, "to the maximum extent practicable and determinable," designate critical habitat concurrently with a determination that a species is threatened or endangered. 16 U.S.C. § 1533(a)(3)(A).
[25] *See* Rohlf & Reynolds, *supra* note 7. The Ninth Circuit's metaphor in *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917 (9th Cir. 2008), while in a different context, is also particularly apt. That case involved a challenge to a biological opinion ("BiOp") that impermissibly included in the environmental baseline (and thus excluded from the agency's jeopardy analysis) effects that in fact were related to the agency action. The record established that such effects, if added to the effects of the proposed action, would tip the species into jeopardy. *Id*. at 929. In upholding the district court's ruling that the BiOp thus was invalid, the Ninth Circuit explained that, under the approach taken by the agency "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*." *Id*. at 930 (emphasis added).

these areas "are essential [to/for] the conservation of the species," whether or not they are currently occupied by the species. *See* 16 U.S.C. §§ 1532(5)(A)(i), (ii).[26] Put another way, critical habitat, by definition, encompasses geographical areas that are deemed "essential to the conservation of the species," regardless of whether endangered or threatened species currently occupy such areas. *See* 16 U.S.C. §§ 1532(5)(A)(i), (ii). Under the regulatory definition of "destruction or adverse modification" in 50 C.F.R. § 402.02, however, an action that would destroy a discrete area of critical habitat could escape a finding of adverse modification—despite the fact that designated critical habitat, *a fortiori*, means that such area is essential to the conservation of the species.

Requiring that critical habitat "as a whole" be "appreciably diminished" to support a finding of destruction or adverse modification of critical habitat is particularly problematic for species that have wide ranges, for migratory species, and for species that are especially susceptible to climate change, as we explained in our 2018 comments on the Trump administration's proposed changes to the ESA regulations.[27] In fact, for species particularly at risk from climate change, smaller areas at the edge of the designated critical habitat may be the last best chance of survival and recovery for the species.

As we pointed out in our 2018 letter, critical habitat for loggerhead sea turtles (*Caretta caretta*) spans approximately 207 million acres of ocean area and over 700 miles of beach, and protecting individual units of these habitats at a local scale is vital for the recovery of the entire population. Some of the loggerhead's most significant nesting aggregations occur in the Southeast, from the beaches of Georgia to North Carolina.[28] Indeed, thousands of loggerhead nests are laid in these states in a given year.

All sea turtles demonstrate temperature-sex determination, meaning warmer incubation temperatures produce more female hatchlings, while cooler incubation temperatures produce more male hatchlings.[29] In looking at the overall sex ratio of the larger population segment, these local differences are thought to balance out. In the South, for example, northern beaches in the Carolinas produce a higher proportion of males than southern beaches. The addition of the words "as a whole" could allow critical nesting habitat in North Carolina and South Carolina to be destroyed—without a finding of adverse modification—on the grounds that critical habitat in Florida still exists. This may have implications for the sex ratio of an entire population, which is especially worrisome in the face of rising temperatures.

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[26] 16 U.S.C § 1532(5)(A), the definition of "critical habitat" provides:

> The term "critical habitat" for a threated or endangered species means –
>
> (i) the specific areas within the geographical area occupied by the species [at the time of listing], on which are found those physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protections; and
>
> (ii) specific areas outside the geographical area occupied by the species [at the time of listing], upon a determination by the Secretary that such areas are essential for the conservation of the species.

[27] SELC 2018 Comments at 18–20.

[28] Designation of Critical Habitat for the Northwest Atlantic Ocean Loggerhead Sea Turtle Distinct Population Segment (DPS) and Determination Regarding Critical Habitat for the North Pacific Ocean Loggerhead DPS, 78 Fed. Reg. 43,005, 43,006 (July 18, 2013) (to be codified at 50 C.F.R. pt. 226).

[29] *See, e.g.*, Thane Wibbels, *Critical Approaches to Sex Determination in Sea Turtles, in* THE BIOLOGY OF SEA TURTLES, VOL. II (Peter Lutz et al. eds., 2003) (attached to SELC 2018 Comments as Exhibit 19).

In addition to the problems with applying the "as a whole" limitation to loggerhead nesting habitat, it could also undermine protections for different types of critical habitat which reflect the unique habitat features required for different life stages. Marine critical habitat for loggerhead sea turtles, for example, is broken into five different types: Nearshore Reproductive, Migratory, *Sargassum*, Breeding, and Overwintering.[30] Atlantic sturgeon (*Acipenser oxyrhynchus oxyrhynchus*) provide another example of a species that must utilize different habitat areas for different life stages; harming a section of critical habitat in a particular reach of a river may not harm the critical habitat unit as a whole, but that fails to acknowledge the sturgeon's differing needs throughout its life and inherently continuous nature of river habitat. Likewise, for highly migratory species like the *rufa* red knot (*Calidris canutus rufa*), which travels up to 19,000 miles annually, an action that would destroy a single unit of critical habitat may look minor when compared to the species' habitat as a whole, but it could have devastating consequences for large numbers of birds with high stopover site fidelity that depend on that particular feeding habitat to fuel the rest of their migration. This is a particular risk at horseshoe crab spawning sites, which are invaluable to red knots and do not occur throughout the species' range. The language "as a whole" in such instances could lead to the anomalous result that habitat deemed essential for a species' particular life function could be destroyed without running afoul of the ESA.

For all of the above reasons, we therefore urge the Services to delete the phrase "as a whole" from the definition of the "destruction or adverse modification" of critical habitat set forth in 50 C.F.R. § 402.02.

B. The Services Should Restore Historic Jeopardy Analysis Definitions and Procedures.

The Services' proposed revisions would largely retain the Trump administration's changes to the Section 7 consultation process. These changes substantially altered and weakened the jeopardy analysis in several ways. First, the 2019 regulations removed from the definition of "effects of the action" all mention of indirect effects and effects of interrelated or independent actions.[31] The regulations then redefined "effects of the action" to include only consequences to listed species or critical habitat that "would not occur *but for* the proposed action and [are] reasonably certain to occur."[32] Next, the Services created a separate definition for "environmental baseline," defining it to include "ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify." This effectively exempted the effects of ongoing agency actions from being fully analyzed as part of a proposed agency action under Section 7 consultation. The Services' current proposal would retain these changes, with limited non-substantive revisions. Furthermore, the Services' current proposal would retain other changes in the 2019 regulations that improperly allow the Services to rely on uncertain,

[30] Critical Habitat for the Northwest Atlantic Ocean Loggerhead Sea Turtle Distinct Population Segment (DPS) and Determination Regarding Critical Habitat for the North Pacific Ocean Loggerhead DPS: Final Rule, 79 Fed. Reg. 39,856 (July 10, 2014) (to be codified at 50 C.F.R. pt. 226).
[31] Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976, 45,016 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 402) [hereinafter 2019 Final Section 7 Rules].
[32] *Id.* (emphasis added).

unsubstantiated mitigation measures in their jeopardy analysis,[33] and the 2023 proposal would take this a step further by allowing offsite mitigation measures to substitute for statutorily-required reasonable and prudent measures to minimize incidental take within a project's action area.[34]

i. The Services Should Further Revise the Definitions of Environmental Baseline and Effects of the Action.

In 2018, the undersigned conservation groups and many other groups opposed the Trump administration's changes to the Services' definitions of "effects of the action" and "environmental baseline."[35] These changes, which are largely retained under the current proposed rules, continue to represent a significant departure from prior regulations and longstanding agency guidance in the Services' Consultation Handbook.[36] The 2019 regulation substantially narrowed the scope of "effects of the action" and moved consideration of effects of ongoing agency actions from being analyzed as "effects of the action" into being considered part of the preexisting environmental baseline. These changes appear to make it virtually impossible for the Services to acknowledge when a species already exists in a state of baseline jeopardy due to previously authorized, ongoing federal actions, such as dams that were installed prior to the enactment of the ESA. The Services' current proposal to omit the word "ongoing" from the definition of "environmental baseline" does not change this outcome.[37]

In 2019, the Services created a great deal of confusion as to whether they would take an additive approach (i.e. adding effects of the action to the baseline) to the jeopardy analysis as indicated by the new text at 50 C.F.R. § 402.14(g)(4),[38] or whether they would continue to take a comparative approach (i.e. comparing effects of the action *against* the baseline) as indicated in the preamble to those changes.[39] The Services have not provided any further clarification in the instant changes, clouding the current proposals in uncertainty and confusion.

Comments from numerous conservation groups criticized the approach of including nondiscretionary portions of federal actions in the "environmental baseline" as a blatant violation

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[33] *See* 50 C.F.R. § 402.14(g)(8) ("Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of binding plans.").

[34] *See* 2023 Proposed Section 7 Rules, 88 Fed. Reg. at 40,763 (proposing to add a new provisions at 50 C.F.R. §§ 402.14(i)(2),(3) that would permit "reasonable and prudent measures" to include "measures implemented . . . outside of the action area.").

[35] *See, e.g.*, SELC 2018 Comments at 20–22.

[36] U.S. Fish and Wildlife Service & National Marine Fisheries Service, *Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* (March 1998) [hereinafter "Consultation Handbook"].

[37] The relevant provision currently says, "the consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline."

[38] The proposed rules would retain the 2019 provision directing that during formal consultation, the Services will "[a]dd the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat."

[39] *See* 2019 Final Section 7 Rules, 88 Fed. Reg. at 44,978 ("In practice, the environmental baseline should be used to compare the condition of the species and the designated critical habitat in the action area with and without the effects of the proposed action . . . .").

of the ESA's mandates, and multiple federal courts have likewise condemned this approach. Still, in the current proposed regulations, the Services are doubling down on their new methodology. Indeed, in the preamble to these regulations, the Services erroneously misapply the Supreme Court's holding in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667–71 (U.S. 2007) ("*Home Builders*") to support their position while ignoring the subsequent, directly applicable holdings of multiple federal courts of appeal. The Court in *Home Builders* held that the Services' interpretation that Section 7(a)(2)'s no jeopardy duty did not apply to a statutorily mandated transfer of Clean Water Act permitting authority from the Environmental Protection Agency was reasonable. The holding of *Home Builders*, however, bears only on *when* Section 7 consultation is required at all; it does not opine on the *scope* of analysis necessary once consultation has been triggered. And it does not authorize exempting certain portions of a federal action from a Section 7 effects analysis, such as by looking only at the additional effects on species from ongoing agency action. Thus, *Home Builders* does not support the Services' new, unscientific process that would avoid a finding of jeopardy where a species is in fact already jeopardized by the ongoing agency activity or facility at the center of the consultation. *See Nat'l Wildlife Fed'n*, 524 F.3d at 929 ("NMFS may not avoid determining the limits of the action agencies' discretion by using a reference operation to sweep so-called 'nondiscretionary' operations into the environmental baseline, thereby excluding them from the requisite ESA jeopardy analysis. And *Home Builders* cannot be read . . . to immunize discretionary agency actions simply because they are taken in pursuit of a non-discretionary goal.").

Furthermore, though the Services do not explicitly argue against the "baseline jeopardy" concept in their preamble here, they continue to rely on the rationale they presented supporting the 2019 changes.[40] The Services also provide an example of how this new definition of environmental baseline and analysis of only "discretionary" agency operations would apply—namely, in the case in which a dam was constructed prior to the enactment of the ESA, and a species affected by the dam was subsequently listed under the ESA, triggering a requirement to reinitiate consultation.[41] The Services say in that case that only consequences of the proposed discretionary operations of the structure are "effects of the action;" therefore the loss of 100 individuals per year due to the mere existence of the dam would be assessed only as part of the environmental baseline. This directly contradicts guidance in the Services' Consultation Handbook, which instructs that consultations on new licenses for existing hydropower projects

[40] In the preamble to 2019 regulation changes, the Services explicitly repudiated the concept of "baseline jeopardy" and attempted to rewrite the holdings of cases that have upheld this concept. *Compare* 2023 Proposed Section 7 Rules, 88 Fed. Reg. at 40,756 ("Thus, the information and examples provided in the 2019 rule's preamble (84 FR 44976 at 44978–44979, August 27, 2019) remain relevant") *with* 2019 Final Section 7 Rules, 84 Fed. Reg. at 44,978 (discussing environmental baseline in final rule preamble) *and* Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. 35,178, 35,182 (July 25, 2018) (preamble to proposed 2019 rule stating that "[i]t is sometimes mistakenly asserted that a species may already in a status of being 'in jeopardy,' 'in peril,' or 'jeopardized' by baseline conditions, such that any additional adverse impacts must be found to meet the regulatory standards for 'jeopardize the continued existence of' or 'destruction or adverse modification,'" and citing *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008); *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 735 (9th Cir. 2017); *Oceana, Inc. v. Pritzker*, 75 F. Supp. 3d 469, 483 (D.D.C. 2014)).

[41] 2023 Proposed Section 7 Rules, 88 Fed. Reg. at 40,756.

require that the Services review the totality of the impacts caused by the hydropower project, in the same way it would review the effects of a new project.[42]

It also directly contradicts the holdings of multiple federal cases that have considered Section 7 consultation requirements for the relicensing of federal hydropower dams. As we previously explained in our 2018 comments,[43] this is particularly problematic for aquatic species in the Southeast because most of the hydroelectric dams in the country were built between 1930 and 1970, before the ESA was enacted, and therefore had never been subject to Section 7 consultation before coming up for license renewal by the Federal Energy Regulatory Commission ("FERC") 30 to 50 years later. [44]

For instance, when seven hydropower dams controlling 275 miles of the Coosa River in Alabama were built in the 1920s and 1950s, they caused "one of the largest extinction rates in North America during the 20th century, with the extinction or extirpation of nearly 40 freshwater species."[45] In 2013, based on an FWS Biological Opinion, FERC reissued a 30-year license for these seven dams.[46] This license failed to include measures for raising dissolved oxygen levels to meet state standards, had no measures for fish passage, and set no mandatory minimum flows for most of the dams. FWS admitted that operating these dams would take 100 percent of several of the species and acknowledged the dire status of the river system. However, it declined to find that the proposed conditions in the license would cause "jeopardy,"[47] on the grounds that the conditions of the new license were more "beneficial" than the previous conditions.[48] In a challenge to the FERC licensing order and biological opinion, the D.C. Circuit Court of Appeals, in *American Rivers v. Federal Energy Regulatory Commission*, 895 F.3d 32 (D.C. Cir. 2018), held that FWS's jeopardy analysis was arbitrary because it "fail[ed] to account for effects of degraded conditions on threatened species" and the "impact of continued operations of the existing dams." *Id*. at 47, 55 (holding as well that FERC's issuance of the license that relied upon the biological opinion was arbitrary and capricious).

Other federal courts have likewise rejected jeopardy analyses as inconsistent with the requirements of the ESA where the Services have attempted to attribute ongoing project impacts to the "baseline" and thereby exclude those impacts from the jeopardy analysis. *See, e.g.*, *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 738 (9th Cir. 2017) (finding "no jeopardy" conclusion to be arbitrary and capricious where "NMFS improperly minimized the risk of bycatch to the loggerheads' survival by only comparing the effects of the fishery against the baseline conditions that have already contributed to the turtles' decline");

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[42] Consultation Handbook at 4-30.
[43] *See* SELC 2018 Comments at 20–23.
[44] *Ala. Power Co.,* 18 F.P.C. 257 (1957); *Ala. Power Co.,* 54 F.P.C. 2452 (1975); *see also Am. Rivers v. Fed. Energy Regul. Comm'n*, 895 F.3d 32 (D.C. Cir. 2018); U.S. ENERGY INFO. ADMIN., *Hydroelectric generators are among the United States' Oldest Power Plants* (Mar. 13, 2017), https://www.eia.gov/todayinenergy/detail.php?id=30312.
[45] U.S. Fish & Wildlife Serv., *Biological Opinion for the Relicensing of Alabama Power Company's Coosa River Hydroelectric Project* (June 7, 2012).
[46] *Order Issuing New License for Alabama Power Company*, 143 Fed. Energy Regulatory Comm'n ¶ 61,249 (2013).
[47] U.S. Fish & Wildlife Serv., *Biological Opinion for the Relicensing of Alabama Power Company's Coosa River Hydroelectric Project* (June 7, 2012) at 90-91 (100 percent of the southern clubshell, finelined pocketbook, southern pigtoe, and Georgia pigtoe would be taken in the Weiss Bypass. One hundred percent of the tulotoma snail, painted rocksnail, and southern clubshell would all be taken downstream of Logan Martin Dam. Further 100 percent of the 21 species reintroduced into the action area would also be taken.).
[48] *Id.* at 89.

Nat'l Wildlife Fed'n, 524 F.3d at 929 (holding that NMFS's exclusion of "nondiscretionary" federal hydropower dam operations from its jeopardy analysis was improper and stating that "we cannot approve NMFS's insistence that it may conduct the bulk of its jeopardy analysis in a vacuum").

If the effects of a new federal action are determined by measuring only its additional effects over historical actions, then when new federal activities, such as the relicensing of a dam or permitting of a fishery are authorized, many ongoing agency activities would continue to take large numbers of listed species at unsustainable rates. This methodology fails to prioritize species conservation, fails to apply the best available science, and fails to comply with Section 7's mandate to insure against jeopardy. 16 U.S.C. § 1536(a)(2). The Services should therefore reverse the Trump changes to environmental baseline and effects of the action and at minimum clarify that impacts included in the environmental baseline will be analyzed along with, rather than compared against, effects of the action in the jeopardy and adverse modification analyses.

ii. Support the Elimination of 50 C.F.R. § 402.17 ("Other Provisions").

We support the Services' current proposal to remove the regulation added in 2019 at 50 C.F.R. § 402.17 ("Other Provisions"). This regulation added impermissible restrictions on what the Services can analyze as effects of the action. The regulation on "consequences caused by the proposed action" contained a non-exhaustive list of factors aimed at forcing the Services to conclude that an effect of an action was too temporally or geographically removed from the proposed action itself to be included in their effects analysis. This regulation improperly constrained the Services from using the best available science and examining the full scope of agency actions in their Section 7 effects analyses. Therefore, we strongly support the removal of this provision.

However, the Services have moved several key components from § 402.17 into the text of § 402.02 in the current proposed regulations, and we oppose the retention of those provisions. The Services fail to go far enough in moving away from the 2019 regulation changes to restore the Section 7 analysis to a process that aligns with agency guidance, federal court decisions, and science.

iii. The Services Should Remove the But-For Causation Requirement and Restore Indirect Effects and Effects of Interrelated and Interdependent Actions in the Definition of Effects of the Action.

The current proposed rules fail to restore the explicit requirement, eliminated in the 2019 Trump revisions, that the Services study indirect effects and effects of interrelated or independent actions as part of the "effects of the action" under consultation.[49] Worse, the proposed regulations would additionally retain the 2019 change that redefined "effects of the action" to include *only* consequences to listed species or critical habitat that "would not occur *but for* the proposed action and [that are] reasonably certain to occur."[50] While the proposed

[49] 2019 Final Section 7 Rules, 84 Fed. Reg. at 45,016.
[50] *Id.* (emphasis added).

regulations make limited technical adjustments to the wording of some of these provisions, they do not change the 2019 regulations in any meaningful way.

Again, SELC and many of the undersigned conservation groups opposed these changes in 2018 and continue to do so now.[51] The Services state that the change merely "collapsed the various concepts of direct and indirect effects, and the effects of interrelated and interdependent actions, into a first sentence that indicates effects of the action are all consequences to the listed species and critical habitat caused by the proposed action."[52] However, the language appears to be much broader than that. The added provision specifies that a "consequence is caused by the proposed action if it would not occur *but for* the proposed action and it is *reasonably certain to occur*."[53] This could substantially narrow or eliminate consideration of indirect effects and the effects of interrelated or interdependent actions.

Such a change goes against the mandates of Section 7 in several ways. First, inserting a requirement of "but-for" causation eliminates from the Services' analysis many foreseeable harms—both direct and indirect—that will result from an action. For example, if the Services are consulting on a project that will result in water pollution detrimental to aquatic species, but there are other sources of pollution present on the same river, it would be very difficult, if not impossible, for FWS to say that the impacts resulting from the project's pollution would not occur to the species but for the project. Thus, the direct adverse impact of the pollution on the species would be ignored under the Services' analysis, despite clear scientific evidence of foreseeable harm to the species.

Similarly, a but-for requirement creates an unreasonably high threshold that must be met in order for the Services to consider foreseeable adverse impacts to species that are affected by a combination of threats. For example, if a project will foreseeably result in the fragmentation of species' habitat, but portions of that habitat are already being lost as a result of climate change, it is unclear whether the project would be considered the but-for cause of the loss. Additionally, indirect effects would often be unlikely to meet the but-for causation threshold, further reducing the scope of what consequences of the action the Service is willing to acknowledge.[54] Likewise, requiring that a consequence must be "reasonably certain to occur" imposes a bar that favors the exclusion of "likely" consequences of an action from the effects analysis and thereby conflicts with the statutory requirement to insure that jeopardy or adverse modification of critical habitat is not "likely" to result from the action. 15 U.S.C. § 1536(a)(2). This further defies the best available science and the conservation mandate of the statute. Rather than adding clarity to the consultation process, the elimination of these terms only makes it more likely that Section 7 consultations will fail to consider the full scope of effects of the action being consulted upon and thereby fail to satisfy the ESA's mandate to insure against jeopardy. Thus, we request that the

[51] SELC 2018 Comments at 22–23.
[52] 2023 Proposed Section 7 Rules, 88 Fed. Reg. at 40,754.
[53] *Id.* at 40,763.
[54] This goes against longstanding precedent requiring the Services to consider the full scope of indirect effects resulting from a project. *See, e.g.*, *Nat'l Wildlife Fed. v. Coleman*, 529 F.2d 359, 374 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976) (holding that indirect effects of private development resulting from proposed construction of highway interchanges had to be considered as impacts of a proposed federal highway project, even though the private development had not been planned at the time the highway project was proposed); *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 513–14 (10th Cir. 1985) (federal agency was required to consider the effects of consumptive water uses made possible by a proposed dam on critical habitat for whooping cranes 150 miles away).

Services restore the definition of "effects of the action" to the text as it existed prior to the 2019 changes.

iv. The Services Should Rescind the Regulation Allowing Indefinite Mitigation Plans.

The Services' current proposed rules additionally fail to remedy the 2019 changes to the regulation governing the Services' responsibilities during formal consultation at 50 C.F.R. § 402.14(g)(8). In 2019, the Services added a new provision to the regulation that stated: "Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of binding plans." The 2019 revisions also gave the same weight to proposed mitigation measures as to mitigation measures that are actually undertaken by federal agencies.[55] In other words, under the 2019 rule, the Services are to presume that all mitigation proposed for an action will be carried out, regardless of substantiation. As SELC and other conservation groups discussed in our 2018 comments,[56] this change unreasonably defies the requirements of the ESA and the holdings of numerous federal courts. We urge the Services to delete this provision.

Federal courts have repeatedly held that while the ESA permits agencies to incorporate conservation measures into a project in order to offset possible impacts, thereby avoiding a "jeopardy" finding under section 7, such measures must be "reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards." *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002) (citing *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987))*; see Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 748 (9th Cir. 2020) (invalidating biological opinion where FWS relied on indefinite mitigation measures that did not constitute a "clear, definite commitment of resources" to conclude that the polar bear's critical habitat would not be adversely modified by the Liberty project); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935–36 (9th Cir. 2008) (holding that even an expressed sincere commitment by a federal agency or applicant to implement future improvements to benefit a species must be rejected absent "specific and binding plans" with a "clear, definite commitment of resources for future improvements"); *Sierra Club v. Marsh*, 816 F.2d 1376, 1385-86 (9th Cir. 1987) (finding reliance on uncertain mitigation "f[e]ll far below *insuring*" project would not likely jeopardize listed species (emphasis in original)).[57]

[55] The 2019 regulatory language reads: "the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions *as proposed or* taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation." 50 C.F.R. § 402.14(g)(8) (emphasis added).

[56] SELC 2018 Comments at 17–18.

[57] *See also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 839 F. Supp. 2d 1117, 1125 (D. Or. 2011) (holding NMFS's no jeopardy conclusion regarding operation of the Federal Columbia River Power System to be arbitrary and capricious where NMFS "improperly relie[d] on habitat mitigation measures that [were] neither reasonably specific nor reasonably certain to occur, and in some cases not even identified"); *Ctr. for Biological Diversity v.*

As demonstrated in the cases above, courts have consistently rejected the Services' reliance on unsubstantiated mitigation measures that are not enforceable, reasonably specific, and certain to occur. Furthermore, the Services are an essential arbiter in ensuring that any mitigation relied upon in a biological opinion will in fact be fully implemented. Action agencies may promise more mitigation than they can deliver in order to avoid a finding of jeopardy, and consultation is the means for ground truthing those assertions to ensure compliance with the law. Finally, this defect cannot be cured by simply reinitiating consultation if the relied-upon mitigation measures do not come to fruition as this approach is both inefficient and ineffective. By the time that a new consultation is completed, irreparable harm may have already resulted to the species or its critical habitat, violating the Services' substantive duty to insure against jeopardy to the species. 16 U.S.C. § 1536(a)(2).

For the foregoing reasons, the Services should rescind the 2019 revisions to the regulation at 50 C.F.R. § 402.14(g)(8).

C. Maintain Expert Agency Role in Recommending Consultation Reinitiation.

The Services' proposal to clarify their role in reinitiating consultation in 50 C.F.R. § 402.16 could unintentionally suggest the Services are taking a "hands off" approach. The Services also retain a damaging limitation on reinitiation in forest planning contexts, which threatens imperiled species and habitats.

First, the proposed rule truncates 50 C.F.R. § 402.16(a)'s statement that "[r]einitiation of consultation is required and shall be requested by the Federal agency or by the Service" by deleting "or the Service."[58] Regardless of whether the Services have the authority to *require* or *compel* reinitiation, however, there is no limit on their authority to "request" or recommend reinitiation. The Services should remain involved in assessing when reinitiation is needed, while emphasizing that action agencies are ultimately responsible for reinitiating consultation. This could be accomplished by recasting § 402.16(a)'s description of the Services' role rather than removing mention of them altogether. For instance, the provision could state that "reinitiation of consultation is required and shall be requested by the Federal agency. The Services shall recommend reinitiation in accordance with the best available scientific information."

The Services should continue to play an active role to ensure that their unique expertise and experience protecting listed species is brought to bear on the question of whether reinitiation occurs. Although action agencies are bound by a legal duty to reinitiate consultation, the Services *could* require themselves to inform action agencies and recommend reinitiation at any time they

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Salazar, 804 F. Supp. 2d 987, 1001–04 (D. Ariz. 2011) (finding biological opinion that relied on mitigation measures that are "not reasonably specific nor reasonably certain to occur" to be arbitrary and capricious); *Or. Nat. Desert Ass'n v. Lohn*, 485 F. Supp. 2d 1190, 1203 (D. Or. 2007) ("NMFS cannot rely on the grazing management strategy, and its promise of 'near natural rates of recovery,' when the mitigation is not 'reasonably certain' to occur. As a result, NMFS' no-jeopardy conclusion is arbitrary and capricious."), *vacated as moot*, 308 F. App'x 102 (9th Cir. 2009); *Nat. Res. Defense Council v. Kempthorne*, 506 F. Supp. 2d 322, 341, 350 (E.D. Cal. 2007) (requiring that a biological opinion must provide objective criteria specifying when mitigation measures must be taken); *Fla. Key Deer v. Brown*, 364 F. Supp. 2d 1345, 1357 (S.D. Fla. 2005), *aff'd sub nom. Fla. Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008) (finding that reasonable and prudent alternatives adopted by action agency illegally relied on voluntary measures and failed to insure against jeopardy).

[58] 2023 Proposed Section 7 Rules, 88 Fed. Reg. at 40,756–57.

believe it is warranted. In the proposed rule and elsewhere,[59] the Services state they believe they are "allowed" to share information and recommend reinitiation of consultation.[60] They should take this one step further and commit to doing so when they believe reinitiation is required by the best available scientific information, even if their recommendation cannot be made binding on the action agency.

Second, we wish to highlight the value of reinitiating consultation with respect to land resource management plans adopted under the National Forest Management Act ("NFMA"), 16 U.S.C. § 1604, and Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1712. We remain highly concerned by the exemption of land management plans adopted under NFMA and FLPMA from reinitiation requirements, even when the typical reinitiation triggers are met. Although we understand the reinitiation requirement in these contexts is constrained by a 2018 statutory amendment, we hope to see FWS play a more active role in promoting the value of consultation—and reinitiating consultation—to ensure plan-level decision-making does not lock in permanent harm to species and habitats in need of immediate protection.

Due to that 2018 legislative amendment,[61] forest plans (i.e., NFMA land resource management plans) are fully exempt from typical reinitiation of consultation requirements unless it has been more than 15 years since the plan was adopted *and* more than five years since the later of a new listing or critical habitat designation. 50 C.F.R. § 402.16(b). The Trump administration's amendments to 50 C.F.R. § 402.16 reflected this legislative change,[62] and the Biden administration's draft rule does not propose to disturb it.

In our region, we recently saw the finalized uplisting of the northern long-eared bat from threatened to endangered status delayed such that a major forest plan revision was narrowly allowed to escape further consultation. Because the uplisting became final shortly after the revised land management plan for the Nantahala-Pisgah National Forests was adopted, the legislative carve-out for forest plans applied, and the agencies avoided having to consult with each other about the plan's impacts on this newly endangered species.

These unfortunate legislative limits on reinitiation in the forest planning context make it even more important that FWS rigorously reviews claims and analysis offered by the Forest Service the first time around, understanding they are unlikely to get a second bite at the apple. But recently, FWS has indicated that because forest plans have few direct effects of their own force, it believes its role as consultant for forest plans should be limited.[63] During the recent revision of the Nantahala-Pisgah Forest Plan in our region, FWS deferred most meaningful analysis to the project level, labeling the plan's impacts as so remote and uncertain that they "are

[59] In the preamble to the proposed rule, 88 Fed. Reg. at 40,756–57, the Services note they have taken this position in the 2019 rulemaking, 84 Fed. Reg. 44,976, 44,980 (Aug. 27, 2019); in a handbook from 1998, Consultation Handbook (FWS and NMFS, March 1998) at 2–11; and as long ago as 1986, 51 Fed. Reg. 19,926, 19,956 (June 3, 1986).
[60] 88 Fed. Reg. at 40,756 (June 22, 2023).
[61] Consolidated Appropriations Act, 2018, Pub. L. 115-141 § 208 (March 23, 2018) (codified at 16 U.S.C. § 1604(d)).
[62] 2019 Final Section 7 Rules, 84 Fed Reg. at 44,980.
[63] Letter from S. Env't L. Ctr., Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act Related to Consultation on the Nantahala-Pisgah Land Management Plan (July 25, 2023), at 11–12, 20. Available at: https://perma.cc/8FWG-VQYR.

unknown and cannot be evaluated"[64] and determining that the forest plan will have "no direct, indirect, or beneficial effects on listed species or their habitats."[65] This view of FWS's consultation duties deprives FWS and the public of perhaps the only meaningful opportunity to survey the impacts of agency works at the spatial and temporal scales necessary to predict what a forest plan will mean for imperiled species and their habitats.

It is not enough, as the existing and draft rules for reinitiation require, that *some* project-level consultation will occur for newly listed species and their critical habitat. Site-level decisions may justify minor adverse impacts here or there as a drop in the bucket without consideration of their cumulative impacts or the structural impact that planning-level decisions would have had. And legally, this outcome is almost guaranteed because the Services' Section 7 regulations exclude other federal actions from being considered at the project level as part of cumulative impacts to listed species. *See* 50 C.F.R. § 402.02 (defining cumulative effects for the purposes of the ESA as "the effects of future State or private activities, not involving Federal activities"). Against this backdrop, project-level consultations are structurally incapable of answering vital conservation questions.

The structure of the ESA otherwise reflects the need to reevaluate the impact of land management plans as new information reveals it is necessary. Courts have previously rejected agency arguments that plan-level decision making was inconsequential for the purposes of Section 7 and recognized the power that forest plans have to limit harm to imperiled species—or, conversely, increase the threats they face. The "argument . . . that there is no reason to believe that lower environmental safeguards at the national programmatic level will result in lower environmental standards at the site-specific level . . . conceives of [programmatic actions] merely as exercises in paper-pushing." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 975 (9th Cir. 2003).

Indeed, the flawed premise that project-level review is sufficient to manage conditions that can only be monitored at the landscape scale has infected the development and implementation of forest plans in our region generally. More and more, difficult but important decisions about how, where, and what to manage are being devolved to the project level, where the incentives to account for landscape-scale ecosystem health are weaker and the informational context for doing so is lacking.

Therefore, we urge FWS to play a more active role in programmatic consultations for land management plans under NFMA and FLPMA. Similarly, the Services should retain a commitment to recommend reinitiation of consultation to federal action agencies within the text of 50 C.F.R. § 402.16(a).

D. The Services Cannot Include Offsite Mitigation as Reasonable and Prudent Measures in Incidental Take Statements.

In addition to leaving in place too many of the harmful regulation changes made in 2019, the Services also include a new proposed and poorly-explained change to the regulations

[64] U.S. Fish & Wildlife Serv., *Programmatic Biological Opinion on the Revised Forest Plan for the Pisgah and Nantahala National Forests* (June 2, 2022), at 58.
[65] *Id.* at 59–61.

governing incidental take statements in the Section 7 consultation process. Incidental take statements "exempt action agencies and their permittees from the Act's section 9 prohibitions if they comply with the reasonable and prudent measures and the implementing terms and conditions."[66] The statute describes the incidental take statement as "a written statement that – (i) specifies the impact of such taking on the species, (ii) specifies those *reasonable and prudent measures* that the Secretary considers necessary or appropriate to minimize such impact," and (iii) "sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with" to implement the reasonable and prudent measures. 16 U.S.C. § 1536(b)(4) (emphasis added).

The Services now propose to revise 50 C.F.R. § 402.14(i)(2) governing the inclusion of reasonable and prudent measures in an incidental take statement. Specifically, the Services would add a clause stating that reasonable and prudent measures, for the first time, "may include measures implemented inside *or outside of the action area* that avoid, reduce, *or offset* the impact of incidental take" (emphasis added).[67] The Services would then add a new paragraph at 50 C.F.R. § 402.14(i)(3), directing that, while the Services should, but would not be required to, prioritize avoiding or reducing the amount of incidental take anticipated within the action area, the Services may also "set forth additional reasonable and prudent measures and terms and conditions that serve to minimize the impact of such taking on the species outside the action area."[68] It is not clear why the Services are proposing this change in a rulemaking otherwise aimed at the Trump administration's rollbacks, or why the Services' prior approach was inadequate.

The Services' proposal would introduce *offsetting* into the jeopardy analysis for the first time under the guise of impact minimization. This proposal does not comport with the requirements of the statute itself, which centers on *minimizing* take resulting from the agency action, not offsetting it. Furthermore, the Services already define "action area" to mean "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. Therefore, the regulation already provides ample opportunity for the Services to minimize adverse impacts of an action without going beyond the action area. As described above, Congress required the Services to issue incidental take statements containing reasonable and prudent measures to reduce take as part of a consultation process designed to "insure" that the agency action is not likely to result in jeopardy to species or adverse modification of critical habitat. The consultation process and the incidental take statement are necessarily tied to the action itself and require minimization of the adverse effects of the action on species and habitat within the action area.

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[66] Consultation Handbook at 4-47.

[67] 2023 Proposed Section 7 Rules, 88 Fed. Reg. at 40,763. The provision, with insertions underlined, would read: "Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action, ~~and~~ may involve only minor changes, and may include measures implemented inside or outside of the action area that avoid, reduce, or offset the impact of incidental take."

[68] 2023 Proposed Section 7 Rules, 88 Fed. Reg. at 40,763 ("Priority should be given to developing reasonable and prudent measures and terms and conditions that avoid or reduce the amount or extent of incidental taking anticipated to occur within the action area. To the extent is it is anticipated that the action will cause incidental take that cannot feasibly be avoided or reduced in the action area, the Services may set forth additional reasonable and prudent measures and terms and conditions that serve to minimize the impact of such taking on the species inside or outside the action area.").

The proposal is also crosswise with the conservation purposes of the ESA and the specific duties imposed on federal agencies, contrary to the Services' unsupported claims otherwise in the preamble text. Offsetting has been recognized to be the least preferred option for conserving species for many reasons, including because its benefits are inherently delayed, uncertain, and unpredictable.[69] This is why offsetting comes last in the "mitigation hierarchy" approach—managers should first avoid, then minimize and mitigate negative impacts before, as a last resort, offsetting any remaining impacts.[70]

Allowing for offsetting could lead to consultations where the take level in an incidental take statement is increased in exchange for a promised offset—but there is no guarantee that the offset will in fact result in a conservation benefit equal to the level of take.[71] Section 7(a)(1) directs federal agencies to "utilize their authorities in furtherance of the purposes" of the ESA. 16 U.S.C. § 1536(a)(1). In order "to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary," federal agencies must minimize harm from their actions, not just offset them. 16 U.S.C. § 1532.[72] Anything less would fall short of the "institutionalized caution" intended by Congress. *Tenn. Valley Auth.*, 437 U.S. at 194. And indeed, decades of agency guidance have properly given the statute the only logical interpretation that it allows—that minimizing take within the action area is required.[73]

The Services' current proposal to include offsetting beyond the action area as mitigation under "reasonable and prudent measures" under the Section 7 consultation process is unsupported by the statute and the agencies' own historic understanding and practice, and it does

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[69] Cross-Sector Biodiversity Initiative, *Framework for Guidance on Operationalizing the Biodiversity Mitigation Hierarchy* (Dec. 2013), http://www.csbi.org.uk/wp-content/uploads/2017/10/Mitigation-Hierarchy-Executive-summary-and-Overview.pdf, at 14.

[70] *Id.* at 8. "As a rule, preventive measures [i.e., avoidance and minimization] are always preferable to remediative measures [i.e., restoration and offsetting]—from ecological, social, and financial perspectives."

[71] This also conflicts with the requirement that the Services "use the best scientific and commercial data available" when "formulating its biological opinion . . . and any reasonable and prudent measures." 50 C.F.R. § 402.14(g)(8). *See, e.g.*, *Defs. of Wildlife v. U.S. Dep't of the Interior*, 931 F.3d 339, 345 (4th Cir. 2019) ("The purpose of the best-available-data standard is to ensure that FWS does not act based on speculation and surmise." (internal quotations omitted)).

[72] The proposal would also corrode the distinction between Section 7 and Section 10. While offsets may be used in permitting activities of private entities under Section 10, federal agencies have a separate and higher duty under Section 7.

[73] *See, e.g.*, Consultation Handbook at 4-53 ("Section 7 requires minimization of the level of take. It is not appropriate to require mitigation for the impacts of incidental take. *Reasonable and prudent measures can include only actions that occur within the action area*, involve only minor changes to the project, and reduce the level of take associated with project activities."); *id.* at 4-19 ("[T]he objective of the incidental take analysis under section 7 is minimization, not mitigation. If the conservation measure only protects off-site habitat and does not minimize impacts to affected individuals in the action area, the beneficial effects of the conservation measure are irrelevant to the incidental take analysis."); *id.* at 2-5 ("For incidental take considerations under section 7, minimization of the level of take on the individuals affected is required.") The surrounding regulations on incidental take statements at 50 C.F.R. § 402.14(i) further reflect this understanding, and the changes proposed by the Services would not make sense in the greater context of those regulations.

not further the conservation purposes of the ESA.[74] The Services therefore should not finalize the proposed changes to the regulations on "reasonable and prudent measures."

IV. THE SECTION 4 LISTING AND CRITICAL HABITAT REVISIONS CAN BE FURTHER IMPROVED

Section 4 of the ESA governs the process for listing species as threatened or endangered and designating critical habitat for such species. In essence, this Section addresses the threshold questions of how the Services will determine which species and habitat will receive the protections of the Act. As detailed below, we are encouraged by some of the proposed changes to the regulations implementing Section 4, but further revisions are needed to ensure the regulations fulfill the Act's broad conservation purpose.

A. Clarify Species Listings Changes.

We wholeheartedly support the restoration of the requirement that the Services make listing decisions "without reference to possible economic or other impacts of such determination" in 50 C.F.R. § 424.11(b).[75] As the Services acknowledge, the plain language of the statute requires that listing decisions "be made solely on the basis of the best scientific and commercial data available,"[76] and restoration of this previous regulatory language in line with the statute will further the science-based conservation purposes of the statute.[77]

We likewise appreciate the Services' proposed revisions regarding how they will determine the "foreseeable future" for purposes of listing species as threatened, but we are concerned the change does not go far enough to ensure full consideration of threats, particularly for climate-imperiled species. As explained in our 2018 comments, defining this term in relation to the ability to determine "likely" threats and responses was unscientific and could lead to adverse listing decisions for species threatened by climate change.[78] The Services' proposed revisions to 50 C.F.R. § 424.11(d) would largely bring the regulatory text in line with the 2009 Department of the Interior Solicitor's M-Opinion on the topic, which the Services reference in the instant proposal. Instead of finalizing that regulation as proposed, however, we suggest the Services simply rescind § 424.11(d) entirely so as to not inadvertently limit the meaning of "foreseeable." Ideally, the Services should issue a draft joint policy for public comment that would incorporate and expand upon the M-Opinion's interpretation and guidance, and more clearly establish guidance about how to incorporate climate change effects on species in such analyses.

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[74] In order for such a policy to even potentially further the conservation purposes of the statute, the regulations would need to include stringent sideboards to ensure that reasonable and prudent measures first avoid and minimize take to the fullest extent possible before any offsetting could occur. Because extensive protective guardrails would be needed, any changes to the regulations on reasonable and prudent measures would be better pursued through a separate rulemaking, rather than as part of the instant, more urgent revisions.

[75] 2023 Proposed Rules on Listing Species and Designating Critical Habitat, 88 Fed. Reg. at 40,765.

[76] *Id.*

[77] Our 2018 comments explained why removing the language was unnecessary and contrary to the ESA's purpose. *See* SELC 2018 Comments at 15.

[78] *Id.* at 15. The 2019 finalized revisions changed slightly from the proposed, but the concerns remain the same whether using the word "likely" or "probable."

As for the Services' proposed changes to the delisting procedures and criteria in § 424.11(e), we recommend the Services simply restore the historic, pre-2019 regulations instead of attempting to revise the current language. The replacement of the phrase "shall delist a species if" with "it is appropriate to delist a species if," and recognition that recovery can be a reason to delist are improvements upon the current language, but the proposed changes do not go far enough to fulfill the ESA's conservation purposes.

The pre-2019 language was clearer and properly defined and emphasized the Act's goal of recovering species within the text of the regulations,[79] required a waiting period to ensure a species presumed extinct was not prematurely delisted, and allowed for removal of a listing if new information indicated a listing was in error.[80] The historic regulatory language also made clear that delisting could only happen if the best available "data substantiate that [the species] is neither endangered nor threatened" due to extinction, recovery, or a classification error. The currently proposed revisions do not restore that important science-based decisionmaking process.

B. Restore Historic Critical Habitat Determinations.

Fifty years after the passage of the ESA, habitat degradation and loss are still the leading causes of extinction, a problem that will only get worse with climate change. In 2019, the Trump administration made several changes to the regulations governing critical habitat protections. These changes constrained the Services' authority to designate unoccupied critical habitat and perversely expanded the Services' authority to declare that designating critical habitat is "not prudent." The Services' current proposed revisions fall short of fulfilling the ESA's conservation purposes. Instead of implementing the proposed revisions, the Services should restore the prior text of these regulations.

i. Restore the Services' Discretion in Designating Unoccupied Critical Habitat.

The Services propose to replace the 2019 language at 50 C.F.R. § 424.12(b)(2), which mandated a "stepwise approach" for the designation of unoccupied critical habitat that only allowed the Services to designate unoccupied critical habitat if occupied habitat alone would be inadequate to ensure the conservation of the species. This stepwise approach imposed an improperly heightened burden on the designation of unoccupied critical habitat and made it virtually impossible for agency staff to designate critical habitat that may be essential to the recovery of species impacted by climate change. Additionally, the Services themselves have previously rejected the stepwise approach as inefficient for conservation, finding that it "may result in a designation that is geographically larger, but less effective as a conservation tool."[81]

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[79] *See* 50 C.F.R. § 424.11(d)(2) (2018) ("Recovery. The principal goal of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service is to return listed species to a point at which protection under the Act is no longer required. A species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened.").

[80] *Id.* § 424.11(d).

[81] Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7,414, 7,415 (Feb. 11, 2016) (to be codified at 50 C.F.R. pt. 424) [hereinafter "2016 Final Rule on Designating Critical Habitat].

While the new proposed text offered by the Services improves upon the 2019 version of the regulation,[82] it still fails to clearly revoke the stepwise approach embodied in the 2019 regulation. The current proposal states that the Services will "identify" unoccupied critical habitat "*[a]fter* identifying areas occupied by the species at the time of listing."[83] The proposed language is needlessly confusing and could be read to mean that the Services will only "designate" unoccupied critical habitat *after* it has already designated critical habitat occupied by the species at the time of listing. This is especially so because the same regulation elsewhere uses the term "identification" to indicate disclosure of critical habitat information to the public, presumably through designation. *See* 50 C.F.R. § 424.12(a)(1)(i).[84] Removing the phrase "after identifying areas occupied by the species at the time of listing" from the proposed text can avoid this potential confusion.

Currently, more than 78 million acres and 26,000 miles of critical habitat[85] have been designated in the Southeast to protect 95 different species of all taxonomic groups.[86] While the majority of this critical habitat is occupied,[87] the designation of unoccupied critical habitat can be necessary to the recovery of Southern species most impacted by climate change. For example, over 30 currently listed threatened or endangered species populations in the Southeast are already at risk from habitat reduction caused by sea level rise.[88] Inland species also will face range shifts forced by climate change; forest-dwelling species will face changes in tree cover and estuarine species will face rising levels of saltwater intrusion. High-elevation forest dwelling species, like the endangered Shenandoah salamander in Virginia, are particularly sensitive to environmental changes from warming temperatures.[89] Additionally, the designation of

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

[83] 2023 Proposed Rules on Listing Species and Designating Critical Habitat, 88 Fed. Reg. at 40,774 (emphasis added). The proposed language reads: "After identifying areas occupied by the species at the time of listing, the Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species at the time of listing that the Secretary determines are essential for the conservation of the species. Such a determination must be based on the best scientific data available."

[84] The text at 50 C.F.R. § 424.12(a)(1)(i), which directs that a designation of critical habitat is not prudent if "[t]he species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species," has been in place since 1980, whereas the verb "identify" was only added elsewhere within the regulation in 2016. *Compare* Rules for Listing Endangered and Threatened Species, Designating Critical Habitat, and Maintaining the Lists, 45 Fed. Reg. 13,010, 13,023 (Feb. 27, 1980) (to be codified at 50 C.F.R. pts. 17, 402, and 424) [hereinafter "1980 Critical Habitat Rules"] *with* 2016 Final Rule on Designating Critical Habitat, 81 Fed. Reg. at 7,439.

[85] Rivers, shoreline, and other linear habitat features are measured in miles, while non-linear habitat features such as lakes and ocean area are measured in acres.

[86] *See* Comment Letter from S. Env't L. Ctr. to U.S. Fish & Wildlife Serv. and Nat'l Marine Fisheries Serv. Opposing Habitat Definition (Sept. 3, 2020) at 3–4 (detailing unique biodiversity and habitat of Southeast), *available at* https://www.regulations.gov/comment/FWS-HQ-ES-2020-0047-45173.

[87] *See, e.g.*, Abbey E. Camaclang et al., Current Practices in the Identification of Critical Habitat for Threatened Species, 29 Conservation Biology 482, 482–92 (2014) ("In addition, unoccupied habitat was included as part of critical habitat for less than one third of the species we considered [from 2003 to 2012].")

[88] *Deadly Waters: How Rising Seas Threaten 233 Endangered Species*, CTR. FOR BIOLOGICAL DIVERSITY (Dec. 2013), https://www.biologicaldiversity.org/campaigns/sea-level_rise/pdfs/SeaLevelRiseReport_2013_print.pdf.

[89] Mary Lou Hoffacker et al., *Interspecific interactions are conditional on temperature in an Appalachian stream salamander community*, OECOLOGIA (2018).

unoccupied habitat is imperative for the recovery of Southern species that have lost the vast majority of their historic ranges, such as the rusty-patched bumblebee (*Bombus affinis*), which is now likely to occur in only approximately 0.7% of its historical range.[90]

Thus, the regulation must reflect that the Services have full discretion to designate and protect unoccupied critical habitat that is essential for species' recovery, unconstrained by any stepwise approach to designation. We urge the Services to revise the proposed regulation accordingly or simply return to the pre-2019 language of 50 C.F.R. § 424.12(b)(2) to ensure that the Services' discretion and ability to apply the best available science is maintained.[91]

ii. Limit the Services' Discretion in Not-Prudent Determinations to the Constraints of the Statute.

Under the ESA, the Secretary is required to designate critical habitat "to the *maximum extent* prudent and determinable" at the time of listing. 16 U.S.C. § 1533(a)(3)(A) (emphasis added). The Secretary may only "exclude any area from critical habitat *if he determines that 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) (emphasis added). In 2019, however, the Services revised the rules on "not prudent" determinations to substantially expand the circumstances under which the designation of critical habitat would be found to be "not prudent." While we support the Services' current proposed rescission of portions of those 2019 changes, we urge the Services to go further and return to the pre-2019 text, which more closely mirrored the requirements of the statute.

In particular, the Services now propose to rescind the provision at 50 C.F.R. § 424.12(a)(ii), which currently states that the designation of critical habitat may not be prudent if "threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act." The preamble to the change proposed in 2018 indicated that this provision was largely aimed at withholding critical habitat protections from species threatened by climate change.[92] However as we explained in our previous comments,[93] species suffering from the effects of climate change may be most in need of critical habitat protection. *See also Conservation Council for Haw. v. Babbitt*, 2 F. Supp. 2d 1280, 1288 (D. Haw. 1998) (striking down FWS decision to exclude critical habitat from designation because much of the area would not have been subject to Section 7 consultation and finding that "there are significant substantive and procedural

[90] U.S. Fish & Wildlife Serv. Minnesota-Wisconsin Field Office, High Potential Zone Model for the Rusty Patched Bumble Bee (*Bombus affinis*), https://www.fws.gov/sites/default/files/documents/HabitatConnectivityModelRPBB_10042022.pdf.

[91] The prior text read: "The Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species based on the best available scientific data." 50 C.F.R. § 424.12(b)(2) (effective March 14, 2016 – Sept. 26, 2019).

[92] Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat, 83 Fed. Reg. 35,193, 35,197 (July 25, 2018) (to be codified at 50 C.F.R. pt. 424) ("Examples would include species experiencing threats stemming from melting glaciers, sea level rise, or reduced snowpack but no other habitat-based threats.").

[93] *See* SELC 2018 Comments at 6–12, 15–17.

protections that result from the designation of a critical habitat outside of the consultation requirements of Section 7"). We therefore support the rescission of this 2019 provision.

However, the Services would still retain most of the changes made in 2019. These include both the removal of the long-standing regulatory requirement that the Services may only reach a "not prudent" determination if designation of critical habitat would not be beneficial to a species, and the introduction of a problematic "catch-all" clause that appears to allow the Secretary unlimited discretion to determine that designation is "not prudent."[94] These changes are contrary to both the purposes and requirements of the statute. *See Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 564 (9th Cir. 2016) ("[T]he existence of alternative protections or programs does not excuse FWS from designating critical habitat."); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 443 (5th Cir. 2001) (noting "the avowed intent of Congress that a 'not prudent' finding regarding critical habitat would only occur under 'rare' or 'limited' circumstances"); *Nat. Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d 1121, 1127 (9th Cir. 1997) (finding that the ESA does not sanction "nondesignation of habitat when designation would be merely *less* beneficial to the species than another type of protection"); *Ctr. for Biological Diversity v. Kempthorne*, 607 F. Supp. 2d 1078, 1091 (D. Ariz. 2009) ("Congress intended the imprudence exception to be invoked rarely and only under extraordinary circumstances.").

Likewise, the Services would retain the provisions stating that designation of critical habitat may not be prudent where "present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species," or "[a]reas 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."[95] These provisions, first introduced in 2016 and 2019, respectively, are unnecessary and counter to the purposes of the statute as they may hinder the designation of habitat essential for species' recovery. For example, FWS improperly attempted to rely on a finding that habitat loss and degradation "is not the primary threat to the species" to justify its determination that designating critical habitat for the rusty patched bumble bee, which has likely disappeared from 99.3% of its range,[96] was not prudent. *See Nat. Res. Def. Council v. U.S. Fish & Wildlife Serv.*, No. CV 21-0770 (ABJ), 2023 WL 5174337 (D.D.C. Aug. 11, 2023) (vacating and remanding critical habitat determination). Removing these provisions from the regulation would avoid the confusion that has encouraged that type of illegal rationalization by the Services.[97]

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[94] The "catch all" at 50 C.F.R. § 424.12(a)(1) is proposed to read: "Designation of critical habitat may not be prudent in circumstances such as, *but not limited to*, the following." 2023 Proposed Rules on Listing Species and Designating Critical Habitat, 88 Fed. Reg. at 40,774 (emphasis added). This would replace the catch all added in 2019, which states that the Secretary may reach a "not prudent" determination when the Secretary "otherwise determines that the designation of critical habitat would not be prudent based on the best scientific data available." 50 C.F.R. § 424.12(a)(v).

[95] 2023 Proposed Rules on Listing Species and Designating Critical Habitat, 88 Fed. Reg. at 40,774.

[96] U.S. Fish & Wildlife Serv. Minnesota-Wisconsin Field Office, High Potential Zone Model for the Rusty Patched Bumble Bee (*Bombus affinis*), https://www.fws.gov/sites/default/files/documents/HabitatConnectivityModelRPBB_10042022.pdf.

[97] While this goal can generally be achieved by restoring the regulation as it most recently existed before the 2019 changes, we additionally recommend removing text at 50 C.F.R § 424.12(a)(1)(ii) in reference to whether "the

We find that the purposes of the ESA would be best served by restoring the longstanding text of 50 C.F.R. § 424.12(a), which required a finding that "such designation of critical habitat would not be beneficial to the species" before an exclusion could be made. 50 C.F.R. § 424.12(a)(1) (effective March 28, 1980 – Sept. 25, 2019).[98] This language better mirrors the statutory requirements of the Act, which provides that the Secretary may "exclude any area from critical habitat *if he determines that 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) (emphasis added). The prior language also better reflects Congress's clear intent that "not prudent" determinations would only be made under rare circumstances where designation of critical habitat would not be in the best interest of the species. *See, e.g.*, *Nat. Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d at 1126 ("The fact that Congress intended the imprudence exception to be a narrow one is clear from the legislative history . . ."); *Conservation Council for Haw. v. Babbitt*, 2 F. Supp. 2d 1280, 1284 (D. Haw. 1998) ("It is only in rare circumstances where the specification of critical habitat . . . would not be beneficial to the species." (quoting H.R. REP. NO. 95-1625, at 17 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9453, 9466–67)). Therefore, we recommend an explicit return to this requirement that a not-prudent determination can only be made *for the benefit of the species*, rather than the broad level of discretion that the Services' proposed text continues to allow.

V. RESTORING THE BLANKET 4(D) RULE IS ESSENTIAL

We applaud the agencies' proposal to reinstate the so-called "blanket 4(d) rule," which extends the Act's broad protections against take to threatened species as well as endangered species. As discussed in our 2018 comments,[99] the blanket 4(d) rule has for decades prevented further decline of threatened species and significantly reduced the administrative burden for FWS, which would otherwise be required to promulgate individual rules for each threatened species under its jurisdiction. With more than 60 species in our region currently benefiting from the blanket 4(d) rule, and more than 110 species awaiting potential threatened listing decisions, restoring these protections is vital. In addition, with the elimination of this significant burden, we hope the agency will expedite the listing process for those species awaiting listing decisions.

We note several candidate species which have been proposed to be listed as threatened with a species-specific 4(d) rule since 2019 could instead receive blanket 4(d) rule protections upon final listing after the proposed revisions are effected. In the South, several species are implicated, including the alligator snapping turtle (*Macrochelys temminckii*), black-capped petrel (*Pterodroma hasitata*), Brawley's Fork crayfish (*Cambarus williami*), green floater (*Lasmigona subviridis*), Ocmulgee skullcap (*Scutellaria ocmulgee*), pyramid pigtoe (*Pleurobema rubrum*), red-cockaded woodpecker (*Picoides borealis*), and Suwannee alligator snapping turtle (*Macrochelys suwanniensis*). We urge the Service to consider applying the blanket 4(d) rule for these species for expeditious and maximum conservation benefit rather than finalizing their respective species-specific 4(d) rules.

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present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species," which was first added to the regulation in 2016. *See* 2016 Final Rule on Designating Critical Habitat, 81 Fed. Reg. at 7,439.

[98] *See* 1980 Critical Habitat Rules, 45 Fed. Reg. at 13,022.

[99] *See* SELC 2018 Comments at 13–14.

VI. RECOGNIZING THE EXPERTISE AND AUTHORITY FOR TRIBES

Under 50 C.F.R. §§ 17.31(b)(1) and 17.71(b)(1), employees or agents of FWS, any other Federal land management agency, NMFS, and state conservation agencies are authorized to "take" threatened wildlife or plant species, without a permit, if such action is necessary to aid sick, diseased, or injured species; to dispose of, or salvage a dead specimen that may be useful for scientific study; or to remove specimens that constitute a demonstrable threat to human safety.[100] FWS now proposes to extend this same authority to federally-recognized Tribes.

FWS explains that the proposed changes to the regulations are "a recognition that Tribes are governmental sovereigns with inherent powers to make and enforce laws . . . and manage and control their natural resources."[101] FWS also cites to a number of memoranda and executive orders that FWS indicates are intended to "ensur[e] that Federal agencies conduct regular, meaningful, and robust consultation with Tribal officials in the development of Federal research, policies, and decisions, especially decisions that may affect Tribal Nations."[102] FWS points in particular to a November 15, 2021 Memorandum on "Indigenous Traditional Ecological Knowledge and Federal Decision Making" that expressly acknowledges the importance of Indigenous Knowledge to the "collective understanding of the natural world."[103] FWS explains that, consistent with the precepts set forth in these documents, it proposes to extend the exception of allowing take of threatened species without a permit "to Tribes in recognition of their authority and expertise in managing natural resources on Tribal lands."[104]

We support FWS's exploration of how to improve the regulations to appropriately recognize and empower Tribes. In doing so, FWS should continue to engage Tribes, including Tribes in the South, about how best to craft these regulations. We also encourage FWS to thoroughly engage with Tribes regarding the possible addition to §§ 17.31(b)(1) and 17.71(b)(1) that would extend to federally recognized Tribes the authority to take threatened wildlife and plant species for purposes related to conservation activities.

VII. CONCLUSION

As outlined at the start of these comments, the South is home to incredible levels of biodiversity—and unfortunately, that rich biodiversity is increasingly at risk due to continued habitat loss and the compounding effects of a changing climate. We have much at stake when it comes to ensuring adequately protective regulations for plants and wildlife in our region. As detailed throughout these comments, revisions to the ESA implementing regulations must further

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[100] 2023 Proposed Rules on Take, 88 Fed. Reg. at 40,752, 40,753.
[101] 2023 Proposed Rules on Take, 88 Fed. Reg. at 40,746.
[102] 2023 Proposed Rules on Take, 88 Fed. Reg. at 40,746.
[103] Memorandum from E. Lander, President's Sci. Advisor & Dir., & B. Mallory, Chair, Council on Env't Quality to Heads of Dep'ts & Agencies re: Indigenous Traditional Ecological Knowledge and Federal Decision Making at 1 (Nov. 15, 2021). The memorandum describes "Indigenous Traditional Ecological Knowledge" ("ITEK") in part as follows: "ITEK is a body of observations, oral and written knowledge, practices, and beliefs that promote environmental sustainability and the responsible stewardship of natural resources through relationships between humans and environmental systems. ITEK has evolved over millennia, continues to evolve, and includes insights based on evidence acquired through direct contact with the environment and long-term experiences, as well as extensive observations, lessons, and skills passed from generation to generation. ITEK is owned by Indigenous people . . . ." *Id.* at 2.
[104] 2023 Proposed Rules on Take, 88 Fed. Reg. at 40,746.

the conservation purposes of the Act. We urge the Services to improve the proposed changes as identified in these comments, and swiftly finalize sufficiently protective regulations to best address the biodiversity and climate crises.

Sincerely,

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Head Coordinator

Spruill Farm Conservation Project
John R. Spruill
Director

Tennessee Riverkeeper
David Whiteside
Executive Director

The Clinch Coalition
Sharon Fisher
President

Upstate Forever
Lisa Hallo
Deputy Director

Virginia Conservation Network
Patrick L. Calvert
Director of Policy & Campaigns

Warioto Audubon Society, Clarksville, TN
Steven Hamilton
President

Waterkeeper Alliance
Daniel E. Estrin
General Counsel and Legal Director

Waterkeepers Chesapeake
Robin Broder
Acting Executive Director

Whale and Dolphin Conservation
Regina Asmutis-Silvia
Executive Director, North America

Winyah Rivers Alliance
Debra Buffkin
Executive Director

[Attachments]