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FOR THE SOUTHERN DISTRICT OF ALABAMA

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Plaintiffs,

vs.

NATIONAL MARINE FISHERIES SERVICE
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UNITED STATES FISH AND WILDLIFE SERVICE
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Defendants.

COMPLAINT

SUMMARY OF ACTION

1. The States of Alabama, Arkansas, Alaska, Arizona, Colorado, Kansas, Louisiana, Michigan, Montana, Nebraska, New Mexico, Nevada, North Dakota, South Carolina, Texas, West Virginia, Wisconsin, and Wyoming hereby challenge two newly issued regulations (the "Final Rules") promulgated under the purported authority of the Endangered Species Act ("ESA") by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the "Services"). These Final Rules are the "Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat" rule, revising portions of 50 C.F.R. § 424 and available at 81 Fed. Reg. 7413–40 (Feb. 11, 2016) (Ex. A), and the

"Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat" rule, revising 50 C.F.R. § 402.02 and available at 81 Fed. Reg. 7214–26 (Feb. 11, 2016) (Ex. B).

2. The Final Rules are an unlawful attempt to expand regulatory authority and control over State lands and waters and should be vacated and enjoined because they violate the ESA and the Administrative Procedure Act ("APA").

3. The ESA carefully delineates how and when the Services may designate areas as critical habitat. The ESA provides that when a species is listed as endangered or threatened, the Services shall "designate any habitat of such species which is then considered to be critical habitat" and "may, from time-to-time thereafter as appropriate, revise such designation." 16 U.S.C. § 1533(a)(3)(A).

4. The ESA defines critical habitat as "specific areas within the geographical area occupied by the species at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). Unoccupied areas trigger an additional requirement—the Services must determine that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

5. By employing two different definitions, "[t]he statute thus differentiates between 'occupied' and 'unoccupied' areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the [Services] to make a showing that unoccupied areas are essential for . . . conservation." *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *accord Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011). The Services have long recognized that they may designate unoccupied areas "only when a designation

limited to its present range would be inadequate to ensure the conservation of the species." 49 Fed. Reg. 38900, 38909 (Oct. 1, 1984) (previously codified at 50 C.F.R. § 424.12(e)).

6. After designation, federal agencies are required to consult with the Services to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2).

7. Decisions on how to designate habitat and how to define destruction or adverse modification of critical habitat directly affect the States as States are expressly covered by the ESA, along with individuals, corporations, municipalities, and political subdivisions of each State and the uses and activities upon lands owned or controlled by such persons within States. 16 U.S.C. § 1532(13).

8. Ensuring compliance with the ESA is a part of many state agencies' operations. This is especially true in the context of state construction projects. State transportation projects, pipeline construction and maintenance, forest and storm water management, and other key infrastructure operations must comply with the ESA and critical habitat designations. States also comply with the ESA when issuing permits to use certain pesticides and herbicides, including monitoring the use of these chemicals to ensure they do not destroy critical habitat.

9. The ESA respects the sovereign right of States to manage and control lands and waters within their borders. As the Services reiterated in a policy revision entitled, "Revised Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities," it is undisputed that "in the exercise of their general governmental powers, States possess broad trustee and police powers over fish, wildlife, and plants and their habitats within their borders. Unless preempted by Federal authority, States possess primary authority and

responsibility for protection and management of fish, wildlife, and plants and their habitats." 81 Fed. Reg. 8663 (Feb. 22, 2016). For this reason, the ESA itself directs the Services to "cooperate to the maximum extent practicable with the States." 16 U.S.C. § 1535(a). In administering the ESA, the States and the federal government are inextricably intertwined.

10. The Final Rules issued by the Services trample upon the sovereign rights of the States as landowners and stewards of their natural resources. They directly implicate state management decisions related to wildlife regulation, forest management, water management, state-owned or supported projects, and other areas of traditional State control. As promulgated, the Final Rules are without foundation in the ESA, violate the APA, and illegally expand the authority of the Services.

11. If allowed to stand, the Final Rules would allow the Services to exercise virtually unlimited power to declare land and water critical habitat for endangered and threatened species, regardless of whether that land or water is occupied or unoccupied by the species, regardless of the presence or absence of the physical or biological features necessary to sustain the species, and regardless of whether the land or water is actually essential to the conservation of the species.

12. The Final Rules essentially nullify statutory provisions requiring that the Services only designate as occupied critical habitat "specific areas…occupied by the species, at the time it was listed…on which are found those physical or biological features" necessary to support the species. 16 U.S.C. § 1532(5)(A)(i). Moreover, the Final Rules would allow the Services to designate areas as unoccupied critical habitat almost without limitation, even though the statutory scheme intended designation of these areas to require a higher threshold than the designation of occupied areas.

13. Moreover, the Final Rules would allow the Service to declare that almost any activity destroys or adversely modifies critical habitat under the theory that such activity might prevent the eventual development of the physical or biological characteristics necessary to support an endangered or threatened species. This novel theory of destruction or adverse habitat modification has no support in the ESA and indeed contravenes the statute. The ESA is present-focused; it prohibits only those activities that "result in the destruction or adverse modification of habitat of such species," not those that might prevent currently non-habitable areas from developing into habitat. 16 U.S.C. § 1536(a)(2).

14. Accordingly, the States ask this Court to vacate the Final Rules, to enjoin the Services from enforcing them, and for any other relief this Court deems proper.

THE PARTIES

15. Plaintiffs, the States appearing by and through Luther Strange, Attorney General of Alabama; Leslie Rutledge, Attorney General of Arkansas; Jahna Lindemuth, Attorney General of Alaska; Mark Brnovich, Attorney General of Arizona; Cynthia H. Coffman, Attorney General of Colorado; Derek Schmidt, Attorney General of Kansas; Jeff Landry, Attorney General of Louisiana; Bill Schuette, Attorney General of Michigan; Tim Fox, Attorney General of Montana; Doug Peterson, Attorney General of Nebraska; Adam Paul Laxalt, Attorney General of Nevada; Alexandra Sandoval, Director of the New Mexico Department of Game and Fish; Wayne Stenehjem, Attorney General of North Dakota; Alan Wilson, Attorney General of South Carolina; Ken Paxton, Attorney General of Texas; Patrick Morrisey, Attorney General of West Virginia; Brad D. Schimel, Attorney General of Wisconsin; and Peter K. Michael, Attorney General of Wyoming, are sovereign States that regulate the natural resources within their borders through

duly enacted state laws administered by state officials and constituent agencies[1]. They are also landowners that are directly regulated by the ESA.

16. The National Marine Fisheries Service ("NMFS") is an agency of the National Oceanic and Atmospheric Administration of the United States Department of Commerce. NMFS has been delegated responsibility for administering the provisions of the ESA. The authority delegated to NMFS to administer and implement the ESA is subject to, and must be in compliance with, the applicable requirements of the ESA and the APA.

17. Penny Pritzker, in her official capacity as Secretary of Commerce, directs all business of the Department of Commerce, including NMFS. In her official capacity as Secretary of Commerce, Pritzker is responsible for the Final Rules and for the associated violations of the ESA and the APA as alleged in this Complaint.

18. The United States Fish and Wildlife Service (FWS) is an agency of the United States Department of the Interior. FWS has been delegated responsibility for administering the provisions of the ESA. The authority delegated to FWS to administer and implement the ESA is subject to, and must be in compliance with, the applicable requirements of the ESA and the APA.

19. Sally Jewell, in her official capacity as Secretary of the Interior, directs all business of the Department of the Interior, including FWS. In her official capacity as Secretary of the Interior, Jewell is responsible for the Final Rules and for the associated violations of the ESA and the APA as alleged in this Complaint.

[1] All plaintiffs are represented by the Attorneys General of Alabama and Arkansas.

JURISDICTION, VENUE & STATUTORY FRAMEWORK

20. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701–706 (APA), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgments), and 28 U.S.C. § 2202 (injunctive relief).

21. Venue is proper under 28 U.S.C. § 1391(e)(1)(C) because plaintiff State of Alabama is located in this judicial district.

22. The APA provides for judicial review of final agency action. 5 U.S.C. § 702. The APA also authorizes courts reviewing agency action to hold unlawful and set aside final agency actions, findings, and conclusions that are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). The Final Rules are subject to judicial review under this provision of the APA.

FACTUAL ALLEGATIONS

23. The Final Rules update implementing regulations for two provisions of the ESA, one establishing how the Services designate critical habitat and the other prohibiting destruction or adverse modification of critical habitat.

A. Designating Critical Habitat

23. In 1973, Congress enacted the ESA to establish procedures to protect the growing number of plant and animal species faced with extinction. Central to this plan was the protection of critical habitat.

24. But in 1978, the Supreme Court's decision interpreting the ESA in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978)—a case which resulted in the suspension of a dam-building project that was 80 percent complete and for which Congress had spent more than $100 million of taxpayer money—led to amendments intended to reform the statute and provide limits

to its reach. These reforms included statutorily defining critical habitat and adverse modification of critical habitat for the first time.

25. In introducing these definitions, the House Merchant Marine and Fisheries Committee explained in its report Congress's concern that the existing regulatory regime "could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 95-1625, at 25 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9475. The Committee warned that in applying the new statutory definition, "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." *Id.* at 18, *reprinted in* 1978 U.S.C.C.A.N. 9468.

26. The Senate Committee on Environment and Public Works explained that the amendments created an "extremely narrow definition" of critical habitat. S. Comm. On Env't & Pub. Works, 97th Cong., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, and 1980, at 1220–21 (Comm. Print 1982).

27. With these concerns in mind, Congress created a statutory definition narrowing the scope of critical habitat that has not since changed:

> (5)(A) The term "critical habitat" for a threatened or endangered species means—
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i–ii).

28. Congress further limited the possible reach of critical habitat by specifying that it "shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C).

29. Prior to the adoption of the Final Rules, the Services last promulgated a comprehensive amendment of the regulations implementing these provisions in 1984. For the last thirty-two years, these regulations have defined the power of the Services to make critical habitat designations.

30. Consistent with the plain language of the ESA, the 1984 regulations require a two-step process in designating critical habitat. First, the Services must look to whether designating specific occupied areas meets the conservation needs of the species. If occupied areas would not meet the species' conservation needs, only then may the Services designate unoccupied areas, and only then when those areas are essential to the conservation of the species. In sum, the 1984 regulations permit the Services to designate unoccupied areas "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 49 Fed. Reg. 38900, 38909 (Oct. 1, 1984) (previously codified at 50 C.F.R. § 424.12(e)).

31. In considering the designation of critical habitat, the 1984 regulations directed that the Services "shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species," including everything from sites for roosting, nesting, spawning, and feeding, to geological formations, vegetation, soil, and water quality. 49 Fed. Reg. 38900, 38909 (Oct. 1, 1984) (previously codified at 50 C.F.R. § 424.12(b)(1-5)).

32. The Services acknowledged in the 1984 regulations that "any designation of critical habitat must be based on a finding that such designated area contains features that are essential in

order to conserve the species concerned. This finding of need will be a part of all designations of critical habitat, whether or not they extend beyond a species' currently-occupied range." 49 Fed. Reg. at 38903 (addressing comments about designating unoccupied areas).

33. In revising the 1984 regulations, the Final Rules make a number of expansive changes to the habitat designation standard, at least four of which go far beyond what the ESA will bear.

34. The Final Rules collapse the ESA's long-established two-step process of designating habitat, allowing the Services to designate unoccupied areas as essential to conservation, even if designating only occupied areas would result in the recovery of the species. The Final Rules also allow the Services to designate areas as occupied critical habitat, containing the physical and biological features essential to conservation, even when those areas are neither occupied nor contain those features. The Final Rules allow the Services to designate uninhabited areas as critical habitat, whether or not they are capable of supporting the species. And finally, the Final Rules allow the Services to declare broad, generalized swaths of land and water critical habitat even though the ESA requires the Services to specifically identify those areas that qualify as critical habitat.

35. First, the Final Rules eliminate the two-step process for designating occupied and unoccupied habitat required by the ESA. In reversing that long standing practice, the Services contend that "there is no specific language in the Act that requires the Services to first prove that the inclusion of all occupied areas in a designation are insufficient to conserve the species before considering unoccupied areas." 81 Fed. Reg. 7414, 7426–27 (Feb. 11, 2016). The Services do not explain how unoccupied areas can be "essential" to the conservation of a species as required by

the specific language in the Act if designating the occupied area alone would meet conservation goals.

36. Second, the Final Rules "completely revis[e] § 424.12(b) of the current regulations." 81 Fed. Reg. at 7432. The 1984 regulations track the statutory framework of the ESA by requiring the Services to only designate areas as occupied critical habitat "*on which are found* those physical or biological features" essential to the conservation of the species. 16 U.S.C. § 1532(5)(A)(i) (emphasis added). But the Final Rules allow the Services to designate areas as occupied critical habitat on which are found neither the species itself nor the physical or biological features essential to the conservation of the species.

37. Under this new definition, the Services may declare an area occupied based on "indirect or circumstantial evidence" of occupation "during some portion of the listed species' life history." 81 Fed. Reg. at 7430. In addition to radically redefining the meaning of the statutory phrase "occupied, at the time it is listed," the Final Rules also declare that essential features include not only the physical or biological aspects that actually support the species, but also items that might lead to the development of those species-supporting features sometime in the future. 50 C.F.R. § 424.02; 81 Fed. Reg. at 7419 (essential "physical or biological features" exist where "once certain conditions are met, the habitat will recur"); 81 Fed. Reg. at 7422 ("[T]he physical or biological features referred to in the definition of 'critical habitat' can include features that allow for the periodic development of habitat characteristics."); 81 Fed. Reg. at 7423 (definition includes areas where features "may exist only 5 to 15 years after" certain events occur); *see also* 81 Fed. Reg. at 7431 (features exist where there is a "reasonable expectation of that habitat occurring again.").

38. Moreover, the rules do not provide any measurable standard for determining whether such features exist or might develop; instead, those determinations will be made on an *ad hoc* basis. *See* 50 C.F.R. § 424.12(b)(1)(ii) (explaining that features "will vary between species and may include consideration of the appropriate quality, quantity, and spatial and temporal arrangements of such features in the context of the life history, status, and conservation needs of the species").

39. Thus, the Final Rules allow the Services to declare areas occupied critical habitat that are not occupied by the species and that could not support the species were it moved there, on the supposition that one day the essential physical and biological features might develop and the species might return. The ESA cannot support this interpretation.

40. Third, the Final Rules assert that the Services can designate unoccupied areas as critical habitat even if those areas are incapable of acting as habitat for the species. The Services claim, "The presence of physical or biological features is not required by the statute for the inclusion of unoccupied areas in a designation of critical habitat." 81 Fed. Reg. at 7420. Thus, the Services assert they can declare an area that is not habitable by the relevant species as essential, critical habitat.

41. Under this interpretation and in contravention of the ESA, it is easier for the Services to designate unoccupied areas critical habitat than it is to designate occupied areas. Courts reviewing the same statutory language have reached the exact opposite conclusion, finding that the ESA imposes "a more onerous procedure on the designation of unoccupied areas." *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163. Rather than the Services' tortured reading of the statutory text, the plain meaning of the ESA is that "both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to

conservation, the area itself must be essential." *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004).

42. Fourth, the Final Rules allow the Services to declare critical habitat "at a scale determined by the Secretary to be appropriate." 81 Fed. Reg. at 7432. In other words, "the Secretary need not determine that each square inch, square yard, acre, or even square mile independently meets the definition of 'critical habitat.'" *Id*. And as discussed above, the Services may include within these broad swaths of habitat any areas with "indirect or circumstantial evidence" of occupation "during some portion of the listed species' life history." 81 Fed. Reg. at 7430.

43. This expansion of the Services' power directly conflicts with the ESA. Nowhere does the statute provide that the Services may designate additional, larger areas that do not qualify as critical habitat. In fact, the ESA expressly requires the Services to designate "specific" occupied and unoccupied areas that meet the statutory definition of critical habitat. 16 U.S.C. § 1532(5)(A).

44. Moreover, by including areas within the "range" of the species and ill-defined "migratory corridors," 81 Fed. Reg. at 7439, the Services have essentially written the requirement that they only designate "specific areas" as critical habitat out of the statute. Under this interpretation, the Services could designate entire States or even multiple States as critical habitat for certain species.

45. By allowing the Services to issue critical habitat designations that do not meet the statutory definitions, the Final Rules conflict with the ESA and run afoul of the very concerns Congress expressed in passing the 1978 critical habitat amendments. *See, e.g.*, S. Rep. No. 95-874, 9–10 (1978); H.R. Rep. No. 95-1625, 25 (1978). Furthermore, Congress specifically provided that the Services "shall not include the entire geographical area which can be occupied by the

threatened or endangered species" when declaring habitat. 16 U.S.C. § 1532(5)(C). But the Final Rules allow the Services to do much more than that; they can now declare as "essential" habitat for the conservation of a listed species vast geographical areas which are not occupied or cannot be occupied.

B. Adverse Modification

46. In addition to redefining how the Services designate critical habitat, the Final Rules also redefine and expand the definition of adverse modification of critical habitat.

47. The ESA empowers the Services to declare as critical habitat areas "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i)

48. As part of that special management and protection, federal agencies must consult with the Services to ensure that their actions do not "result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). In other words, federal agencies must not act in a way that makes "essential" habitable land or water uninhabitable for a listed species.

49. But in expanding the Services power to declare critical habitat beyond what is permissible under the ESA, the Final Rules also expand the definition of adverse modification beyond what the ESA can bear.

50. The new definition reads,

> Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.
>
> 50 C.F.R. § 402.02

51. By including alterations that "preclude or significantly delay development" of physical or biological features, the Final Rules give the Services power that the ESA never contemplated—to consider whether an alteration would adversely modify or destroy features that do not exist at present.

52. This overreach goes hand in glove with the Services' new critical habitat definitions. If allowed to stand, the Services may first declare as critical habitat areas that do not have and may never have the physical and biological features necessary to support a species and then prohibit an activity that might prevent the development of those features. For example, under the Final Rules, the Services could declare desert land as critical habitat for a fish and then prevent the construction of a highway through those desert lands, under the theory that it would prevent the future formation of a stream that might one day support the species. Or the Services could prevent a landowner from planting loblolly pine trees in a barren field if planting longleaf pine trees might one day be more beneficial to an endangered or threatened species.

C. Procedural violations of the APA.

53. The Services not only ignored the limits of the ESA in releasing the Final Rules, they also violated the procedural safeguards in the APA against arbitrary and capricious rulemaking.

54. The Services failed to provide a basis for repealing the requirement that they determine that occupied areas are not sufficient for conservation before designating unoccupied areas. The Services have long acknowledged that they must determine that occupied areas are insufficient for conservation before designating unoccupied areas. Even if the statute permits the Services to adopt a contrary approach and designate both simultaneously, the Services fail to offer a legitimate explanation for changing their approach.

55. Instead, in an attempt to justify their about-face, the Services assert that the previous regulations "may result in a designation that is geographically larger, but less effective" and "that the inclusion of all occupied habitat in a designation does not support the best conservation strategy." 81 Fed. Reg. at 7415. But the Services do not point to any evidence that the previous process compelled larger designations, let alone required them to simply designate all occupied areas. Indeed, that approach would have violated Section 1532(5)(A)(i)'s requirement that the Services designate only certain "specific areas within the geographical area occupied by the species" and Section 1532(5)(C)'s limitation on including "the entire geographical area which can be occupied." Moreover, contrary to the Services' unexplained assertion, numerous comments explained how excising the sufficiency requirement would result in larger—not smaller—designations. By failing to consider those comments and relying on irrelevant information, the Services acted arbitrarily and capriciously.

56. In adopting the Final Rules, the Services failed to respond to numerous comments requesting that they define, explain, or otherwise illuminate critical terms. *See* 81 Fed. Reg. at 7419 (asking what constituted a "reasonable expectation of that habitat occurring again"); 81 Fed. Reg. at 7422 (requesting essential features be defined and inquiring how the Services would distinguish those features from others); 81 Fed. Reg. at 7217 (querying what constitutes appreciable diminishment as opposed to lesser changes). For example, comments asked the Services to explain what it meant for a species to be temporarily or periodically present. *See* 81 Fed. Reg. at 7421. The Services declined to define that phrase or provide guidance on the grounds that any response might not cover every conceivable situation, species, or data set. *See* 81 Fed. Reg. at 7421 ("We will use the best scientific data available to determine occupied areas including those that are used only periodically or temporarily by a listed species . . . This will be determined

on a species-by-species basis."). Similar responses were given to requests for guidance on what constitutes a "reasonable expectation" of recurrence (81 Fed. Reg. at 7419), "appreciabl[e] diminish[ment]" (81 Fed. Reg. at 7218), and "essential features." *See* 81 Fed. Reg. at 7422 (vaguely indicating essential features include "those found in the appropriate quality, quantity, and spatial and temporal arrangements in the context of the life history, status, and conservation needs of the species" and even then emphasizing that what is essential "varies"). At most, the Services suggested that each term's meaning would become clear "in [the] proposed and final rules designating critical habitat for a particular species." 81 Fed. Reg. at 7418; *accord* 81 Fed. Reg. at 7421; 81 Fed. Reg. at 7422. And even then, any information would depend on what "is appropriate in light of what is known about the species' habitat needs, while recognizing that the available science may still be evolving." 81 Fed. Reg. at 7422.

57. The Services' refusal to provide guidance, define, or otherwise illuminate critical terms on the grounds that the information provided might not cover every conceivable situation or development amounts to little more than an attempt to avoid grappling with serious issues because so doing would be too difficult. But under the APA, the Services may not simply avoid facing significant issues highlighted by commentators merely because they are challenging.

58. The Services also failed to consider administrative, litigation, and other costs associated with Final Rules, or to respond to comments discussing how the revised designation process and their use of vague and ill-defined terms is likely to result in increased litigation and impose considerable costs. *See* 81 Fed. Reg. at 7416 (noting comments). Rather than respond to those concerns, the Services simply assumed that costs will not increase because "[t]he amended regulations do not substantially change the manner in which critical habitat is designated." 81 Fed. Reg. at 7416. But the transition from a well-established system to an entirely novel designation

process will result in disputes and litigation. Similarly, the Services simply assume that their new definitions are not vague—or will not be when applied—and, therefore, will not result in increased litigation. *See* 81 Fed. Reg. at 7416; *accord* 81 Fed. Reg. at 7417. The Services' failure to acknowledge or consider those issues demonstrates that they failed to appropriately weigh the costs of the Final Rules.

59. Moreover, the Final Rules do not address how the Services will distinguish between changes in occupancy and changes in information. The ESA requires that occupancy be determined at listing, but the Services read the statutory scheme as permitting them to designate an area decades after listing when they conclude their initial data was incomplete. But as the authorizing release acknowledges, the Services have not addressed how they will "distinguish between actual changes to species occupancy" after listing "and changes in available information." 81 Fed. Reg. at 7430. Thus, the Services have failed to consider and address an important aspect of the problem that the Final Rules purport to address.

60. The Services' failure to conduct a regulatory flexibility analysis was arbitrary, capricious, and contrary to law. The Services assert that a regulatory flexibility analysis was not required because the rules only apply to federal agencies and do not directly impact others. However, a critical habitat designation "can impose significant costs on landowners," states, and small business "because federal agencies may not authorize, fund, or carry out actions that are likely to result in the destruction or adverse modification of critical habitat." *Otay Mesa*, 646 F.3d at 915 (internal quotation marks omitted). Thus, the Services' failure to consider those direct impacts was contrary to the law.

61. Similarly, the Services' failure to comply with Executive Order 13,132 and conduct a federalism assessment was arbitrary, capricious, and contrary to law. The Services assert that a

federalism assessment was not required as the regulations pertain only to determinations to designate critical habitat and "will not have substantial direct effects on the States." 81 Fed. Reg. at 7437 and 81 Fed Reg. at 7225. But as discussed in more depth above, the Final Rules will directly implicate any State operations that fall under the ESA. Also, E.O. 13,132 requires the Services to consult with state and local officials before any action that would limit the policymaking discretion of the States to determine whether federal objectives can be attained by any other means. The Services' failure to meaningful consult with the States is contrary to the intent of E.O. 13,132. And, in striking contrast, the Services did exchange information with Federally recognized Indian Tribes' representatives and intend to continue to collaborate and coordinate with them. 81 Fed. Reg. at 7437 and 81 Fed. Reg. at 7225.

62. The Services' final definition of "destruction or adverse modification" is not a logical outgrowth of the rulemaking process. The Services also modified several other terms in the final release without explaining how those changes reflected the rulemaking process. *See* 81 Fed. Reg. at 7216. For example, while maintaining the earlier term was "clear and can be applied consistently," the Services replaced "conservation value" with the phrase "the value of critical habitat for the conservation of a listed species." 81 Fed. Reg. at 7218. But the Services do not explain how the newly adopted phrase is clearer than their original proposal or what comments they considered in adopting it. Nor do the Services ever analyze, consider, or explain how using "the value of critical habitat" in combination with "conservation" instead of "survival and recovery" might change the applicable standard or be applied. *See* 81 Fed. Reg. at 7218; *cf*. 81 Fed. Reg. at 7217 (discussing decision to replace recovery with conservation). Thus, the modification cannot be termed a logical outgrowth and the Services failure to address those issues invalidates the Final Rules.

63. The Final Rules contain no standards for determining what constitutes the best available data. The ESA requires the Services to rely on the best available data in designating critical habitat. To justify their failure to create clear and measurable standards or metrics or even to define basic terms, the Services repeatedly rely on this language and assert that they cannot provide more guidance because what a term means will depend on the best available data. But neither the Final Rules—nor the release—contain any standards for determining what constitutes the best available data. Their failure to develop or provide any guidance demonstrates that the Services failed to consider an important aspect of the problem that the rules purport to address, and thus violates the APA.

CLAIMS FOR RELIEF

COUNT ONE:

Violation of the Endangered Species Act and Administrative Procedures Act

64. The States incorporate by reference the allegations of the preceding paragraphs.

65. All regulations must be consistent with their authorizing statutes. 5 U.S.C. § 706(2)(A).

66. The ESA sets forth a carefully delineated and limited procedure by which the Services can declare areas critical habitat and prevent adverse modification or destruction of those habitats. *See* 16 U.S.C. § 1533(a)(3)(A), (A)(i), (A)(ii); 16 U.S.C. § 1536(a)(2).

67. Because the Final Rules exceed the Services' statutory authority under the ESA and are indeed contrary to the provisions of the ESA, they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

COUNT TWO:

The Final Rules are Arbitrary and Capricious Under the Administrative Procedure Act

68. The States incorporate by reference the allegations of the preceding paragraphs.

69. Rules cannot be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Services must provide an internally consistent and satisfactory explanation for their actions. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Ala. Power Co. v. F.C.C.*, 311 F.3d 1357, 1371 (11th Cir. 2002); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987). They must treat similar cases similarly or "provide a legitimate reason for failing to do so." *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996).

70. The Final Rules repeatedly fail to provide explanations for the changes contained therein, or to provide guidance for their consistent application. The Final Rules are thus "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

COUNT THREE:

Claim for Injunctive Relief

71. The States incorporate by reference the allegations of the preceding paragraphs.

72. A plaintiff must satisfy a four-factor test before a court will grant injunctive relief. A plaintiff must show: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

73. An injunction is warranted and would serve the public interest because the Final Rules expand federal regulatory authority over property and land and water resources, impairing

the States' ability to protect and manage their resources in accordance with local needs. By expanding the scope of federal regulatory authority, the Final Rules impose significant costs on States, businesses and citizens, and introduce grievous uncertainty into land use and water management.

74. The States and their citizens will be irreparably injured by the Final Rules.

75. The Final Rules require the States to expend resources as land owners subject to the requirements set out by the ESA. The States expend resources in order to comply with the ESA in their own operations and in assisting private citizens' compliance efforts.

76. The Final Rules also harm States and their citizens by transferring regulatory authority over state-owned resources to the federal government. The Final Rules harm the States in their capacity as sovereigns with both the right and the obligation to ensure appropriate usage of State resources. In addition, the statutory and constitutional limitations on the authority of federal agencies protect citizens from the intrusion of the federal government into areas where local knowledge is critical to designing effective rules and policies. The preservation of habitat critical to threatened and endangered species is one of those areas.

77. By displacing local regulatory authority, the Final Rules impede, rather than advance, efforts to protect endangered and threatened species around the country.

78. The Final Rules impose numerous harms specifically on citizens. The Final Rules impose costs upon citizens because individuals and businesses must obtain federal permits that are directly affected by the Final Rules' expansion of potential critical habitat designations and the definition of adverse modification and destruction of critical habitat.

79. The States are therefore entitled to injunctive relief under 5 U.S.C. § 702.

PRAYER FOR RELIEF

80. Wherefore, the States ask this court to enter an order and judgment:

a. Declaring that the Final Rules are unlawful because they: (1) were issued in violation of the ESA and the APA; and (2) are arbitrary and capricious in violation of the APA;

b. Vacating and setting aside the Final Rules in their entirety;

c. Issuing injunctive relief prohibiting the Services from using, applying, enforcing, or otherwise proceeding on the basis of the Final Rules;

d. Remanding this case to the Services, to permit the Services to issue rules that comply with the ESA and the APA;

e. Awarding the States costs and attorneys' fees pursuant to any applicable statute or authority; and

f. Awarding the States such additional relief, including equitable injunctive relief, as the Court deems appropriate.

Respectfully submitted,

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