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U.S. Fish and Wildlife Service
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Falls Church, VA 22041-3803

Public Comments Processing
Attn: FWS-HQ-ES-2021-0107
U.S. Fish and Wildlife Service
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Public Comments Processing
Attn: FWS-HQ-ES-2021-0104
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Submitted via <https://www.regulations.gov>

Re: Comments on three related proposed rulemakings: (1) “Endangered and Threatened Species: Listing and Designating Critical Habitat” (Docket No. FWS-HQ-ES-2021-0107); (2) “Endangered and Threatened Species: Regulations Pertaining to Endangered and Threatened Wildlife and Plans” (Docket No. FWS-HQ-ES-2023-0018); and (3) “Endangered and Threatened Species: Interagency Cooperation” (Docket No. FWS-HQ-ES-2021-0104).

Dear Sir/Madam:

On behalf of the States of Alabama, Alaska, Arkansas, Idaho, Indiana, Iowa, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, Utah, West Virginia, and Wyoming, we respectfully submit the following comments in response to three related Proposed Rules:

- (1) *Endangered and Threatened Species: Listing and Designating Critical Habitat*, 88 Fed. Reg. 40,764 (June 22, 2023) (the “Proposed Listing Rule”), issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service together;
- (2) *Endangered and Threatened Species: Regulations Pertaining to Endangered and Threatened Wildlife and Plans*, 88 Fed. Reg. 40,742 (June 22, 2023) (the “Proposed Blanket Rule”), issued by the U.S. Fish and Wildlife Service only; and
- (3) *Endangered and Threatened Species: Interagency Cooperation*, 88 Fed. Reg. 40,753 (June 22, 2023) (the “Proposed Interagency Cooperation Rule”), issued by the Services together.

As the chief legal officers of our States, we take seriously the responsibility to steward resources and care for the diversity of wildlife in our States. Long before federal agencies were created for such purposes, the Constitution recognized that States have the primary legal responsibility for wildlife protection and administration. Congress did the same when it enacted the Endangered Species Act, directing the Services to “cooperate to the maximum extent practicable with the States.” 16 U.S.C. § 1535(a). States know their resources best and are uniquely positioned to engage in creative conservation efforts that work with, rather than against, private landowners and businesses to spur species recovery and protection.

Unfortunately, the Proposed Rules would do much to undo recent progress. They would reinstate portions of repealed regulations that many of our States previously challenged as unlawful, sow confusion and uncertainty into the regulatory landscape, impose significant costs on landowners with no attendant benefits to protected species, and hamper States’ ability to foster our rich biodiversity by treating our assets like liabilities. We are thus concerned that portions of the Proposed Rules would violate the Endangered Species Act and fail to meet the requirements of reasoned decisionmaking under the Administrative Procedure Act. And given these obvious effects on our States, we disagree with the Services’ determination that a federalism summary impact statement is not required under Executive Order 13132.

The Proposed Listing Rule appears designed to evade statutory requirements for designating unoccupied areas as “critical habitat.” Such designations must be “essential for the conservation of the species,” 16 U.S.C. § 1532(5)(A)(ii), and unoccupied “critical habitat” must first be “habitat” for the species, *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018). Consistent with those statutory limitations, “[t]he Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas would be inadequate to ensure the conservation of the species.” 50 C.F.R. § 424.12(b)(2). Yet the Proposed Rule would inexplicably remove that regulatory requirement in a move at odds with the letter and spirit of the Endangered Species Act.

Likewise, the Proposed Blanket Rule would resurrect the Fish and Wildlife Service’s misguided default policy of providing the same blanket protection to both threatened species and endangered species. The rule’s conflation flouts the Act’s recognition that endangered and threatened species are separate categories that the Secretary “may” treat alike only when needed and only on an individualized basis at the time of listing—not beforehand. The proposal also runs contrary to wildlife management best practices that use differences in the regulatory burdens to induce stakeholders to protect threatened and endangered species.

Then there is the Proposed Interagency Rule, which for the first time ever would allow the Services to require “offsets” far from the federal action area at issue as a purported “reasonable and prudent measure” to “minimize” the impacts of incidental take *at* the action area. The Services have not explained how the Endangered Species Act confers this novel power nor how far it extends. The proposal is arbitrary and capricious and ripe for mischief and agency overreach.

We encourage the Services to withdraw the Proposed Rules.

BACKGROUND

Because the Proposed Rules seek to rescind or revise regulations the Services issued in 2019, some history of those regulations is in order. That history begins with drastic changes the Services made to their regulations in 2016.

A. The 2016 Rules

In early 2016, the Services issued two regulations that many of our States challenged as unlawful. *See* First Am. Compl., *Ala. ex rel. Steven T. Marshall v. Nat’l Marine Fisheries Serv.*, No. 1:16-cv-00593-CG-MU (S.D. Ala. Feb. 2, 2017), ECF 30.

The first concerned the designation of “critical habitat” for threatened or endangered species. *See Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulation for Designating Critical Habitat*, 81 Fed. Reg. 7414 (Feb. 11, 2016). That rule eliminated the two-step approach the Services used for over thirty years to designate critical habitat. *See* 49 Fed. Reg. 38,900, 38,909 (Oct. 1, 1984) (previously codified at 50 C.F.R. § 424.12(b)(1-5)). Under this longstanding approach, the Services had looked first to areas a species already occupied and determined whether those areas were adequate to meet the conservation needs of the species. “[O]nly when a designation limited to” occupied areas “would be inadequate to ensure the conservation of the species” could the Services then turn to designating unoccupied areas as “critical habitat.” *Id.*

The 2016 rule change collapsed this two-step approach and purported to give the Services authority to designate unoccupied areas as critical habitat without regard to occupied areas. *See* 81 Fed. Reg. at 7426-27. Not only that, but the new regulation allowed the Services to designate unoccupied areas as critical habitat more easily than they could designate occupied areas because, under the

amended rule, “[t]he presence of physical or biological features [essential to the conservation of the species¹] is not required . . . for the inclusion of unoccupied areas in a designation of critical habitat.” 81 Fed. Reg. at 7420. Thus, under the 2016 rule, the Services could deem unoccupied land as critical habitat even if the habitat where the species lived was adequate to ensure its conservation and even if a species could not actually survive in its unoccupied “critical habitat.”

This was unlawful. Not only did the rule change set aside thirty years of agency precedent, but it also violated the text of the Endangered Species Act. Section 3(5)(A)(ii) of the Act is clear that unoccupied areas may be designated as critical habitat *only* if “such areas are essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A)(ii). “The statute thus differentiates between ‘occupied’ and ‘unoccupied’ areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.” *Ariz. Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010). Designating an *unoccupied* area as critical habitat cannot be “essential for the conservation of the species” if designating only *occupied* areas would meet conservation needs. The Act itself necessitates a two-step inquiry of the kind abandoned by the Services in 2016.

In 2018, the Supreme Court poured cold water on the novel interpretation used to jettison the requirement that unoccupied critical habitat have the “physical or biological features essential to the conservation of the species.” “Even if an area otherwise meets the statutory definition of unoccupied critical habitat because the Secretary finds the area essential for the conservation of the species,” the Court held, “Section 4(a)(3)(i) [of the Act] does not authorize the Secretary to designate the area as *critical* habitat unless it is also *habitat* for the species.” *Weyerhaeuser*, 139 S. Ct. at 368 (emphasis added). Of course, an area cannot be “habitat for the species” unless it has the physical or biological features necessary for the species to survive there. A desert cannot be an unoccupied “critical habitat” for an alligator if there is no water for the alligator to live in.

The second challenged regulation in 2016 concerned the Services’ definition of “destruction or adverse modification” of critical habitat. *See Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat*, 81 Fed. Reg. 7214 (Feb. 11, 2016). Under the Endangered Species Act, federal agencies must consult with the Services to ensure that their actions do not “result in the destruction or adverse modification of [critical] habitat” of an endangered species. 16 U.S.C. § 1536(a)(2). In this way, federal agencies must not act so as to make “essential” habitable land or water uninhabitable for a listed species. *See id.* § 1532(5)(A)(i) (defining “critical habitat”). But in their rule change, the Services defined “de-

¹ *See* 16 U.S.C. § 1532(5)(A)(i) (defining occupied critical habitat as “the specific areas within the geographical area occupied by the species . . . 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” (emphasis added)).

struction or adverse modification” to include alterations “that preclude or significantly delay development” of physical or biological features that did not yet exist. 81 Fed. Reg. at 7226. This overreach was particularly problematic when combined with the Services’ rule change for designating critical habitat since the combination meant the Services could (1) declare as “critical habitat” areas that did not have and may never have the physical or biological features necessary to support a species and then (2) prohibit an activity that might prevent the development of features that did not and may never exist.

In November 2016, many of our States sued the Services and the Secretaries of the Departments of the Interior and Commerce to challenge the regulatory changes under the Endangered Species Act and the Administrative Procedure Act. The case settled two years later when the Services agreed to reconsider the rules.

B. The 2019 Rules

In 2019, following notice and comment, the Services promulgated three rules that fixed the errors of the 2016 regulations and made additional changes to make the regulatory process more predictable and to spur innovation to protect at-risk species. It is these rules that the Proposed Rules seek to rescind or revise.

1. The 2019 Listing Rule

The 2019 Listing Rule made several changes that the Services now seek to undo in whole or in part. *See Regulations for Listing Species and Designating Critical Habitat*, 84 Fed. Reg. 45,020 (Aug. 27, 2019).

First, consistent with the text of the Endangered Species Act, the Services restored the two-step process from the 1984 rule for designating unoccupied areas as “critical habitat.” Per the 2019 rule, “the Secretary will first evaluate areas occupied by the species” and “will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species.” *Id.* at 45,053 (codified at 50 C.F.R. § 424.12(b)(2)).

Second, the Services complied with the Supreme Court’s *Weyerhaeuser* decision by ensuring that unoccupied “critical habitat” is, first and foremost, habitat: “[F]or an unoccupied area to be considered essential,” the new rule stated, “the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.” *Id.*

Third, the Services clarified that the Endangered Species Act does not impose a more stringent standard for *de*-listing species than for *listing* species. *Id.* at 45,0252. In section 4(c) of the Act, Congress tasked the Secretary with listing endangered and threatened species and “revis[ing] each list . . . to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b)” of the same section. 16 U.S.C. § 1533(c)(1); *see also id.* § 1533(c)(2).

Subsection (a), in turn, provides five criteria by which the Secretary is to judge whether a species is endangered or threatened, in conjunction with the definitions of “endangered” and “threatened” in section 3. *Id.* §§ 1532(6), (2), 1533(a)(1).

The 2019 Listing Rule applied these statutory requirements to require the Secretary to “delist a species if the Secretary finds that, after conducting a status review based on the best scientific and commercial data available . . . [t]he species does not meet the definition of an endangered species or a threatened species,” “consider[ing] the same factors and apply[ing] the same standards set forth in” section 4(a) of the Act. 84 Fed. Reg. at 45,052 (codified at 50 C.F.R. § 424.11(e)). This change made perfect sense because a species that has recovered such that it would not be classified as threatened or endangered, no longer meeting the definitions of those categories, cannot be listed as “threatened” or “endangered” under the Act.

Fourth, because the Act defines “threatened species” as those likely to become endangered “within the foreseeable future,” 16 U.S.C. § 1532(20), the 2019 Listing Rule helpfully and accurately defined the term “foreseeable future” to “extend[] only so far into the future as the Services can reasonably determine that both the future threats and the species’ responses to those threats are likely.” 84 Fed. Reg. at 45,052 (codified at 50 C.F.R. § 424.11(d)).

Fifth, the Services “set forth a non-exhaustive list of circumstances in which the Services may find it is not prudent to designate critical habitat,” 83 Fed. Reg. 35,193, 35,196 (Jul. 25, 2018), consistent with the Act’s recognition of the Secretary’s responsibility to designate critical habitat to the “extent prudent and determinable,” 16 U.S.C. § 1533(a)(3)(A). Of pertinence here, the 2019 rule sensibly noted that it could be prudent *not* to designate critical habitat if “[t]he present or threatened destruction, modification, or curtailment of a species’ habitat or range is not a threat to the species, or threats to the species’ habitat stem solely from causes that cannot be addressed through management actions resulting from” interagency consultations. 84 Fed. Reg. at 45,053 (codified at 50 C.F.R. § 424.12(a)(1)). “Examples would include species experiencing threats stemming from melting glaciers, sea level rise, or reduced snowpack but no other habitat-based threats.” *Id.* “In such cases,” the Services explained, “a critical habitat designation and any resulting” interagency consultation, “or conservation effort identified through such consultation, could not ensure protection of the habitat.” *Id.*

Sixth, the 2019 Listing Rule gave the Services the option of collecting and presenting to the public certain information regarding the economic impacts of a listing determination while retaining the requirement that the listing decision itself be made “solely on the basis of the best available scientific and commercial information regarding a species’ status.” *Id.* at 45,052 (codified at 50 C.F.R. § 424.11(b)).

2. The 2019 Section 4(d) Rule

Under the Endangered Species Act, a species listed as endangered receives certain protections automatically, including against any “take” by a private or

public entity. 16 U.S.C. § 1538(a). The Act does not afford the same statutory protections to threatened species. Instead, “[w]henver any species is listed as a threatened species,” “the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.” 16 U.S.C. § 1533(d). The Secretary “may,” as needed, extend to a newly listed threatened species the protections afforded to endangered species. *Id.*

Since 1978, the Fish and Wildlife Service has extended endangered-species protections by blanket rule to all threatened species. That is, instead of issuing a species-specific regulation to protect a threatened species at the time of listing, the Service defaulted to extending all threatened species the same statutory protections applicable to endangered species. *See Protection for Threatened Species of Wildlife*, 43 Fed. Reg. 18,180, 18,181 (Apr. 28, 1978).

By contrast, the National Marine Fisheries Service hewed closer to the Act’s text, taking a more tailored approach by promulgating species-specific protections for threatened species. These protections could, if the circumstances warranted, be the same protections as those given to endangered species, but they did not have to be. In 2019, the Fish and Wildlife Service adopted this approach, too. *See Regulations for Prohibitions to Threatened Wildlife and Plants*, 84 Fed. Reg. 44,753 (Aug. 27, 2019); 50 C.F.R. §§ 17.31(a) (threatened wildlife), 17.71(a) (threatened plants). By recognizing a middle tier between endangered and unlisted species, as the Act itself does, the rule encouraged creative conservation efforts, aligned the incentives of landowners with the interests of at-risk species, and allowed for activities that pose no threat to the species but which may not be allowed if the species were automatically treated as “endangered” by blanket rule.

3. The 2019 Interagency Cooperation Rule

Section 7 of the Endangered Species Act requires federal agencies to consult with the Secretaries of the Interior and Commerce to ensure that any action authorized, funded, or carried out by the agencies is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat for those species. *See* 16 U.S.C. § 1536(a). The activities by the “action agencies” could include, *inter alia*, a decision whether to issue permits to States or private parties to engage in economic development.

In the 2019 Interagency Cooperation Rule, the Services adopted several procedural changes to the consultation process and amended the definitions of some of the terms defining those processes. *See Regulations for Interagency Cooperation*, 84 Fed. Reg. 44,976 (Aug. 27, 2019). Most notably, the Services resolved the statutory overreach of the 2016 regulation that had defined the term “destruction or adverse modification” to include alterations that “preclude or significantly delay development” of “physical or biological features essential to the conservation of a species” that did not yet exist. *See* 81 Fed. Reg. at 7226; 84 Fed. Reg. at 45,016. The definition now reads: “Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of

critical habitat as a whole for the conservation of a listed species.” 50 C.F.R. § 402.02.

The rule also clarified several regulatory definitions and applications pertinent to the interagency consultation process, including “effects of the action,” “environmental baseline,” and “programmatic consultation.” *See* 84 Fed. Reg. at 45,016. And it added a provision explaining concepts like “reasonably certain to occur” and “consequences caused by the proposed action” to help both regulators and the regulated understand what events were and were not too remote to be considered “consequences” of an agency action. The Services explained that “[t]o be considered an effect of a proposed action, a consequence must be caused by the proposed action (i.e., the consequence would not occur but for the proposed action and is reasonably certain to occur).” *Id.* at 45,018 (codified at 50 C.F.R. § 401.17). The rule continued: “Considerations for determining that a consequence to the species or critical habitat is not caused by the proposed action include, but are not limited to: (1) The consequence is so remote in time from the action under consultation that it is not reasonably certain to occur; or (2) The consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur; or (3) The consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur.” *Id.*

C. The Proposed Rules

As the Proposed Rules note, the 2019 rules were challenged in court in the Northern District of California. Many of our States intervened to defend the rules. *E.g.*, States’ Mot. to Intervene, *Ctr. for Bio. Diversity*, No. 4:19-cv-05206-JST (N.D. Cal. Jan. 7, 2020), ECF 47. Before the court could rule on the merits, the Services asked the court to remand, without vacatur, for further consideration of the rules. In doing so, the Services took pains to note that they were not confessing any legal error but had been directed by the White House to review the rules based on new policy priorities. *E.g.*, Federal Defs’ Reply in Supp. of Mot. for Voluntary Remand at 8, *Ctr. for Bio. Diversity*, No. 4:19-cv-05206-JST (N.D. Cal. Jan. 3, 2022), ECF 154. After a few missteps that required the Ninth Circuit’s correction (such as initially vacating the rules despite not reaching the merits), the district court eventually remanded the rules to the Services without vacatur.

While the Proposed Rules rightfully retain many aspects of the 2019 rules, they rescind or revise significant portions of those rules.

First, among other things, the Proposed Listing Rule (1) removes the Services’ ability to collect and report the economic impacts of listing determinations, (2) broadens the definition of “foreseeable future,” (3) inserts the phrase “the species is recovered” into the factors considered for delisting, (4) removes from the list of circumstances in which the Services may find that it is not prudent to designate critical habitat instances in which the threat to the species’ habitat stems solely from causes that cannot be addressed through management actions, and (5) removes much of the language concerning the designation of unoccupied

areas as “critical habitat,” including the requirement that “[t]he Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species.” *See* 88 Fed. Reg. 40,765-71.

Second, the Fish and Wildlife Service’s Proposed Blanket Rule would resurrect the blanket rule, defaulting to providing threatened species the same “blanket” protection afforded to endangered species. Once again, the rule would put the Services’ approaches at odds with each other and the Fish and Wildlife Service’s approach in tension with the text of the Endangered Species Act and conservation best practices.

Third, the Proposed Interagency Cooperation Rule would (1) revise certain definitions in the 2019 rule, (2) delete entirely the 2019 rule’s clarification of when an activity or consequence of federal agency action is “reasonably certain to occur” (while promising to provide clarity in the future via a guidance document without the trouble of notice and comment), and (3) allow the Services to require offsite “offsets” as a “reasonable and prudent measure” to “mitigate” effects of incidental take *at* an agency action site. *See* 88 Fed. Reg. 40,754-58.

DISCUSSION

As noted, we are concerned that many aspects of the Proposed Rules violate the text of the Endangered Species Act and the reasoned decisionmaking requirements of the Administrative Procedure Act. We address each Proposed Rule in turn.

I. Proposed Listing Rule

We have concerns about nearly every change in the Proposed Listing Rule and encourage the Services to withdraw it.

Economic Impacts. To start, the Services have not adequately explained why they have rejected their recent determination that the Endangered Species Act permits them to compile and share economic data about listing decisions. To be sure, the Services note that they cannot *rely* on such information when evaluating a species’ classification status. *See* 88 Fed. Reg. 40,765. But that fact, which the prior rule did not contradict, does not bar the Services from sharing economic impact information to promote governmental transparency and public awareness. None of the legislative history cited by the Services suggests otherwise, *see id.* at 40,765-66, yet the Services offer these statements as their primary reason for proposing the change. That is not reasoned decisionmaking.

Foreseeable Future. We are concerned that the Services’ broadening of the “foreseeable future” definition will result in listing decisions beyond what the Act allows. The current definition properly cabins a listing decision to “only so far into the future as the Services can reasonably determine that both the future threats and the species’ responses to those threats are likely.” 50 C.F.R. § 424.11(d). The proposed definition is both broader and vaguer, allowing the

Services to make decisions “as far into the future as the Services can reasonably rely on information about threats to the species and the species’ responses to those threats.” 88 Fed. Reg. 40,766. But the Act itself requires that listing decisions for threatened species be made only when the species “is *likely* to become an endangered species within the foreseeable future,” 16 U.S.C. § 1532(2) (emphasis added); by removing the qualifier, the proposed rule exceeds the Act’s limitations. Far from implying that “the Services were adopting a novel requirement to conduct an independent analysis of the status of the species,” as the Services suggest, the current definition simply tracks the Act. And it makes sense that the Services can determine whether a species is “likely to become an endangered species” only if they know whether “future threats and the species’ responses to those threats are likely.” The Act does not allow the Services to use crystal balls or computer models tinged with political preferences to make listing decisions based on suspicions of what the world might look like in hundreds of years. *Cf. Threatened Status for the Beringia and Okhotsk Distinct Population Segments of the Erignathus Barbatulus Nauticus Subspecies of the Bearded Seal*, 77 Fed. Reg. 76,740 (Dec. 28, 2012) (making a listing decision based on a model to project the level of sea ice in one hundred years). The “foreseeable future” must actually be “foreseeable” to determine whether the species is “likely” to become endangered. The Act requires preserving the current definition or something close to it.

The Services’ suggested alternative—removing the definition altogether and reverting to non-binding agency guidance—would be even worse. *See* 88 Fed. Reg. 40,766. Such “guidance” creates uncertainty for regulated entities and does not have the force of law to restrict the Services. Removing the regulatory definition could increase the chance of arbitrary and capricious listing decisions based on the “foreseeable future”—which, we fear, will quickly become a theoretical future rather than one that is “likely” to occur. Whatever definition the Services choose should be adopted through notice-and-comment rulemaking.

Factors Considered in Delisting Species. While we commend the Services for planning to keep the phrase “does not meet the definition of a threatened or endangered species” in 50 C.F.R. § 424.11(e), the Services confusingly propose inserting “the species is recovered or otherwise” before that phrase. The 2019 rule made clear—and the Services still agree—“that the standard for whether a species merits protection under the Act should be applied consistently, regardless of whether the context is potential listing, reclassification, or delisting.” 88 Fed. Reg. at 40,767. The definition was meant to “remove the misperception that delisting decisions are contingent upon the satisfaction of a recovery plan for that species.” *Id.* If the Services still wish to avoid that misperception, then why add “recovered species” to the definition? To be sure, recovery is *one way* a species may no longer meet the definition of a threatened or endangered species (and thus merit delisting). But that much is clear from the existing regulations and the structure of the Act, which permit listing only those species meeting the relevant definition. We fear the proposed change will cause confusion, not alleviate it.

For the same reason, we oppose the Services’ proposed revision to subsection (e), which would make it appear that delisting is discretionary rather than

mandatory. The current phrasing—“The Secretary shall delist a species if . . .”—mirrors the language of the Act and clarifies that the Services *must* delist a species if appropriate under the Act. *See* 16 U.S.C. § 1533(c)(1) (“The Secretary *shall* from time to time revise each list . . . to reflect recent determinations, designations, and revisions” (emphasis added)); *id.* § 1533(c)(2) (“The Secretary *shall* conduct, at least once every five years, a review of all species included in a list . . . and determine on the basis of such review whether any such species should be removed from such list” (emphasis added)). But where the Act imposes mandatory duties, the new rule proposes discretion: “It is appropriate to delist a species if . . .” 88 Fed. Reg. 40,767. The Act does not afford the Services discretion to delist a species if that species no longer meets the definition of a threatened or endangered species. Implying such discretion would create tremendous uncertainty. Acting on it would be unlawful. We urge the Services to reconsider.

Not-Prudent Determinations. We oppose the Services’ proposal to remove language from the criteria for designating critical habitat that clarifies that the Services may properly determine that designating critical habitat would 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.” 50 C.F.R. 424.12(a)(1)(ii). As the Services previously explained, in such instances “a designation could create a regulatory burden without providing any conservation value to the species concerned.” 83 Fed. Reg. at 35,197. “Examples would include species experiencing threats stemming from melting glaciers, sea level rise, or reduced snowpack but no other habitat-based threats. In such cases, a critical habitat designation and any resulting section 7(a)(2) consultation, or conservation effort identified through such consultation, could not prevent glaciers from melting, sea levels from rising, or increase the snowpack.” *Id.* Designation of critical habitat in these cases “may not be prudent because it would not serve its intended function to conserve the species.” *Id.*

The Services’ proposal to remove this language suggests that the Services intend to make critical habitat designations even if those designations would do *nothing to help conserve the species*. Such a stance cannot be reconciled with the Endangered Species Act, by which Congress granted the Services limited authority to take actions to conserve and protect at-risk species. Congress did not give the Service carte blanche to take whatever actions they thought prudent in response to climate change. *Cf. West Virginia v. Environmental Protection Agency*, 145 S. Ct. 2587 (2022). And the cases the Services nominally rely on to support their proposal do not say otherwise—as the Services ably explained in their prior rulemaking that relied on the same cases as the *driver* for the 2019 regulations. *Compare* 83 Fed. Reg. at 35,197 (discussing *Natural Res. Def. Council v. U.S. Dep’t of Interior*, 113 F.3d 1121 (9th Cir. 1997) and *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998)), *and* 84 Fed. Reg. at 45,040 (same), *with* 88 Fed. Reg. at 40,768. The Services do not offer a reasoned explanation for their arbitrary reversal.

Designating Unoccupied Areas. We likewise oppose the Services’ proposal to remove language concerning the designation of unoccupied areas. The Services

first propose removing the requirement that “[w]hen designating critical habitat, the Secretary will first evaluate areas occupied by the species” and “will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species.” 88 Fed. Reg. at 40,769. According to the Services, “[n]either the Act nor the legislative history creates a requirement to exhaust occupied areas before considering designation of unoccupied areas; therefore, this is an area where the statutory framework contains a gap that the Services may fill.” *Id.* To the contrary, the Act requires that the Secretary designate unoccupied areas as “critical habitat” *only* “upon a determination by the Secretary that such areas are essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A)(ii). Thus, the Act itself imposes the two-step process recognized by the 2019 rule because an unoccupied area cannot be “essential for the conservation of the species” if designating occupied critical habitat alone will adequately conserve the species. There is no statutory gap for the Services to fill. The proposal is unlawful.

So is the Services’ proposal to strike the requirement “that for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.” 88 Fed. Reg. at 40,769. In a return to the unlawful 2016 rule, this deletion would ignore the Act’s requirement that unoccupied critical habitat be “habitat” for the species. *See Weyerhaeuser*, 139 S. Ct. at 368. If an unoccupied area does not have *any* of the “physical or biological features essential to the conservation of the species,” then the species could not survive in that area. If a species could not survive in that area, the area cannot be “habitat” for the species. And if the area is not “habitat” for the species, then it cannot be “critical habitat.”

Despite this obvious conflict, the Services assure us they “recognize the importance of the Supreme Court’s ruling in *Weyerhaeuser*.” 88 Fed. Reg. at 40,771. Their actions bely their assurances—first by rescinding the rule they just recently added to define “habitat” in line with *Weyerhaeuser*,² and now by proposing to remove another check that ensures compliance with the decision.

The Services say their proposed excision is necessary “[t]o avoid the potential for rendering any part of the statutory language surplusage,” 88 Fed. Reg. at 40,770. The apparent theory is that because the Act requires occupied critical habitat designations to include “those physical or biological features” “essential to the conservation of the species,” such features cannot also be a requirement for unoccupied critical habitat since the language is repeated in the second definition. *See* 16 U.S.C. § 1532(5)(A).³ But tellingly, the phrase “essential to the conserva-

² *See Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat*, 87 Fed. Reg. 37,757 (June 24, 2022).

³ The statutory definition in its entirety reads:

The term “critical habitat” for a threatened or endangered species means—

tion of the species” *is* repeated, yet the Services do not suggest giving *that* language a different meaning. Accordingly, it would be unreasonable for the Services to suggest, as they apparently do, that certain physical or biological features may be “essential to the conservation of the species” in *occupied* areas but not in *unoccupied* areas. The Services would thus violate the Act if they determined that unoccupied “areas are essential for the conservation of the species,” *id.* § 1532(5)(A)(ii), if those areas did not have the “physical or biological features essential to the conservation of the species,” *id.* § 1532(5)(A)(i). Yet that is precisely what the proposed rule contemplates. The proposal is contrary to law and should be abandoned.

II. Proposed Blanket Rule

We also oppose the Fish and Wildlife Service’s proposed blanket rule.

First, there is good reason to think the Services’ current species-specific approach is statutorily compelled, so the new blanket rule is contrary to law. Section 4(d) of the Endangered Species Act provides:

Whenever any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited . . . with respect to endangered species.

16 U.S.C. § 1533(d).

Contrary to the Fish and Wildlife Service’s proposed reading, context suggests that Congress did not grant the Services broad authority to regulate “any” (read “all”) threatened species generally but to adopt specific regulations for “any” threatened species when *that* species is listed. *Cf.* 42 U.S.C. § 7521(a)(1) (provision of Clean Air Act requiring EPA to regulate the “emission of any air pollutant”—“any” meaning any particular air pollutant, not “all” pollutants generally). Were it otherwise, the Service would be adopting prospective blanket regulations for as-yet unidentified and unlisted species, rather than (as the Act requires) adopting the regulation “[w]henver any species is listed.” Likewise, the Service would adopt the regulation before it could even determine that it was “necessary and advisable to provide for the conservation of such species,” as the Act also requires. The Service’s blanket rule would violate these requirements of

(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.

the Act. *See generally* Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 Pace Env't L. Rev. 23 (2015).

The Act's legislative history confirms that the Service is to issue regulations for a *specific* species when it is listed as threatened—not issue a blanket regulation that preemptively governs *all* species should one be listed someday in the future. As the Senate Report notes, section 4(d) of the Act “[r]equires the Secretary, once he has listed a species of fish or wildlife as a threatened species, to issue regulations to protect *that* species.” *Id.* at 36 (quoting S. Rep. No. 93-307, at 8 (1973)). “Among other protective measures available,” the Report continues, the Secretary “may make any or all of the acts and conduct defined as ‘prohibited acts’ . . . as to ‘endangered species’ also prohibited acts as to *the particular* threatened species.” *Id.* (emphasis in original) (quoting S. Rep. No. 93-307, at 8 (1973)).

Second, the proposed blanket rule is arbitrary and capricious because it does not further the conservation goals of the Endangered Species Act. In fact, it undermines them. By defaulting to the same burdensome standards for both endangered and threatened species, the blanket rule would further the perverse incentives of heavy-handed “take” regulation and discourage creative conservation efforts. *See, e.g.*, Terry Anderson, *When the Endangered Species Act Threatens Wildlife*, Hoover Institution (Oct. 20, 2014), <https://perma.cc/BK45-4D3Z> (explaining how heavy regulatory burdens lead landowners to resort to the “shoot, shovel and shut up” approach). Through the Act's creation of a secondary classification with a reduced burden, Congress appropriately realigned incentives.

For one, “property owners, communities, and states whose lands contain *threatened* species . . . have an incentive to protect them voluntarily” to avoid those species becoming endangered. Wood, *Take It to the Limit, supra*, at 48 (emphasis added). Because “the prospect of the take prohibition's application if a species becomes *endangered* is a big stick” that “does not apply to threatened species,” the dual classification scheme spurs “less burdensome” voluntary efforts to protect threatened species. *Id.*

Likewise, “[t]he blanket prohibition against takes of threatened species undermines a second important incentive for private conservation—the prospect of a downlisting.” *Id.* Rather than rewarding landowners whose wildlife improves from endangered to threatened status with a reduced regulatory burden (which will be even further reduced if the wildlife is delisted completely), the blanket rule is all stick and no carrot—and the stick is one size fits all. Perhaps it is no wonder Congress's goal of species *recovery* has not been realized. *See* Katherine Wright & Shawn Regan, *Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals* (July 26, 2023), <https://perma.cc/DHJ7-UZSW>.

The Service should reject the blanket rule, which is arbitrary and capricious because it directly undermines the goals of the Endangered Species Act. As the representative for the 50-state Association of Fish and Wildlife Agencies told

Congress before the 2019 rule was enacted, “restor[ing] the distinction between threatened and endangered species to reflect Congressional direction” in the Act would “provid[e] greater flexibility to manage these categories differently” and restore the ability of States “to lead the management of threatened species, including the provision of ‘take’ as a means of conservation of the species.” *See* Testimony of Gordon Myers Before the Committee on Environment and Public Reports (Feb. 15, 2017), <https://perma.cc/6NR2-E8Q9>. We oppose the blanket rule and urge the Services to reconsider.

III. Proposed Interagency Cooperation Rule

Finally, we have serious concerns with the Proposed Interagency Cooperation Rule as well.

First, the rule would sow confusion by removing the clarifications of “activities that are reasonably certain to occur” and “consequences caused by the proposed action” in 50 C.F.R. 402.17. The language was added in the 2019 rule precisely to clarify for all parties what these concepts mean and (importantly) do not mean as well as to impose limits on concepts that could easily become unbounded. Intentionally muddying those waters again is arbitrary and capricious.

If the Services rescind the current rule despite these concerns, we urge the Services to engage in future rulemaking to provide clarity and guidance for regulated entities. We do not think “address[ing] and expand[ing] on these factors in updates to the Services’ Consultation Handbook” is sufficient given the significance of the interagency consultation process for regulated entities. 88 Fed. Reg. at 40,758. Such entities would have greater confidence and understanding if the Services acted through notice-and-comment rulemaking.

Second, the Services’ new interpretation of “reasonable and prudent measures” exceeds their statutory authority. Under section 7 of the Endangered Species Act, the Secretary must review federal agency action and provide to the agency and the applicant “a written statement that,” among other things, “(i) specifies the impact of such incidental taking on the species” and “(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact.” 16 U.S.C. § 1536(b)(4)(C). Per the Act’s terms, the “reasonable and prudent measures” are thus tied to “minimiz[ing]” the “impact of such incidental taking on the species.” *Id.*

For the first time in their history, the Services now interpret this provision to mean that they can require “offsetting measures” *away* from the site of the agency action. As the Services recognize, both components of the proposed rule constitute drastic changes in policy. *See* 88 Fed. Reg. at 40,758 (noting that the 1998 Consultation Handbook confined “reasonable and prudent measures” to “minimization”—not “mitigation”—measures at the action site). The Services’ historical interpretation is more appropriate: it tracks the language of the Act (“minimize”) and its tether to “minimiz[ing]” the “impact of such incidental taking.” That impact necessarily occurs *at* the action site, meaning actions taken to “minimize” that impact must occur there too. The Services have not pointed to a

provision of the Act that grants them the *additional* authority to regulate conduct and require offsets far from the action area.

More broadly, we are concerned about the reach of the proposed rule and the Services' view of the discretion it provides. Simply put, requiring offsets far from the action area seems like a recipe for arbitrary enforcement. It also seems like a good way to make private permit applicants pay for broader policy goals that—however meritorious—are only tangentially related to the requested agency action. The Act already requires the Services to “minimize” the impact of incidental taking; it does not authorize the Services to require additional measures to “mitigate” that impact by forcing the permit applicant to pay for “offsets” far from the action area. The proposed rule would be unlawful.

CONCLUSION

We thank the Services for the opportunity to comment on the Proposed Rules, and we join the Services in their efforts to conserve and protect our nation's at-risk wildlife. But we have serious concerns that the Proposed Rules undermine those efforts by imposing perverse incentives and engendering confusion in the regulated community. Many portions of the Proposed Rules are at odds with the requirements of the Endangered Species Act, and we are disappointed that the Services would try to resurrect aspects of rules many of our States have already challenged as unlawful without even conducting a federalism impact statement as required by Executive Order 13132. We invite the Services to withdraw or substantially revise their proposals.

Respectfully submitted,



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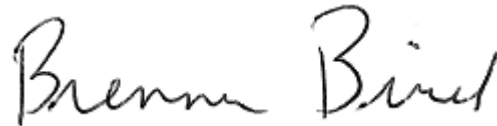
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