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RE: Proposed Changes to Regulations Governing Exclusion of Critical Habitat, Docket No. HQ–ES–2025–0048.

Mr. Tirpak:

The undersigned organizations and our millions of members and activists nationwide write to oppose the regulations proposed by the U.S. Fish and Wildlife Service ("Service") that would govern exclusion of critical habitat under the Endangered Species Act, 16 U.S.C. § 1533(b)(2). *See* Regulations for Designating Critical Habitat, 90 Fed. Reg. 52,592 (Nov. 21, 2025) ("Proposed Rule"). Commenters incorporate by reference, in full, all studies and other documents cited in these comments.

The Proposed Rule overhauls the exclusion process under Section 4(b)(2) in numerous ways, but has three principal components. First, it would establish a low bar for industry special interests to force the Service to consider excluding an area from critical habitat. Second, it would rig the exclusion process against habitat protection by giving special weight to economic analyses prepared by these special interests. Third, it would force the Service to leave an area unprotected whenever it finds that the costs of designation outweigh the benefits. It categorically puts the profits of industry above the needs of listed species.

The Service's proposal is both unwise and unlawful. It would result in reduced protections for the habitat that imperiled species rely upon, in stark contrast with the intent of Congress in enacting the ESA and its protections for critical habitat. The Proposed Rule is unlawful and should be withdrawn.

LEGAL BACKGROUND

I. The Endangered Species Act

The ESA is America's most important and effective wildlife protection law. Since its passage in 1973, the Act has prevented the extinction of 99 percent of listed species and recovered countless from the brink—like the bald eagle, gray wolf, and American alligator. Its protections are needed now more than ever. Just last year, the Inter-Governmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) announced its determination that a million species are threatened with extinction in coming decades. IPBES, Summary for

Policymakers – Global Assessment, available at https://ipbes.net/ga/spm. Urgent action, including full and proper implementation of ESA protections, is needed to avert this extinction crisis.

The ESA is intended "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). Conservation means "the use of all methods and procedures which are necessary" to bring a listed species "to the point at which" protection under the ESA is no longer needed. *Id.* § 1532(5).

Once a species is listed under Section 4, 16 U.S.C. § 1533, several legal protections become effective. But only one directly protects the habitat on which those species rely. At the time a species is listed, the relevant Service must designate "critical habitat" for the species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A).

Congress defined critical habitat to include areas both "within" and "outside the area occupied by the species at the time it is listed." 16 U.S.C. § 1532(5)(A). First, the definition includes occupied areas which, at the time of listing, contain "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." The statutory definition also includes unoccupied areas "upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Critical habitat describes those areas that are essential to the survival *and recovery* of listed species. *See Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 442 (9th Cir. 2001) (interpreting the statutory definition of "conservation" as it applies to critical habitat).

Before designating critical habitat, the Service must consider the "economic impact, the impact on national security, and any other relevant impact" of designation. 16 U.S.C. § 1533(b)(2). If an area satisfies the definition of critical habitat, the Service nevertheless *may* exclude it from designation if the "benefits of such exclusion" outweigh the benefits of designation. *Id.* The Service cannot exclude an area if doing so will result in the extinction of species. *Id.* Each determination must be made solely "based on the best scientific and commercial data available." *Id.*

Once designated, critical habitat provides a crucial check on federal actions that might otherwise degrade or destroy the habitat of listed species. Federal agencies must consult with the Services under ESA Section 7 before authorizing, funding, or otherwise carrying out any activity that "may affect" listed species *or* critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a) Only those actions that are not "likely to jeopardize the continued existence" of a listed species or result in "destruction or adverse modification" of critical habitat are permitted. *Id.*

Designation of critical habitat is, therefore, a crucial component of ESA protection. Indeed, Congress emphasized the importance of habitat protections, describing "the

determination of the habitat necessary for . . . species' continued existence" as being "[o]f equal or more importance" than listing. H.R. Rep. No. 887, 94th Cong., 2d Sess. 3 (1976); *see also* H.R. Rep. No. 43-412, at 144 ("Man can threaten the existence of species of plants and animals in any of a number of ways. The most significant of those has proven also to be the most difficult to control: the destruction of critical habitat.").

II. The National Environmental Policy Act

The National Environmental Policy Act (NEPA), 43 U.S.C. § 4321, serves as "our basic national charter for protection of the environment." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008). It requires that all federal agencies "take a 'hard look' at the 'environmental consequences' of their decisionmaking." *Citizens for Clean Energy v. U.S. Dep't of Interior*, 384 F. Supp. 3d 1264, 1272 (D. Mont. 2019) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

Specifically, NEPA and its implementing regulations require that agencies prepare an environmental impact statement, including a detailed assessment of the environmental consequences and "reasonable alternatives to the proposed action," 40 C.F.R. § 1502.14(a), for all "major federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C). An EIS need not be prepared in every circumstance; an agency can also prepare an environmental assessment and accompanying "finding of no significant impact" or it can rely on a "categorical exclusion" where it determines that the action at issue will not have a significant effect on the environment. 40 C.F.R. § 1508.1(e), (j), (q).

COMMENTS

In the Proposed Rule, the Service turns a narrow ESA provision into a gaping loophole that threatens to swallow the protections Congress put in place for species on the brink of extinction. If the Service codifies standards and procedures by which it will consider Section 4(b)(2) exemptions, it must do so consistent with the spirit and purpose of the ESA. To that end, it should commit to designating and protecting critical habitat broadly. It should also rely solely on independent, unbiased cost estimates. To the extent the Service gives any weight at all to cost estimates provided by exemption proponents, like developers, oil and gas companies, mining companies, and other extractive industries, it must at a minimum independently analyze those estimates. Above all, it should ensure that 4(b)(2) exemptions continue to be used sparingly, only in exigent circumstances that do not undermine species protection.

In promulgating the Proposed Rule, the Service fails on all counts, violating the ESA, the Administrative Procedure Act, and the National Environmental Policy Act:

- The proposal undermines conservation of listed species.
- The Service unwisely and unlawfully plans to consider exemptions on Federal land.
- The Service plans to apply Section 4(b)(2) exemptions broader than ever but fails to

provide a rational basis for its decision.

- The Proposed Rule fails to provide clarity or transparency in the exemption process, thus falling short on the Service's own justification.

- The proposal will make even more work for an overburdened agency, with the Service likely to spend more time analyzing exclusions and less time protecting species.

- The Proposed Rule would allow industry special interests to drive the exclusion process with unverified, potentially biased data.

- The proposal would unlawfully leave areas undesignated simply because they are covered by conservation agreements not anticipated in the ESA. And it would do so without verifying that those agreements benefit listed species and provide their habitats with sufficient protection.

- The Service plans to push forward with its destructive proposal without undertaking the proper analysis under NEPA.

For all these reasons, the Proposed Rule should be withdrawn.

I. The Proposed Rule undermines the conservation purpose of the ESA

The Proposed Rule will reduce habitat protections and hasten the extinction of species, contrary to the intent of Congress. Congress intended critical habitat designation to address widespread threats to the habitat of listed species—a threat it considered to be the "most significant" and "the most difficult to control." H.R. Rep. No. 43-412, at 144. To protect the "*ecosystems* on which [listed] species depend," 16 U.S.C. § 1531(b) (emphasis added), Section 4 directs the Service to protect "to the maximum extent prudent and determinable" areas that contribute to the conservation of species. *See id.* § 1533. The Service must construe Section 4(b)(2) in accordance with the protective purpose of Section 4. *King v. Burwell*, 576 U.S. 473, 493 (2015) ("We cannot interpret federal statutes to negate their own stated purposes.").

Instead, the Proposed Rule hands control of each step in the exclusion process over to developers, oil and gas companies, and other groups with a vested interest in limiting habitat protections. It effectively creates a presumption *against* protection of habitat with features already deemed to be "essential" to species conservation. 16 U.S.C. § 1532(5).

First, the Proposed Rule requires the Service to consider excluding an area from protection if a party provides "credible information" supporting exclusion. 90 Fed. Reg. at 52,599. It describes credible information as "a reasonably reliable indication regarding the existence of . . . meaningful" impacts. *Id*. This is a vague and extraordinarily low bar that allows third parties to force the Service to conduct an exclusion analysis and will result in far more areas being considered for exclusion.

Second, once that analysis is triggered, the Proposed Rule would require the Service to "give weight" to economic or other information provided by proponents of exclusion. 90 Fed. Reg. at 52,595. This prescription is also vague and allows opponents of habitat protection to drive the Service's decision about whether to protect habitat and to inflate the benefits of exclusion.

Third, the Service proposes not to protect habitat any time it determines that benefits of exclusion outweigh benefits of protection. 90 Fed. Reg. at 52,596. Because of the new "weight" given to information from developers, that analysis would already be unduly influenced by industry special interests, putting a thumb on the scale against Congress's mandate to designate habitat to the maximum degree possible. But on top of that, the Service would remove its own discretion to protect habitat in any instances in which it finds that benefits of exclusion outweigh benefits of protection by even the slightest amount.

The Proposed Rule, therefore, will result in more exclusion analyses, greater influence of industry special interests, and ultimately far less protection for habitat that is essential for the survival and recovery of species. It rigs the analysis against species already on the brink of extinction. The Service's vast expansion of the exemption subverts the purpose of the ESA to protect the ecosystems on which species depend and is unlawful.

II. The Service's proposal to consider exemptions on Federal land is unlawful.

The Proposed Rule would expand consideration of critical habitat exemptions on Federal land. 90 Fed. Reg. 52,595. This proposal is both unwise and unlawful.

Initially, Federal lands are among the most important places for the Service to protect. Where critical habitat is designated on Federal land, any action that may destroy or adversely modify that habitat will trigger formal consultation because there is always a federal nexus. *See* 81 Fed. Reg. at 7,231. Designation on Federal land, therefore, provides a high level of protection for species and substantial conservation benefit. *Id.* For this reason, the Service itself has explained that "[f]ederal lands should be prioritized as sources of support in the recovery of listed species," 81 Fed. Reg. 7,231. Considering exclusions in each case will only undermine habitat protections the Service itself has determined to be important, waste Service resources, and provide less clarity for stakeholders.

The Service also fails to provide a reasoned explanation for its change in course from its 2016 Policy Memorandum. *See Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125-6 (2016). Where an agency changes its policy, it must "'display awareness that it is changing position' and '*show that there are good reasons for the new policy*.'" *Id.* (emphasis added) (quoting *FCC v. Fox Television Stations*, *Inc.*, 556 U.S. 502, 515 (2009). Though it acknowledges its policy green-lighting exclusions on federal lands is new, the Service does not provide a single justification for its change. The Service simply states that nothing in the ESA prevents its new policy and that the Service "do[es] not wish to foreclose the potential to exclude areas under Federal ownership." 90 Fed. Reg. 52,596. That the Service is proposing to

exclude federal lands under certain circumstances already suggests that it "does not wish to foreclose" that outcome; the relevant question, which remains unanswered, is *why*.

The Proposed Rule also fails to square its decision with the reasoning behind the 2016 Policy. *See Fox Television Stations*, 556 U.S. at 515-516 ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay . . . the previous policy."). Previously, the Service explained that benefits of including federal land are generally greater than non-federal land and that "[f]ederal lands should be prioritized as sources of support in the recovery of listed species." 81 Fed. Reg. 7,231. The Service does not explain why or whether these justifications no longer apply.

Further still, the Service states that it will now "consider the avoidance of the administrative or transactional costs as a benefit of exclusion of a particular area of Federal land." 90 Fed. Reg. 52.596. As previously explained by the Service itself, to exclude areas from designation based on administrative costs to the agency would not be consistent with "the unique obligations that Congress imposed for Federal agencies in conserving" listed species. 81 Fed. Reg. 7,231. The ESA provides that all agencies must "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation" of listed species. 16 U.S.C. § 1536(a)(1). Congress plainly did not intend the Service to decrease protections for species because of "administrative or transactional costs," 90 Fed. Reg. at 52,596, of pursuing that very mandate.

The Service also fails to provide any explanation for its unwise change in policy. In light of its earlier determination that considering administrative and transactional costs was inconsistent with this mandate, the Service must explain the reasoning for its change in policy. It has failed to do so, rendering its change arbitrary. *See Fox Television Stations*, 556 U.S. at 515-16.

The Service's proposal to permit exclusions on Federal land is also arbitrary and capricious because it runs counter to its justification for the Proposed Rule. *See Motor Vehicle Mfrs' Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious where the agency "offered an explanation for its decision that runs counter to the evidence before the agency"). The Service claims that the "intended effect" of the Proposed Rule is "to provide greater transparency and certainty for the public and stakeholders." 90 Fed. Reg. at 52,592. By opening up Federal lands, the Service undermines its sole justification for the Proposed Rule. Previously, the Service's bright-line policy provided clarity for stakeholders; they knew that exemptions would generally not be considered on Federal land. With the Service's new policy, that certainty goes out the window. Even designation on Federal land is now subject to the Service's vague 4(b)(2) exemption regime, *see infra* Part IV.

III. The proposal to always exclude areas from designation where costs outweigh benefits contravenes the ESA and is arbitrary

The Service proposes to *always* exclude areas from critical habitat protection when it

determines that the benefits of exclusion outweigh benefits of protection, except when exclusion would result in extinction of the species (hereafter, "mandatory exclusion"). 90 Fed. Reg. at 52,596. The mandatory exclusion is inconsistent with Section 4 and Congress's intent to award maximum protections to the areas that listed species need to survive. Additionally, this represents an unexplained change from its previous practice, wherein the Service reserved its discretion to protect habitat even where costs of designation exceeded benefits of designation. Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 Fed. Reg. 7,226 (Feb. 11, 2016). This unexplained change in course is arbitrary and capricious. *See Encino Motorcars,* 136 S.Ct. at 2125-6.

The Services' mandatory exclusion would contradict the language of section 4 and unlawfully expand the Section 4(b)(2) exemption such that it undermines Congress's intent to designate critical habitat broadly. Section 4 provides only that the Service "may" exempt an area where costs of designation would outweigh benefits. *Id.* § 1533(b)(2). This is a far cry from a mandate that the Service "must"—or even "should"—exempt areas in such circumstances. Indeed, Section 4(b)(2) gives the Service discretion not to grant such exemptions at all. By removing its own discretion to protect such areas, the Service contradicts the plain meaning of section 4(b)(2) and unlawfully re-writes Congress's directive from "may exclude" to "shall exclude." That Congress stopped well short of requiring the Service to exempt areas from designation further evinces Congress's intent that the exemption should be used narrowly, preserving broad designations of critical habitat. The Service's vast expansion of the Section 4(b)(2) exemption contradicts this intent and is unlawful.

The Service provides no reasoning for its reinstatement of the mandatory exclusion. It states only that the Service "would exercise the broad discretion given under section 4(b)(2)" to always exclude habitat for which costs outweigh benefits, however little. 90 Fed. Reg. 52,596. Even assuming the Service has discretion to do so, however, does not mean that it can exercise that discretion without explanation. *State Farm*, 463 U.S. at 48-49 (The Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner."). The Service has imposed a new requirement on itself that will reduce protections for species' habitat entirely without explanation. The requirement is inconsistent with the Service's past practice and with the statute, which provides only that the Service *may* exempt habitat where costs outweigh benefits. The Proposed Rule is arbitrary and capricious. *State Farm*, 463 U.S. at 48-49.

IV. The vague standards set by the Service fail to provide transparency or clarity.

The Service states that the "intended effect" of the Proposed Rule is "to provide greater transparency and certainty for the public and stakeholders." 90 Fed. Reg. at 52,592. The vague standards set by the Service, however, prompt more questions than they answer, undermining this justification.

For example, the "credible information" standard provides a vague yet apparently low bar for triggering the exemption process. In attempting to explain this standard, the Service only

supplies more vague standards, referring to "reasonably reliable indication[s]" of "meaningful impacts." 90 Fed. Reg. at 52,595. These standards hardly provide clarity about the types of information needed to trigger an exclusion analysis.

Similarly, the Service's explanation of its exclusion analysis provides little insight into the process. It explains that the Service will "give weight" to information that is consistent with expert and firsthand information outside the Service's expertise. 90 Fed. Reg. at 52,595. Nowhere does the Service explain what it means to "give weight" to information or explain the practical implications of this policy. Moreover, the Service provides an exception to this general practice where the Service has "knowledge or material evidence that rebuts that information." *Id.* Again, neither this phrase nor its component parts, like "material evidence," are explained in the Proposed Rule. The Service's explanation that its Proposed Rule will provide transparency and clarity runs counter to the evidence before the agency and is arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

V. The Services fail to consider the administrative burden of the Proposed Rule and its effect on species protection.

The Service's proposal would make an enormous amount of work for an agency that is already underfunded and far behind on its responsibilities under the ESA. As a result, species in need of swift protection will suffer. Consistent with the purpose of Congress in enacting the ESA, the Services must consider the impact that spending additional time and resources considering weak or frivolous requests for exclusion will have on species protection. Failure to do so would be arbitrary and capricious and unlawful. *See State Farm*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious where it "entirely failed to consider an important aspect of the problem").

The Proposed Rule would enact an extremely low bar to force the Service to engage in an exclusion analysis. Namely, the Services propose to do so any time a party presents "credible information" that might support exclusion of an area. Industry special interests will, as a result, flood the agency with information alleging that designation of an area will cause economic or other costs worthy of consideration. Nothing in the rule provides guidance for how the agency should sort through information that meets the minimal threshold of being "credible" even if it is weak, incomplete, biased, or misleading. Indeed, it not difficult to imagine how some sort of minimal "credible information" could be submitted for every listing decision made by the Service and thus trigger a full-blown exclusion analysis.

Further still, the Service proposes to begin considering exclusions on Federal land. Federal lands cover about 640 million acres, or 28% of the total land area of the U.S. Congressional Review Service, Federal Land Ownership: Overview and Data at 1 (Feb. 21, 2020), https://fas.org/sgp/crs/misc/R42346.pdf. Newly considering these lands for exclusion will likely, therefore, considerably increase the number of exclusion analyses undertaken by the Service. As a result of this change and the Service's low bar for triggering an exclusion analysis, the Service will spend more time analyzing economic exclusions, and less time protecting

species.

Many species cannot afford further delays. As things stand, hundreds of species are awaiting a determination from the Service about whether listing is warranted under the Act. *See* FWS, *National Domestic Listing Workplan* (updated May 2024).[3] For other species, the Service has determined that listing is "warranted but precluded," meaning they would likely be listed and protected if the Service had available resources. *See, e.g.*, Review of Species That Are Candidates for Listing as Endangered or Threatened; Annual Notification of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions, 90 FR 48,912 (Oct. 31, 2025) (providing update on 16 listing or uplisting candidates for which protection is "warranted but precluded"). With more of the Service's resources dedicated to exclusion analyses, the number of at-risk species that lack protection under the ESA will only grow.

The Proposed Rule imposes the additional, unnecessary burden on the Service to perform vastly more exemption analyses than it does at present. The Service, however, completely ignores the administrative burden its proposal would create and the negative effects of this burden on imperiled species. The Service cannot finalize its Proposed Rule without considering this important factor. *See State Farm*, 463 U.S. at 43.

VI. The Proposed Rule would inappropriately give weight to unverified, potentially biased information.

The Service proposes to uncritically accept estimates of the cost of critical habitat designation from oil and gas lessees, permittees, and other parties that stand to lose money from protection of species' habitat. *See* 90 Fed. Reg. 52,599 (The Service will "give weight" to information regarding "nonbiological impacts identified by a permittee, lessee, or contractor applicant for a permit, lease, or contract on federal lands."). Only where the Service has information that contradicts the party's claim would it not accept the information provided. *Id.* ("unless the Secretary has knowledge or material evidence that rebuts that information.").

There are two main problems with the Service's proposal, which would stack the deck in favor of destruction of areas that should be protected as critical habitat. First, it assumes, without evidence or consideration, that parties with "firsthand information" about costs of designation will always provide good faith estimates of those costs. Second, the proposed regulation would prevent the Service from independently verifying claims from these potentially biased parties.

The Service has every reason to be skeptical of the economic valuations provided by project proponents. They stand to gain from analyses that inflate or overestimate the value of their proposed project and, correspondingly, the costs of habitat protection. A salient example of such overestimation is Northern Dynasty Minerals' estimate of the value of the Pebble Mine in Bristol Bay, Alaska. In 2011, Northern Dynasty commissioned an estimate of the value of the project, which anticipated a net value of $3.7 billion. However, another expert's more recent assessment found that the project was not economically viable at all, with a net value as low as *negative* $3 billion. *See* Letter from Richard K. Borden to Shane McCoy, U.S. Army Corps of

Engineers (Mar. 28, 2019), available at https://on.nrdc.org/2FZcTcv. While it does not involve economic exemptions under Section 4(b)(2), the project is a preview of what the Service can expect from its new exemption scheme: vastly over-inflated valuations intended to influence agencies that stand in the way of exploitation of our natural areas. Where literally any other information is available, economic information from potentially biased exclusion proponents is unlikely to constitute the "best scientific and commercial data available." 16 U.S.C. § 1533(b)(2).

Making matters worse, the Service's proposed regulation leaves no room for the Service—or any other party—to independently verify these estimates. A proponent of excluding an area from critical habitat would likely present information in comments on a proposed critical habitat designation; all other parties would have to comment at the same time. Once the comment period closed, the Service could determine that the proponent provided "credible information" and begin its exclusion analysis. The Proposed Rule then requires that the Service would "give weight" to the proponent's analysis unless the Service already has "knowledge or material evidence that rebuts that information." This knowledge or material evidence would have to be generated during the comment period or the Service's proposed economic analysis, both of which were completed before (or concurrently with) the party raising project-specific economic impacts. The Service, therefore, will frequently be forced to give weight to the proponent's claimed costs because there has been no opportunity for any party to rebut those claims. Such a process creates strong incentives for the submission less-than-complete information or even outright fraud.

In sum, the Service proposes to hand over its economic exclusion analysis to oil and gas, mining, and other extractive industries while giving itself and other parties no opportunity to rebut claims made by those opponents of habitat protection. The Service should not give special weight to information from parties with "first hand information" regarding costs because those same parties have significant incentives to present a biased, inflated assessment. If it insists on giving weight to this information, it must provide an opportunity for the Service and other independent parties to independently verify that information and provide additional information that informs or contradicts the supposedly "credible" information.

VII. The Service's plan to exclude areas covered by voluntary consultation agreements is unlawful.

The Proposed Rule would make it less likely that areas covered by voluntary consultation agreements would be designated as critical habitat. Specifically, the Service would consider these plans as evidence that designation of the covered area would carry less marginal benefit for listed species, tipping the balance in favor of exclusion. This proposal is unlawful.

The circumstances in which the Service proposes to exclude areas covered by conservation agreements fail to account for the actual benefit of those plans to listed species. As proposed, the Service would "consistently exclude[e]" areas covered by plans that meet the following criteria: (1) the plan is being properly implemented; (2) the species for which critical

habitat is being designated is a covered species under the plan; and (3) the plan "specifically addresses the habitat of the species for which critical habitat is being designated and meets the conservation needs of the species in the planning area." 85 Fed. Reg. at 55,403.

The above conditions hinge on whether a party is properly implementing the conservation agreement, but do not require that the plan in question *effectively* protects habitat of the species. Because only the effectiveness of the plan bears on whether designation of critical habitat would provide additional benefits for the species, the Service must take this into account. The Service may not delegate its statutory duty to designate critical habitat, or narrow the scope of that duty, based on voluntary agreements by third parties that do not trigger the same protections as a critical habitat designation and which are not be legally enforceable by the public. Failing to look to the actual benefit of such agreements for species would be arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

VIII. The Service cannot rely on a categorical exclusion to avoid analysis of the Proposed Rule under NEPA.

The Service may not rely on a categorical exclusion to avoid further NEPA review because the Proposed Rule qualifies constitutes an "extraordinary circumstance" in which the Service may not rely on an exclusion at all. *See* 43 C.F.R. § 46.215. The Service must, at minimum, prepare an environmental assessment for the Proposed Rule.

First, the Service cannot rely on a CatEx for an action that has "significant effects on . . . wilderness areas; wild or scenic rivers; . . . wetlands; floodplains; . . . migratory birds; and other ecologically significant or critical areas." *Id.* § 46.215(b). The Proposed Rule would make it easier to leave areas that are essential to the conservation of listed species vulnerable to destruction and modification. Such areas likely include wilderness areas, wetlands, wild and scenic rivers, and floodplains; they are also, by definition, "ecologically significant or *critical* areas." *Id.* (emphasis added). Moreover, many listed species are migratory birds,[1] and many migratory birds are likely to be listed under the ESA in the future. The Service must prepare an analysis under NEPA to fully understand the impacts of its rule on these critical areas and species.

Second, the Proposed Rule "Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects." 43 C.F.R. § 46.215(d). The Proposed Rule removes the Service's discretion to protect critical habitat in certain circumstances where industry special interests allege economic or other impacts of designation. *See supra* Part III (describing proposed automatic triggers for habitat exclusion under Section 4(b)(2)). The impacts of leaving critical habitat unprotected are undoubtedly "potentially significant" for imperiled species and, therefore, analysis of the Proposed Rule is warranted.

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[1] *See* 50 C.F.R. § 17.11 (naming ESA-listed species, including migratory birds like the yellow-billed cuckoo, whooping crane, piping plover, snowy plover, red knot, and bachman's warbler).

Given the substantial evidence that "extraordinary circumstances" prevent the Service from relying on a CatEx, it would be arbitrary and capricious for the Service to finalize the rule without, at minimum, addressing these circumstances. *See Reed v. Salazar*, 744 F. Supp. 2d 98, 115 (D.D.C. 2010).

CONCLUSION

For the foregoing reasons, finalizing this rule as proposed would violate the ESA, APA, and NEPA. At a time of biodiversity crisis compounded by the climate crisis, the Service's proposal would leave critical habitat—areas already deemed crucial for species conservation—unprotected. Nothing in the ESA permits the Service to sacrifice imperiled species to protect the profits of industry special interests. The Proposed Rule should be withdrawn.

Respectfully submitted,

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On behalf of:

Alliance for Sustainability
American Bird Conservancy
Animal Welfare Institute
Center for Food Safety
Endangered Species Coalition
Endangered Habitats League
Environmental Defense Center
Environmental Protection Information Center
Friends of Minnesota Scientific and Natural Areas
Friends of the Mississippi River
International Marine Mammal Project, Earth Island Institute
Kettle Range Conservation Group
Klamath Forest Alliance
Los Angeles Audubon Society
Maine Audubon
Massachusetts Audubon
Massachusetts Pollinator Network
Minnesota River Valley Audubon Chapter
National Wolfwatcher Coalition
Natural Resources Defense Council
New Jersey Audubon
People & Pollinators Action Network
Pollinator Friendly Alliance
Prairie Hills Audubon Society
Save the Sound

South Carolina Aquarium
Starry Skies North
The Urban Wildlands Group
Vote Climate
Wyoming Untrapped