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Public Comments Processing
U.S. Fish and Wildlife Service
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Re: Comments on four related proposed rulemakings: (1) "Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants" (Docket No. FWS–HQ–ES–2025–0029); (2) "Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat (Docket No. FWS–HQ–ES–2025–0048); (3) "Endangered and Threatened Wildlife and Plants; Interagency Cooperation Regulations" (Docket No. FWS–HQ–ES–2025–0044); and (4) "Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat" (Docket No. FWS–HQ–ES–2025–0039)

Dear Sir/Madam:

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

(1) *Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants*, 90 Fed. Reg. 52,587 (Nov. 21, 2025) (the "Proposed Blanket Rule"), issued by the U.S. Fish and Wildlife Service;

(2) *Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat*, 90 Fed. Reg. 52,592 (Nov. 21, 2025) (the "Proposed Exclusion Rule"), issued by the U.S. Fish and Wildlife Service;

(3) *Endangered and Threatened Wildlife and Plants; Interagency Cooperation Regulations*, 90 Fed. Reg. 52,600 (Nov. 21, 2025) (the "Proposed Interagency Cooperation Rule"), issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, together; and

(4) *Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat*, 90 Fed. Reg. 52,607 (Nov. 21, 2025) (the "Proposed Listing Rule"), issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, 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. Moreover, ensuring compliance with the Act is a part of many State agencies' operations, including State transportation projects, utility construction and maintenance, forest and stormwater management, and other key infrastructure operations. Those efforts are stymied by federal overreach under the Act and associated increased litigation invited by the injection of ambiguity, new requirements, and vast agency discretion beyond the text of the Act.

We thus appreciate the Services' return in the Proposed Rules to a more cooperative federalism that recognizes the unique responsibilities and insights by States and other local partners. We also commend the Services for proposing to realign their regulations with the textual requirements of the Endangered Species Act. These steps are also good for conservation, easing regulatory burdens that are counterproductive and aligning incentives with landowners to work toward species recovery. We ask the Services to finalize the Proposed Rules as drafted.

BACKGROUND

Because many of the Proposed Rules seek to reinstate the 2019 rules, many of which the Services revised in 2024, some history of the pertinent regulations is in order.

A. The 2016 Rules

In early 2016, the Services issued two regulations that many of our States challenged as unlawful for attempting to substantially expand the Endangered Species Act beyond its longstanding and proper scope. *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 had 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 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. It also 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 species[1]] is not required . . . for the inclusion of unoccupied areas in a designation of critical habitat." 81 Fed. Reg. at 7420. Under the 2016 rule, then, 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 change set aside thirty years of agency precedent, but it 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.

The Supreme Court has also poured cold water on the interpretation the Services 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

[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)).

Secretary to designate the area as *critical* habitat unless it is also *habitat* for the species." *Weyerhaeuser*, 586 U.S. 9, 20 (2018). 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. For example, 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 2016 regulation 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 "destruction or adverse modification" to include alterations "that preclude or significantly delay development" of physical or biological features *that did not exist*. 81 Fed. Reg. at 7226. This overreach was particularly problematic when combined with the Services' change for designating critical habitat because 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 improvements to make the regulatory process more predictable and spur innovation for protecting at-risk species.

1. The 2019 Listing Rule

The 2019 Listing Rule made several changes to better align the Services' listing decisions with the text of the Act. *See Regulations for Listing Species and Designating Critical Habitat*, 84 Fed. Reg. 45,020 (Aug. 27, 2019).

First, 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.

Second, the Services complied with the Supreme Court's *Weyerhaeuser* decision by ensuring that unoccupied "critical habitat" is actually habitat: "[F]or an unoccupied area to be considered essential," the 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). This change made sense because a species that would not be classified as threatened or endangered on the front end should not—indeed, cannot—any longer be listed as a "threatened" or "endangered" species under the Act. Indeed, the goal of the Endangered Species Act is to preserve species, not to preserve listings when no longer needed.

Fourth, because the Act defines "threatened species" as those species 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.

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). 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. "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 ex-

plained, "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 to enhance transparency 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.

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). But the Act does not afford the same statutory protections to merely threatened species. Instead, "[w]henever 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 had extended endangered-species protections by blanket rule to all threatened species. In other words, 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. Those 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 more tailored approach, too. *See Regulations for Prohibitions to Threatened Wildlife and Plants*, 84 Fed. Reg. 44,753 (Aug. 27, 2019). That was a commendable move. 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 2019 definition read: "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." 84 Fed. Reg. at 45,016.

The 2019 rule also clarified several regulatory definitions and applications pertinent to the interagency consultation process, including "effects of the action," "environmental baseline," and "programmatic consultation." *Id.* 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. 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 2024 Rules

The 2019 rules were challenged in court, and many of our States intervened to defend them. *See* 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 based on the new policy priorities of the Biden administration. The court eventually granted that request, and in 2024 the Services finalized rules that repealed or substantially modified the 2019 rules.

First, among other things, the 2024 Listing Rule (1) removed the Services' ability to collect and report the economic impacts of listing determinations, (2) broadened the definition of "foreseeable future," (3) changed the criteria for

delisting a species, (4) removed from the list of circumstances in which the Services could 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) removed 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* 89 Fed. Reg. 24,300, 24,335 (Apr. 5, 2024).

Second, the Fish and Wildlife Service's 2024 Blanket Rule once again defaulted to providing threatened species the same "blanket" protection afforded to endangered species. *See* 89 Fed. Reg. 23,919, 23,940 (Apr. 5, 2024). The change put the Services' approaches at odds with each other and the Fish and Wildlife Service's approach in conflict with the text of the Endangered Species Act and conservation best practices.

Third, the 2024 Interagency Cooperation Rule (1) revised certain definitions in the 2019 rule, (2) deleted entirely the 2019 rule's clarification of when an activity or consequence of federal agency action is "reasonably certain to occur," and (3) authorized the Services to require offsite "offsets" as a "reasonable and prudent measure" to "mitigate" effects of incidental take at an agency action site. *See* 89 Fed. Reg. 24, 268, 24,297-98 (Apr. 5, 2024).

DISCUSSION

The Proposed Rules would repeal many unlawful aspects of the 2024 rules and by and large revert to the text of the 2019 rules. We commend and support the Services in doing so. These amendments are faithful to the best reading of the Endangered Species Act, which was intended to be applied in a manner that is balanced and reasonable when it was enacted with bipartisan support in 1973.

I. Proposed Listing Rule

Economic Impacts. To start, the Services are right to remove the phrase "without reference to possible economic or other impacts of such determination" from the end of 50 C.F.R. 424.11(b). As the Services note, the Act requires listing decisions to be made on the basis of the best scientific *and commercial* data available; it does not prohibit the Services from collecting or sharing related economic data about those decisions, and doing so fosters transparency and accountability.

Foreseeable Future. The 2024 Listing Rule broadened the definition of "foreseeable future" in 50 C.F.R. § 424.11(d), making it both broader and vaguer than the 2019 version and purporting to allow the Services to make decisions "as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats." That definition is circular and in great tension with the statutory text of the Act, which directs 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 that qualifier, the 2024 rule exceeded the Act's limitations, which do not allow the Services to use crystal balls or internal 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 Barbatus 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). Clarifying that the term foreseeable future "extends *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*," 90 Fed. Reg. at 52,610 (emphasis added), thus realigns the regulatory definition with the Act's text and reimposes statutory limits on the Services.

Factors Considered in Delisting Species. By adding the language of species "recovery," the 2024 rule confusingly suggested that there were additional, non-statutory factors that the Services could consider before delisting a species. But as the Services now recognize, "the standards for delisting a species are the same as the standards for a decision not to list it in the first instance," meaning that it is mandatory that the Services delist any species that "does not meet the definition of an endangered species or a threatened species." 90 Fed. Reg. at 52,610. The Proposed Rule thus conforms with the Act's statutory requirements and fulfills the Act's aim that some species will no longer warrant listing.

Not-Prudent Determinations. In the 2024 rule, the Services removed language from the criteria for designating critical habitat that clarified 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." 90 Fed. Reg. at 52,611. That removal erroneously implied that the Services could make critical habitat designations even if those designations would do *nothing* to help conserve a species. However, Congress did not grant such unlimited authority to the Services in the Endangered Species Act. *Cf. West Virginia v. Environmental Protection Agency*, 597 U.S. 697 (2022). Rather, as the Services previously explained, if "threats to the species' habitat stem solely from causes that cannot be addressed through management actions," then designating critical habitat anyway "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.* We strongly agree with the Services' proposal to reinstate the language from the 2019 rule, which aligns with the text of the Act.

Designating Unoccupied Areas. We likewise strongly support the Services' proposal to reinstate language specifying 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." 90 Fed. Reg. at 52,615. This two-step process is statutorily mandated because the Act itself 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) (emphasis added). An unoccupied area cannot be "essential for the conservation of the species" if designating occupied critical habitat alone would adequately conserve the species. The 2024 rule (and the 2016 rule before it) was thus unlawful, and the Services are right to remedy that violation.

The 2024 rule also violated the Act by diluting the statutory definition of "habitat." The Services propose to remedy that violation by reinstating language from the 2019 rule explaining 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." 90 Fed. Reg. at 52,615. The proposed rule thus recognizes that the Act and the Supreme Court require that unoccupied critical habitat be first and foremost "habitat" for the species. *See Weyerhaeuser*, 586 U.S. at 19-20. 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." Yet the 2024 Rule nonetheless suggested that the Secretary could designate unoccupied areas as "essential for the conservation of the species" even if those areas did not have the "physical or biological features *essential* to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii), (i) (emphasis added). Returning to the language of the 2019 Rule remedies that error.

The proposed rule's approach to listing "critical habitat" also accords with the limited role of that statutory concept. Following the Supreme Court's decision interpreting the Act in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), Congress limited the Act's reach as to critical habitat, including by statutorily defining that term for the first time. In introducing those definitions, the House 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. And the House 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. The Senate Committee likewise 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). So to the extent that legislative history is relevant, the 2024 Rule reflected a marked departure from how Congress originally intended for the concept of "critical habitat" to be understood, which the proposed rule now corrects.

II. Proposed Repeal of the Fish and Wildlife Service's Blanket Rule

We also support the Fish and Wildlife Service's proposed repeal of the blanket rule, which likewise remedies unlawful aspects of the 2024 rule.

First, as a federal court recently held, the Endangered Species Act compels a species-specific approach to designating protections for listed species. *See Kansas Nat. Res. Coal. v. U.S. Fish & Wildlife Serv.*, 780 F. Supp. 3d 650, 659 (W.D. Tex. 2025). Section 4(d) of the 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 suggestion in the 2024 rule, Congress did not grant the Services broad authority to regulate "any" (read "all") threatened species generally, but rather it provided a more limited authority 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). In other words, "[s]entence one sets out a mandatory duty" for the Secretary to issue regulations "he first 'deems necessary and advisable to provide for the conservation of that species.'" *Kansas Nat. Res. Coal.*, 780 F. Supp. 3d at 659. "Sentence two gives the Secretary discretion and guidance—he 'may by regulation prohibit with respect to any threatened species any act prohibited'" for an endangered species. *Id.* The second sentence simply "supplements" the first; "[i]t stretches credulity to conclude that Congress intended sentence two's discretionary duty to swallow sentence one's mandatory duty, thus neutering it altogether." *Id.* 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]henever any species is listed." Indeed, 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 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." *See* Jonathan Wood, *Take It to the Limit: The Illegal Regulations Prohibiting the Take of Any Threatened Species Under the Endangered Species Act*, 33 Pace Env't L. Rev. 23, 36 (2015) (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 2024 blanket rule is arbitrary and capricious because it does not further the conservation goals of the Endangered Species Act. Instead, it undermines them. By defaulting to the same burdensome standards for both endangered and threatened species, the 2024 blanket rule furthers the perverse incentives of heavy-handed "take" regulations and discourages 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 2024 blanket rule is all stick and no carrot—and the stick is one size fits all. With agency interpretations like that, perhaps it is no wonder Congress's goal of species *recovery* largely 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 once again rid itself of the blanket rule, which 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. The proposed rule would afford the Service the same flexibility that the National Marine Fisheries Service has long exercised and thereby align both Services vested with the same obligations under the Act.

For similar reasons, we also support the proposed addition of language specifying that each species-specific rule "will include a necessary and advisable determination (including consideration of conservation and economic impacts consistent with the findings and declaration of purposes and policy of the Endangered Species Act, 16 U.S.C. 1531, based on the best scientific and commercial data available) and will seek public comment on that determination." 90 Fed. Reg. at 52,591. The Act itself requires the consideration of "conservation and economic impacts" by requiring the Secretary to make a determination that the species-specific protections are both "necessary" and "advisable." 16 U.S.C. § 1533(d). But a decision could not be "advisable" if it "impose[d] billions of dollars in economic costs in return for a few dollars in . . . environmental benefits." *Kansas Nat. Res. Coal.*, 780 F. Supp. 3d at 661 (quoting *Michigan v. EPA*, 576 U.S. 743, 753 (2015)). Because any species-specific determination "requires consideration of costs," *Kansas Nat. Res. Coal.*, 780 F. Supp. 3d at 661, the Fish and Wildlife Service is right to add that requirement to its regulation. Our only recommendation is that the National Marine Fisheries Service do so as well in a subsequent rulemaking docket.

III. Proposed Interagency Cooperation Rule

The Services' Proposed Interagency Cooperation Rule also seeks to correct even further statutory violations in the 2024 rule.

First, the Services' 2024 interpretation of "reasonable and prudent measures" exceeded 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 tied to "minimiz[ing]" the "impact of such incidental taking on the species." *Id.*

For the first time in their history, the Services interpreted this provision in the 2024 rule to mean that they can require "measures implemented . . . outside of the action area that . . . offset the impact of incidental take." 50 C.F.R. § 402.14(i)(2). As the Services recognized when they proposed this rule, these additions constituted drastic changes in policy. *See* 88 Fed. Reg. at 40,758 (acknowledging that the 1998 Consultation Handbook confined "reasonable and prudent measures" to "minimization"—not "mitigation"—measures at the action site). The Services' pre-2024 interpretation was correct: 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 that actions taken to "minimize" that impact must occur there, too. The Services have

never been able to point to a provision of the Act that granted them the *additional* authority to regulate conduct and require offsets far from the action area. And the 2024 rule has been a recipe for arbitrary enforcement, allowing the Services to demand that private permit applicants pay for broader policy goals through off-site "offsets" that are only tangentially related to the requested agency action. As far as predictability goes, that 2024 rule change was a regulatory nightmare. The Services must correct this unlawful addition, and we strongly support the proposed rule in this regard.

Second, we support the Services' proposed changes to the definitions of "environmental baseline," "effects of the action," and "reasonably certain to occur." Those changes helpfully clarify when the environmental baseline is evaluated ("at the time of the proposed action") and uphold the statutory limitation of proximate causation when determining the "effects" of a federal agency action. As the Services rightfully note, "[i]f a consequence will happen irrespective of the proposed action, then it cannot be caused by the proposed action, *i.e.*, it would not be a reasonably certain result of the proposed action." 90 Fed. Reg. at 52,604.

IV. Proposed Exclusion Rule

Last, we also support the Fish and Wildlife Service's Proposed Exclusion Rule. Section 4(b)(2) of the Act allows the Secretary to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2). The Service's proposed rule would provide needed structure for when and how the Secretary conducts this analysis, affording participants and interested stakeholders clarity and involvement in the process.

In particular, given the Act's federalism mandate, *see* 16 U.S.C. § 1535(a), we appreciate the Service's recognition that States and local governments have particular expertise in the management of wildlife and that the Service must take account the actions by State officials when determining whether to exclude areas as critical habitat. *See* 90 Fed. Reg. at 52,599 (recognizing that "state or local governments" have expertise in identifying "[n]onbiological impacts" of a potential critical habitat designation), *id.* (proposing that the Secretary consider "[t]he degree to which agency review and required determinations (*e.g.*, State regulatory requirements) have been completed"). As the Service notes, one "benefit of exclusion" can be "the unhindered, continued ability to maintain existing partnerships, as well as the opportunity to seek new partnerships with potential [conservation] plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners," who, together,

"can implement conservation actions that the FWS would be unable to accomplish without their participation." *Id.* at 52,596.

CONCLUSION

We thank the Services for the opportunity to comment on the Proposed Rules and encourage the Services to finalize them as proposed.

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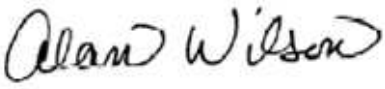

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