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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, a non-profit corporation, GREENPEACE, INC., a non-profit corporation, and DEFENDERS OF WILDLIFE, a non-profit corporation,

Plaintiffs,

vs.

DIRK KEMPTHORNE, Secretary, United States Department of the Interior, CARLOS GUTIERREZ, Secretary, United States Department of Commerce, DALE HALL,

Case No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Director, United States Fish and Wildlife Service, and JAMES BALSIGER, Acting Assistant Administrator, National Marine Fisheries Service,

Defendants.

I. INTRODUCTION

1. This case challenges the U.S. Department of the Interior's ("DOI") and U.S. Department of Commerce's ("DOC") (collectively "Departments") final Regulations Amending the Endangered Species Act Section 7 Implementing Regulations ("Final Regulations" or "Regulations"). The Regulations violate the Endangered Species Act ("ESA"), will inevitably contribute to the extinction of endangered and threatened species, and have been hastily promulgated in derogation of the public's right, under the Administrative Procedure Act ("APA"), to have a meaningful opportunity to comment on, and thereby influence, substantive regulations, particularly those that work fundamental changes in public policy and longstanding agency practice.

2. The Regulations will eliminate the requirement that federal agencies consult with the U.S. Fish and Wildlife Service ("FWS") or National Marine Fisheries Service (collectively, "the Services") – the mechanism enacted by Congress to ensure that federal agency actions do not jeopardize the recovery of endangered and threatened species or adversely modify their critical habitat – on potentially thousands of federal actions that may adversely affect listed species or their critical habitat. The Regulations also drastically weaken long-established regulatory standards (adopted by the Reagan Administration in 1986) that have governed the section 7 consultation process, by replacing those standards with vague, incoherent, and undefined terms that will invariably lead to inconsistent application, agency confusion, increased litigation, and, most important, decreased protection for species already on the brink of extinction.

3. Notwithstanding the fact that the Final Regulations provide federal action agencies with unprecedented authority to unilaterally assess the impact of their own actions on listed species and critical habitat, including agencies with poor or limited track records of complying with the ESA's section 7 consultation regulations, the Services have failed to require that agency personnel even undertake any training or establish even the most minimal scientific qualifications or competency before exercising the expansive new authority over endangered and threatened species afforded by the Regulations. Moreover, the Regulations do not even establish

any oversight or monitoring procedures to allow the Services to ensure that action agencies are administering these new standards correctly and are adequately protecting listed species and critical habitat, nor do they require such agencies to even document when they invoke the new regulations and forgo section 7 consultation in reliance on them.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702 (APA).

5. Venue is proper in the Northern District of California pursuant to 28 U.S.C. § 1391(e), as this civil action is brought against an agency of the United States and officers and employees of the United States acting in their official capacities and under the color of legal authority, no real property is involved in this action, and at least one Plaintiff resides in this judicial district.

III. INTRADISTRICT ASSIGNMENT

6. Pursuant to Local Rules 3-5(b) and 3-2(c) and (d), assignment of this case to the San Francisco or Oakland Division is appropriate because Plaintiffs are located in San Francisco County.

IV. PARTIES

7. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a non-profit 501(c)(3) corporation with offices in San Francisco and Joshua Tree, California, as well as in Arizona, New Mexico, Oregon, and Washington, D.C. The Center for Biological Diversity works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in species and habitat protection issues throughout the United States and the world, including protection of plant and animal species from the impacts of global warming. The Center has over 40,000 members throughout the United States and the world.

8. The Center brings this action on its own institutional behalf and on behalf of its members, many of whom regularly enjoy and will continue to enjoy educational, recreational, and scientific activities regarding endangered and threatened species and critical habitats

impacted by these regulations. The interests of the Center and its members in observing, studying, and otherwise enjoying endangered and threatened species and their critical habitats, and in obtaining and disseminating information regarding the survival of endangered and threatened species and their critical habitats, have been harmed by defendants' actions regarding these Regulations. In particular, the Regulations will increase the likelihood that many of the endangered and threatened species and critical habitats that the Center's members observe, study, photograph, and otherwise enjoy, will be adversely affected by federal agency actions, including those that contribute to global warming.

9. As a result of the Regulations, many federal agency actions affecting the Center's and its members' interests in particular species and habitats will no longer be subject to the safeguards of the ESA section 7 consultation process at all; and for those actions that are subject to the process, the Center's and its members' interests will also be impaired because the action agency and the Service are foreclosed by the Regulations from adequately addressing the full range of direct, indirect, and cumulative effects of agency actions on listed species and their critical habitats. For example, by declaring categorically that the impacts of any agency actions on greenhouse gas emissions (and hence on species threatened with extinction because of global climate change) are adverse effects that "need not be considered in any consultation," 73 Fed. Reg. 47872, the Regulations significantly increase the likelihood that species harmed by global climate change and as to which the Center and its members have recreational, aesthetic, scientific, and other concrete interests, will be driven to extinction.

10. The Center and its members are further injured by defendants' failure to prepare an Environmental Impact Statement and/or to prepare an adequate Environmental Assessment pursuant to the National Environmental Policy Act ("NEPA"). By failing to prepare a NEPA document that adequately discloses and discusses all of the adverse environmental impacts that will likely result from the Regulations, including those related to greenhouse gas emissions and climate change, defendants have further undermined the Center's and its members' interests in species and habitats affected by the Regulations.

11. For example, the Center submitted comments to the FWS urging it to address the

direct, indirect and cumulative impacts to threatened and endangered species from federally-permitted coal fired power plants. One such proposed project is the Desert Rock coal power plant in New Mexico. This plant will produce greenhouse gas emissions and climate change impacts as well as other effects on threatened and endangered species that will receive inadequate section 7 consultation under the Regulations. Comments submitted by the Center to the FWS explained that the Desert Rock power plant could result in adverse impacts to federally-listed species including Colorado pikeminow, razorback sucker, southwestern willow flycatcher, elkhorn and staghorn coral, Quino checkerspot butterfly and other species as to which the Center and its members have recreational, aesthetic, scientific and other concrete interests

12. Another example is the proposed White Pine coal fired power plant in Nevada. Once completed this project will result in the emission of greenhouse gases and will likely directly and indirectly impact threatened and endangered species. Yet under the Regulations impacts from the White Pine project to endangered and threatened species as to which the Center and its members have recreational, aesthetic, scientific and other concrete interests, including the desert tortoise, will not be adequately addressed or even considered. *Id.* at 2.

13. The Center and its members are also injured by defendants' hasty promulgation of the Regulations in a manner that has effectively nullified the public's right to comment under the APA on substantive regulations. By issuing the Regulations in a matter of weeks following the receipt of hundreds of thousands of public comments – the vast majority of which are severely critical of the rule – defendants have abridged the Center's and its members' procedural rights to meaningfully influence a rulemaking that threatens to undermine their concrete interests in many endangered and threatened species and critical habitats.

14. The Center and its members are further injured by the Regulations because the Regulations will render it extremely difficult, if not impossible, for the Center and its members even to effectively monitor and hence learn about when the Regulations are being invoked to bypass or limit section 7 consultations with respect to particular projects. The Regulations do not impose on action agencies or defendants themselves any obligation to routinely maintain

and make available to the public in a timely fashion a data base reflecting what projects the action agencies have determined may have effects on listed species but nonetheless may avoid any consultation with defendants. Consequently, there is no effective means by which the Center and its members may even learn about agency actions affecting species and habitats in which plaintiffs have concrete interests but that are being excluded from consultation, let alone challenge those actions in a timely fashion.

15. Plaintiff GREENPEACE, INC. ("Greenpeace") is a California non-profit corporation with offices in San Francisco, San Diego, Los Angeles, San Jose, Costa Mesa, as well as cities in 18 other states and the District of Columbia. Its mission is to raise public awareness of environmental problems and promote changes that are essential to a green and peaceful future. There are approximately 250,000 current Greenpeace members in the United States. Since the 1980's, Greenpeace has been a lead advocacy organization working to raise awareness of global warming and the protection of wildlife, and to advocate for serious cuts in greenhouse gas emissions through local, national, and global action. For the past decade, Greenpeace has campaigned on the causes and impacts of climate change in the Arctic, including the impacts on species which are threatened by continued Arctic warming.

16. Greenpeace brings this action on its own institutional behalf and on behalf of its members, many of whom regularly enjoy and will continue to enjoy educational, recreational, and scientific activities regarding endangered and threatened species and critical habitats impacted by the Regulations. The interests of Greenpeace and its members in observing, studying, and otherwise enjoying endangered and threatened species and their critical habitats, and in obtaining and disseminating information regarding the survival of endangered and threatened species and their critical habitats, are harmed by defendants' actions in adopting the Regulations. In particular, the Regulations will increase the likelihood that many of the endangered and threatened species and critical habitats that Greenpeace's members enjoy, including the beluga whale and Stellar sea lion will be adversely affected by federal agency actions, including those that contribute to global warming.

17. As a result of the Regulations, many federal agency actions affecting

Greenpeace's and its members' interests in particular species and habitats will no longer be subject to the safeguards of the ESA section 7 consultation process at all; and for those actions that are subject to the process, Greenpeace's and its members' interests will also be impaired because the action agency and the Service are foreclosed by the regulations from adequately addressing the full range of direct, indirect, and cumulative effects of agency actions on listed species and their critical habitats. For example, by declaring categorically that the impacts of any agency actions on greenhouse gas emissions (and hence on species threatened with extinction because of global climate change) are adverse effects that "need not be considered in any consultation," 73 Fed. Reg. 47872, the Regulations significantly increase the likelihood that species harmed by global climate change and as to which Greenpeace and its members have recreational, aesthetic, scientific, and other concrete interests, will be driven to extinction.

18. Greenpeace and its members are further injured by defendants' failure to prepare an Environmental Impact Statement and/or to prepare an adequate Environmental Assessment pursuant to the National Environmental Policy Act ("NEPA"). By failing to prepare a NEPA document that adequately discloses and discusses all of the adverse environmental impacts that will likely result from the Regulations, including those related to greenhouse gas emissions and climate change, defendants have further undermined Greenpeace's and its members' interests in species and habitats affected by the Regulations.

19. Greenpeace and its members are also injured by defendants' hasty promulgation of the Regulations in a manner that has effectively nullified the public's right to comment under the APA on substantive regulations. By issuing the Regulations in a matter of weeks following the receipt of hundreds of thousands of public comments – the vast majority of which are severely critical of the rule – defendants have abridged Greenpeace's and its members' procedural rights to meaningfully influence a rulemaking that threatens to undermine their concrete interests in many endangered and threatened species and critical habitats. Greenpeace and its members are further injured by the Regulations because the Regulations will render it extremely difficult, if not impossible, for Greenpeace and its members even to effectively monitor and hence learn about when the Regulations are being invoked to bypass or

limit section 7 consultations with respect to particular projects. The Regulations do not impose on action agencies or defendants themselves any obligation to routinely maintain and make available to the public in a timely fashion a data base reflecting what projects the action agencies have determined may have effects on listed species but nonetheless may avoid any consultation with defendants. Consequently, there is no effective means by which Greenpeace and its members may even learn about agency actions affecting species and habitats in which plaintiffs have concrete interests but that are being excluded from consultation, let alone challenge those actions in a timely fashion.

20. Plaintiff DEFENDERS OF WILDLIFE ("Defenders") is a non-profit 501(c)(3) organization headquartered in Washington, D.C. with field offices in Alaska, California, Colorado, Florida, Idaho, Montana, New Mexico, Oregon, Canada and Mexico. Founded in 1947, Defenders is a science-based conservation organization with more than 1,000,000 members and supporters nationwide.

21. Defenders is dedicated to the protection of all native wild animals and plants in their natural communities, and the preservation of the habitat on which they depend. Defenders advocates new approaches to wildlife conservation that will help keep species from becoming endangered, and it employs education, litigation, research, legislation and advocacy to defend wildlife and their habitat.

22. Defenders is one of the nation's leading advocates for endangered species and has been involved in issues of ESA implementation for more than 30 years. Recently Defenders testified before Congress on the importance of the consultation process for wildlife and the impacts of these regulations on critical checks and balances established by Congress through section 7 of the ESA. Defenders also submitted detailed comments on the proposed regulations and the environmental assessment, stressing how the regulatory changes undermine the ESA section 7 consultation process and the failure of defendants to prepare an adequate Environmental Assessment. A leading voice on the impacts of global warming on wildlife, Defenders released in November 2008 a new report, *Beyond Cutting Emission: Protecting Wildlife and Ecosystems in a Warming World*, that advocates a national strategy for addressing

global warming.

23. Defenders brings this action on its own institutional behalf and on behalf of its members and staff who derive scientific, aesthetic, recreational, and spiritual benefit from the endangered and threatened species and their habitats that will be impacted by these regulation. The interests of Defenders in observing, studying, and otherwise enjoying endangered and threatened species and their critical habitats, and in obtaining and disseminating information regarding the survival of endangered and threatened species and the critical habitats have been harmed by defendant's actions regarding these regulations. In particular, these regulations will increase the likelihood that many of the endangered and threatened species and critical habitat that Defenders' members observe, study, photograph, and otherwise enjoy will be adversely affected by federal agency actions, including those that contribute to global warming.

24. As a result of the Regulations, many federal agency actions affecting Defenders' and its members' interests in particular species and habitats will no longer be subject to the safeguards of the ESA section 7 consultation process at all; and for those actions that are subject to the process, Defenders' and its members' interests will also be impaired because the action agency and the Service are foreclosed by the Regulations from adequately addressing the full range of direct, indirect, and cumulative effects of agency actions on listed species and their critical habitats. For example, by declaring categorically that the impacts of any agency actions on greenhouse gas emissions (and hence on species threatened with extinction because of global climate change) are adverse effects that "need not be considered in any consultation," 73 Fed. Reg. 47872, the Regulations significantly increase the likelihood that species harmed by global climate change and as to which Defenders and its members have recreational, aesthetic, scientific, and other concrete interests, will be driven to extinction.

25. Defenders and its members are further injured by the Regulations because the Regulations will render it extremely difficult, if not impossible, for Defenders and its members even to effectively monitor and hence learn about when the Regulations are being invoked to bypass or limit section 7 consultations with respect to particular projects. The Regulations do not impose on action agencies or defendants themselves any obligation to routinely maintain

and make available to the public in a timely fashion a data base reflecting what projects the action agencies have determined may have effects on listed species but nonetheless may avoid any consultation with defendants. Consequently, there is no effective means by which Defenders and its members may even learn about agency actions affecting species and habitats in which plaintiffs have concrete interests but that are being excluded from consultation, let alone challenge those actions in a timely fashion.

26. Defenders and its members are also injured by defendants' hasty promulgation of the Regulations in a manner that has effectively nullified the public's right to comment under the APA on substantive regulations. By issuing the Regulations in a matter of weeks following the receipt of hundreds of thousands of public comments – the vast majority of which are severely critical of the rule – defendants have abridged Defenders' and its members' procedural rights to meaningfully influence a rulemaking that threatens to undermine their concrete interests in many endangered and threatened species and critical habitats.

27. Defenders and its members are further injured by defendants' failure to prepare an Environmental Impact Statement and/or to prepare an adequate Environmental Assessment pursuant to the National Environmental Policy Act ("NEPA"). By failing to prepare a NEPA document that adequately discloses and discusses all of the adverse environmental impacts that will likely result from the Regulations, including those related to greenhouse gas emissions and climate change, defendants have further undermined Defenders' and its members' interests in species and habitats affected by the Regulations.

28. Defendant DIRK KEMPTHORNE, United States Secretary of the Interior, is the highest ranking official within the U.S. Department of the Interior and, in that capacity, has ultimate responsibility for the administration and implementation of the ESA with regard to terrestrial endangered and threatened species, and for compliance with all other federal laws applicable to the Department of the Interior. He is sued in his official capacity.

29. Defendant CARLOS GUTIERREZ, United States Secretary of Commerce, is the highest ranking official within the U.S. Department of Commerce and, in that capacity, has ultimate responsibility for the administration and implementation of the ESA with regard to

most marine endangered and threatened species, and for compliance with all other federal laws applicable to the Department of Commerce. He is sued in his official capacity.

30. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is a federal agency within the Department of the Interior authorized and required by law to protect and manage the fish, wildlife and native plant resources of the United States, including enforcing and implementing the ESA. The Service has been delegated primary authority for day-to-day administration of the ESA with respect to terrestrial species.

31. Defendant NATIONAL MARINE FISHERIES SERVICE is a federal agency within the Department of Commerce authorized and required by law to protect and manage marine resources of the United States, including enforcing and implementing the ESA. NMFS has been delegated primary authority for day-to-day administration of the ESA with respect to most marine species.

V. STATUTORY AND REGULATORY FRAMEWORK

A. The Endangered Species Act

32. Recognizing that all of the country's "species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people," 16 U.S.C. § 1531(a)(3), Congress enacted the ESA with the express purpose of providing both a "means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] . . . a program for the conservation of such endangered species." 16 U.S.C. § 1531(b).

33. The ESA "is the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The Supreme Court's review of the ESA's "language, history, and structure" convinced the Court "beyond a doubt" that "Congress intended endangered species to be afforded the highest of priorities." *Id.* at 174. As the Court found, "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184.

34. Principal responsibilities for implementing the Act have been delegated to the

FWS, an agency within the Department of the Interior, and to the National Marine Fisheries Service ("NMFS"), an agency within the Department of Commerce.

35. A "species" is defined by the Act to include "any subspecies of fish or wildlife or which interbreeds when mature . . . ." 16 U.S.C. § 1532(16). Before a species may receive protection under the ESA, it must be listed by the Services as "endangered" or "threatened."

36. A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A species is "threatened" if it is "likely to become an endangered species within the foreseeable future." 16 U.S.C. § 1532(20).

37. When the Services list a species as endangered or threatened, they generally must also designate critical habitat for that species. Section 4(a)(3)(A)(i) of the ESA states that, "to the maximum extent prudent and determinable," the Services, "shall, concurrently with making a determination . . . that a species is an endangered species or threatened species, designate any habitat of such species which is then considered to be critical habitat . . . ." 16 U.S.C. § 1533(a)(3)(A)(i); *see also id.* at § 1533(b)(6)(C).

38. Critical habitat is defined by Section 3 of the ESA as: "(i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the [ESA], on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it was listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A).

39. For any "endangered species," the ESA makes it unlawful for any person to "take any such species within the United States." 16 U.S.C. § 1538(a)(1)(B). The term "take" includes "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19).

40. Under section 7(a)(2) of the Act, each federal agency "shall, in consultation with the Secretary, insure that any action authorized, funded, or carried out by such agency [] is not likely to jeopardize the continued existence of any endangered species or threatened species or

result in the destruction or adverse modification" of the species' designated critical habitat. 16 U.S.C. § 1536(a)(2). Further, "[t]o facilitate compliance with the requirements of subsection (a)(2), each Federal agency shall . . . request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action." *Id.* § 1536(c).

41. Section 7 and its implementing regulations, as adopted in 1986, set forth a detailed process that must be followed before agencies take or approve actions that may harm a species or impair its critical habitat. Initially, the "action agency" may be required to prepare a "Biological Assessment" "concerning listed [] species and designated and proposed critical habitat that may be present in the action area . . .." 50 C.F.R. § 402.02; *see also* 16 U.S.C. § 1536(c)(1).

42. Under the 1986 regulations, if the contemplated action "may affect listed species or critical habitat," then the agency and the Secretary must pursue "formal consultation," 50 C.F.R. § 402.14(a), that requires the action agency to submit extensive information to the Services, including "the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an addition may have upon listed species or critical habitat." *Id.* § 402.14(d).

43. The Services' "responsibilities during formal consultation" include "[r]eview[ing] all relevant information provided by the Federal agency or otherwise available," including "an on-site inspection of the action area," "[e]valuat[ing] the effects of the action and cumulative effects on listed species or critical habitat," and then producing a Biological Opinion ("BO") that must contain a "detailed discussion of the effects of the action on listed species or critical habitat," and determine "whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or modification of critical habitat." *Id.* at §§ 402.14(g), (h)(2).

44. If "jeopardy" or "destruction or adverse modification of critical habitat" is likely to occur, then the Services must prescribe in the BO "reasonable and prudent alternatives" to avoid these results. *Id.* The BO must also include a written statement (referred to as the

"Incidental Take Statement") specifying "the impacts of such incidental taking on the species," any "reasonable and prudent measures that the [Services] consider[] necessary or appropriate to minimize such impact," and the "terms and conditions" that the agency must comply with in implementing those "measures." 16 U.S.C. § 1536(b)(4).

45. With regard to actions that "may affect" listed species or critical habitat, the Services' longstanding regulations implementing section 7 of the ESA allow formal consultation and the issuance of a BO to be avoided only when the Services issue a "written concurrence" that the proposed action "is not likely to adversely affect any listed species or critical habitat." 50 C.F.R. § 402.13(a). During this "informal consultation" between the action agency and the Services, the Services not only decide whether to "concur" that formal consultation may be avoided, but may also "suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat." *Id.* § 402.13(b).

46. When the section 7 consultation regulations were promulgated in 1986, the Services stated that they "properly and accurately implement[]" the ESA and "afford[] the protection mandated by section 7 of the ESA." 51 Fed. Reg. 19927 (1986). The Services also stated that the "purpose" of the regulations was to "streamline the consultation process while maintaining the protections afforded species under section 7." *Id.* The preamble to the 1986 regulations further explained that the "Service believes that informal consultation is extremely important and may resolve potential conflicts (adverse effects) and eliminate the need for formal consultation. Through informal consultation, the Service can work with the Federal agency and any applicant and suggest modifications to the action to reduce or eliminate adverse effects" to the species or its critical habitat. *Id.* at 19949.

B. The National Environmental Policy Act

47. NEPA is "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It was enacted in 1970 to put in place procedures to insure that, before irreversibly committing resources to a project or program, federal agencies "encourage productive and enjoyable harmony between man and his environment," "promote efforts which

will prevent or eliminate damage to the environment," and "enrich understanding of the ecological systems and natural resources important to the Nation." 42 U.S.C. § 4321.

48. NEPA seeks to guarantee that: (1) agencies take a "hard look" at the environmental consequences of their actions before these actions occur by ensuring that the agency carefully considers detailed information concerning significant environmental impacts; and (2) agencies make the relevant information available to the public so that it may also play a role in both the decision making process and the implementation of that decision. *See, e.g.* 40 C.F.R. § 1500.1.

49. NEPA and the regulations promulgated thereunder by the Council on Environmental Quality ("CEQ") require that all federal agencies must prepare an environmental impact statement ("EIS") for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4.

50. The fundamental purpose of an EIS is to force the decision-maker to infuse the policies and goals defined in NEPA into the actions of the federal government. 40 C.F.R. § 1502.1. An EIS analyzes the potential environmental impacts, alternatives and mitigation opportunities for major federal actions.

51. An EIS must provide a detailed statement of: (1) the environmental impact of the proposed action; (2) any adverse environmental effects that cannot be avoided should the proposed action be implemented; (3) alternatives to the proposed actions; (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(C).

52. An EIS must "inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. NEPA also requires federal agencies to analyze the direct, indirect, and cumulative impacts of the proposed action. 40 C.F.R. §§ 1508.7 & 1508.8. In addition to alternatives and impacts, NEPA requires agencies to consider mitigation measures to minimize the environmental impacts of the proposed action. 40 C.F.R. § 1502.14

(alternatives and mitigation measures); *id.* at § 1502.16 (environmental consequences and mitigation measures).

53. An agency may first prepare a detailed Environmental Assessment ("EA") to determine whether the project *may* significantly affect the environment and requires a full EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.9. An EA is "a concise public document" that serves to "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." *Id.* As with any document prepared under NEPA, an environmental assessment is intended to "ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b).

54. Significance is based upon the "intensity" and "context" of the action. 40 C.F.R. § 1508.27. "Context" refers to the geographic and temporal scope of the agency action and the interests affected. Id. at § 1508.27(a). "Intensity" addresses the severity of the impacts. *Id.* at § 1508.27(b). Factors relevant to intensity include: the degree to which the effects on the quality of the human environment are likely to be highly controversial; the degree to which the action may adversely affect an endangered or threatened species or its critical habitat; the presence of "uncertain impacts or unknown risks;" whether the action is "related to other actions with individually insignificant but cumulatively significant effects;" and whether the project "threatens a violation" of other laws. *Id.* at § 1508.27(b).

55. If, after preparing an EA, the agency determines an EIS is not required, the agency must provide a "convincing statement of reasons" why the project's impacts are insignificant and issue a Finding of No Significant Impact or "FONSI." 40 C.F.R. §§ 1501.4, 1508.9 & 1508.13.

C. The Administrative Procedure Act

56. The Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, provides general rules governing the issuance of proposed and final regulations by federal agencies. Fundamental to the APA's procedural framework is the requirement that, except in narrow circumstances, a federal agency publish as a proposal any rule that it is considering adopting

and allow the public a reasonable opportunity to submit written comments on the proposal. 5 U.S.C. § 553.

57. A "rule" is defined by the APA as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency...." 5 U.S.C. § 551(4).

58. Specifically, the APA provides that all federal agencies must give "general notice" of any "proposed rule making" to the public by publication in the Federal Register. The publication must, at a minimum, include "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b).

59. In addition, the APA requires that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c).

60. An agency may only short-circuit the public notice and comment requirements of the APA if it finds, "for good cause," that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b).

VI. FACTUAL AND PROCEDURAL BACKGROUND

A. The Proposed Regulations

61. On August 15, 2008, the Services issued Proposed Regulations Amending the Endangered Species Act's Section 7 Regulations ("Proposal"). *See* 73 Fed. Reg. 47868, August 15, 2008. Notwithstanding the fact that the Proposal represented the most significant changes to the ESA's implementing regulations in more than 20 years, the public was initially provided with just 30 days in which to comment.

62. In summarizing the Proposal, the Services explained that they "are proposing

these changes to clarify several definitions, to clarify when the section 7 regulations are applicable and the correct standards for effects analysis, and to establish time frames for the informal consultation process." 73 Fed. Reg. at 47868.

63. More specifically, according to the Services, the regulatory changes would "reduce the number of unnecessary consultations," by "allow[ing] a Federal action agency to make a 'not likely to adversely affect' determination without the concurrence from the Services" in a wide variety of circumstances that previously required some form of consultation with the Services. *Id.* at 47871. The Services, however, did not identify even a single "unnecessary" consultation nor did they adequately justify how eliminating the requirement that the Services concur on "not likely to adversely affect" determinations will improve the conservation of endangered and threatened species. The Services stated that they "believe that Federal action agencies are fully qualified to make these determinations," yet they provided no evidence establishing such qualifications, nor did they propose to adopt any requirement that agency personnel authorized to make these determinations must, in fact, be so qualified. The Services also noted that they "have determined that actions satisfying these [proposed] criteria will not cause adverse effects on listed species," but they failed to explain in any coherent fashion how such a finding could reasonably be predetermined with respect to potentially thousands of different future federal actions producing a wide range of adverse effects on listed species and critical habitats.

64. In addition, the Services "propose[d] to clarify the appropriate causation standard to be used in determining the effects of agency actions" and to make what the Services characterized to the public in the preamble as "relatively minor procedural changes to 'informal' consultations, including inserting time frames into the informal consultation process." *Id.* at 47869. In reality, contrary to the Services' characterization, the proposed changes would severely limit the kinds of direct, indirect, and cumulative effects that must be addressed in section 7 consultations, and would also result in a plethora of actions harmful to listed species proceeding without the Services' input or involvement merely because the Services lacked adequate time or resources to respond within the mandatory time frames

imposed by the regulations.

65. The Services did not propose any system for monitoring how the new regulations are implemented. In fact, the Proposal did not even require action agencies to document when they are forgoing section 7 consultation under the new standards. The Services also did not propose any standards or process for determining which personnel within action agencies would be equipped to evaluate the impacts of projects on listed species, or even for training such personnel as to the correct understanding and implementation of crucial terms and phrases never previously employed in the context of implementation of section 7 of the ESA.

66. The Services proffered several justifications for the Proposal, none of which suggested any genuine urgency in modifying the section 7 process that has been in place for decades, much less how the proposed regulatory changes would advance the conservation of endangered and threatened species. First, the Services noted that "[s]ince [the 1986 section 7 consultation] regulations were issued, much has happened." *Id.* at 47868. For example, "[t]he Services have gained considerable experience implementing the Act, as have other Federal agencies, States, and property owners . . . ." *Id.* However, the Services' Proposal did not demonstrate that "[f]ederal agencies, States, and property owners" have the requisite biological expertise, neutrality, resources, or other attributes necessary to make accurate assessments as to the likely impact of their own projects on listed species, let alone to apply the entirely new concepts incorporated into the Regulations.

67. Second, the Services announced that they were proposing "these regulatory changes in response to new challenges we face with regard to global warming and climate change." *Id.* at 47869. However, the proposal did not explain why entirely excluding global climate change effects from the section 7 process is consistent with the language and purposes of the ESA, nor why it makes any sense to list a species as endangered or threatened due to global climate change, but then to entirely ignore in the section 7 process the very impacts that resulted in the species' listing and are contributing to its extinction. Finally, the Services stated that the Regulations somehow respond to a 2004 GAO report on section 7 consultation which found, among other things, "that although the Services had made improvements to the

consultation process, it remained contentious between the Services and action agencies." *Id.* The Proposal did not acknowledge, however, that the "GAO concluded that, given the unique requirements and circumstances of different species, a 'healthy dose of professional judgment' from the Services would always be required, meaning there will always be some disagreements." *Id.*

68. On September 15, 2008, in response to strenuous objections to the truncated rulemaking process by members of Congress, conservation organizations, and many others, the Services agreed to extend the public comment period on the Proposal by only 30 days.

69. The Services received nearly 300,000 comments on the Proposal, the vast majority of which strongly objected to the proposed regulations on the grounds that they are both unlawful and devastating to the conservation of the nation's imperiled wildlife.

70. By letter dated October 14, 2008, plaintiff Center for Biological Diversity and other conservation organizations urged the Services not to adopt the Proposal. In their letter the Center advised the Services that "[t]he Proposal arbitrarily and unlawfully upends the ESA's longstanding and successful regulatory regime for ensuring that endangered and threatened species and their critical habitats are adequately protected from the effects of literally tens of thousands of federal projects each year." The Center also pointed out that the "[t]he Services have failed to put forth any rational bases for these drastic changes including, most important, any coherent explanation of how this Proposal will advance the purposes of the ESA and the conservation of endangered and threatened species . . .." Instead, the Center commented that the Proposal "will foster confusion, inconsistent application, increased litigation and drastically weakened protections for listed species."

71. Regarding the Proposal's stated intent to "respond to new challenges we face with regard to climate change," the Center responded that "the proposed regulations attempt to create an exemption for greenhouse gas emissions to the definitions of direct, indirect, and cumulative impacts and other changes in the consultation procedures." The Center also explained that "[t]he proposed changes are illegal and conflict with the plain language of the statute" and that "given the preeminent threat of global warming to plants and animals, ignoring greenhouse gas

emissions in Section 7 consultations cannot possibly contribute to the conservation of listed species."

72. Plaintiffs Defenders of Wildlife and Greenpeace echoed and further elaborated on these objections to the regulations' legality and wisdom, as did many other commenters. For example, 80 environmental law professors from around the country submitted a 67-page comment letter delineating various legal flaws in the rulemaking, bemoaning the "hushed and hurried manner" in which it was being adopted, and explaining that, if adopted, it would "place[] some of the most important decisions federal agencies can make about the management of protected species and their ecosystems in the hands of agencies that have a basic conflict of interests and often have no knowledge or expertise regarding either species or habitat."

73. The Services issued a Draft Environmental Assessment ("Draft EA") regarding the Proposal concluding, among other things, that "none of the individual proposed changes are anticipated to have any significant environmental impacts" and also that "the proposed changes collectively will not have any environmental impacts." Draft Environmental Assessment for the Proposed Modifications to Regulations Implementing Interagency Cooperation Under the Endangered Species Act, at 25. The Services also asserted that "the substantive standards that protect listed species and designated habitat proposed by these regulations are not changed by the proposed action" and that the Regulations "only involve process modifications to implementation of section 7 of the ESA." *Id.*

74. On October 27, 2008, the Services reopened the comment period on the Proposal for just 10 days so that the public could comment on the Draft EA. By letter dated November 6, 2008, the Center and many other conservation organizations submitted comments addressing numerous flaws with the Draft EA. Thus, for example, the Center noted that "a ten-day comment period is woefully inadequate to respond to the major issues raised by this Draft EA." Moreover, the Center explained that the "Draft EA fails to consider information that is vital to proper and thorough analysis of the proposed action at hand," including information regarding "global warming and climate change's profound impact upon threatened and endangered species." The Center also noted that the Draft EA fails to adequately address cumulative effects,

including those pertaining to climate change, and failed to consider a reasonable range of alternatives. Finally, the Center explained that given the Proposal's significant impact on endangered and threatened species and critical habitats the Services were required to complete an EIS.

B. The Final Regulations

75. On December 11, 2008, the defendants announced that "today they published joint final regulations" amending the ESA's section 7 interagency cooperation regulations.[1] Notwithstanding that most of the hundreds of thousands of comments submitted by the public were strongly opposed to the Services' proposed changes to the Section 7 regulations, the Services largely adopted the Proposal, although they also added a new basis for avoiding consultation that was never previously made available for public comment.

76. The Regulations provide that section 7 consultation may be avoided entirely with regard to effects of agency actions that may in fact adversely affect listed species or critical habitats but are determined by action agencies themselves to be "manifested through global processes" and that meet certain criteria. This new exclusion from the safeguards of the ESA, as to which the public had no opportunity to comment before the rule was adopted, does not further define what is meant by "global processes," nor does it provide any guidance as to how agencies should apply the criteria for excluding actions from the consultation process.

77. The Regulations further provide that action agencies may avoid consultation entirely with regard to actions that may affect species or critical habitats but as to which the action agencies themselves determine that the effects of the action "[a]re not capable of being meaningfully identified or detected in a manner that permits evaluation" or are regarded by the action agency as "wholly beneficial." The Regulations do not further define these phrases, nor do they provide any other meaningful guidance to action agencies as to how they should be interpreted and applied.

78. To the extent an action agency decides to forgo any consultation with the Services on an action that may affect listed species, the Regulations fail to explain how the agency can

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[1] Plaintiffs' descriptions of the Final Regulations are all based on information and belief.

then meet its statutory duty to "request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action."

79. The Regulations further provide that, even after initiating consultation with the Services because an action may in fact affect listed species or critical habitat, an action agency may nonetheless "terminate consultation" and proceed with the action without obtaining any written (or other) concurrence from a Service that the action is not likely to adversely affect listed species or critical habitat. Under the Regulation, consultation is terminated and the "consultation provision in section 7(a)(2) is satisfied" – even if there has actually been no "consultation" whatsoever – simply because 60 days has passed with no input by the Service.

80. Even with regard to those agency actions that continue to be subject to a genuine consultation requirement under the Regulations, the Regulations codify definitions of the "effects" of actions that will exclude from consideration by the Services and action agencies many adverse impacts on listed species and critical habitats. With regard to "cumulative effects" that must be considered, the Regulations provide that such effects "do not include future Federal activities that are physically located within the action area of the particular Federal action under consideration," and, even with respect to "future State or private activities" that must be considered, only effects that are "reasonably certain to occur within the action area" need be addressed. With regard to "indirect effects" that must be considered, the Regulations define such effects as "those for which the proposed action is an essential cause," without defining what that term means, and again provide that "[r]easonably certain to occur is the standard used to determine the requisite confidence that an effect will occur."

81. In adopting the Regulations, the Services failed to provide a more coherent rationale for them than the Services did at the proposal stage. Instead, the Services offered several objectives the regulations are meant to accomplish, all of which are arbitrary and/or fail to justify the regulatory changes made in the Regulations. First, the Services state that the Regulations "amend [] the cumulative effects language [] to clarify and distinguish the term 'cumulative effects' under the ESA from the term 'cumulative effects' under NEPA" – which requires consideration of prospective federal, as well as state and private, actions -- and that the

Regulation "clarifies the current regulatory definition of cumulative effects and distinguishes it from the definition of 'cumulative effects' in NEPA." The Services, however, fail to provide a coherent rationale for adopting a regulatory definition of "cumulative effects" under the ESA that is far narrower than the definition of "cumulative effects" under NEPA; nor do the Services explain how excluding foreseeable federal actions from the definition of cumulative effects advances the conservation of endangered and threatened species.

82. According to the Services, the Regulation also "clarifies" the term "reasonably certain to occur" in the terms "effects of the action" and "cumulative effects" and rejects a more protective "reasonably foreseeable" standard as used in NEPA analysis. The Services' explanation is that "NEPA is designed to insure that a decision maker has a full complement of information about the possible environmental effects of the decision before making it" and hence "that the more information the decision maker has, the better the decision is likely to be," but that "[t]he ESA, on the other hand, is designed to insure the accomplishment of a particular substantive objective, i.e., that Federal actions are not likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat," and "[u]nlike NEPA, the prohibition in the ESA can stop an otherwise worthwhile Federal project from going forward." "For that reason," the Services assert that "it makes sense" to adopt the less protective "reasonably certain to occur" standard in lieu of one that encompasses all "reasonably foreseeable" effects in determining the impacts of agency actions on listed species and critical habitats. This explanation, however, essentially concedes the illegality of a standard that, by the Services' own admission, does not and cannot ensure that the Services or action agencies will have a "full complement of information about the possible environmental effects" of agency actions on listed species or critical habitats. Indeed, given the ESA's strict statutory prohibition on any federal actions likely to result in jeopardy to species or adverse modification of critical habitats, a standard that requires the assessment of all "reasonably foreseeable" effects is far more consistent with the language and purpose of the ESA than one that only requires agencies to examine effects "reasonably certain to occur."

83. In adopting the Regulations, the Services also explain that the Final Rule "is intended to assist agencies in determining when consultation is necessary under section 7(a)(2)," including by exempting a plethora of potential federal actions from the section 7 consultation requirements. Accordingly, throughout the Final Rule the Services repeatedly assert that "[a]ction agencies and agency personnel have struggled periodically to determine when informal and formal consultation is required" and that "this rule assists action agencies in determining when consultation is necessary in the very narrow circumstances of agency actions involving effects that are manifested through global processes." Yet the Final Rule fails to provide any coherent explanation for how eliminating any section 7 consultation between the Services and action agencies on potentially tens-of-thousands of actions annually that may affect listed species or critical habitat could possibly help such agencies, including those with little if any expertise conserving endangered species or administering the ESA, to determine when consultation is required. Moreover, the assertion that the rule only applies "in the very narrow circumstances of agency actions involving effects that are manifested through global processes" is patently inconsistent with the Regulation itself, which also applies to effects that "are not capable of being meaningfully identified or detected in a manner that permits evaluation," and that have nothing to do with so-called "global processes."

84. The public was never afforded an opportunity to comment on the exception from the consultation requirement of effects "manifested through global processes" because it was not part of the Services' original proposal. The Final Rule also fails sufficiently to define "global processes," beyond climate change effects, nor does it provide a rational basis for excluding such effects from the consultation process.

85. The Services also point to their increased section 7 consultation workload to justify the Regulation's new consultation exceptions. For example, the Services state that "requests to the Services for technical assistance or section 7 consultations increased from 41,000 requests in 1999 to over 68,000 requests in fiscal year 2006," and that "[i]n 2006, there were 39,346 requests for technical assistance, 26,762 requests for informal consultations, and 1,936 requests for formal consultations." The Services do not explain, however, whether

endangered and threatened species have benefited or suffered as a result of these increased consultations and requests for "technical assistance," nor do they explain why devoting additional resources to the consultation process rather than adopting wholesale exclusions from it would not be a more reasonable and appropriate response to the Services' increased consultation workload in light of the ESA's overarching species-protection purposes.

86. The preamble to the Final Rule also suggests that exempting action agencies from having to consult pursuant to section 7 regarding myriad federal actions that may affect listed or critical habitat is justified because "Congress left it to the Services to craft the consultation process, including the interpretation of the reach of the statute and the development of an appropriate trigger for formal and informal consultation." The Services, however, entirely fail to address comments discussing the ESA's extensive legislative history that plainly establishes that Congress did not leave it to the Services to define consultation. Rather, the legislative history clearly provides, consistent with the ESA's longstanding section 7 regulations, that Congress ratified a requirement that section 7 consultation occur with respect to every federal action that "may affect" listed species or critical habitat in any manner.

87. In adopting the Regulations, the Services also incorrectly rely on Supreme Court rulings to buttress their argument that they have essentially unfettered discretion to define when consultation is required, or to define away the consultation obligation entirely. Although the Services cite *See Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 515 U.S. 687, 708 (1995)), nothing in that decision supports the Services' assertion that Congress delegated to the Services the authority to "interpret[] the reach of the statute and the development of an appropriate trigger for formal and informal consultation." The Services also erroneously assert that under *National Association of Home Builders v. Environmental Protection Agency*, 127 S. Ct. 2518 (2007) ("*NAHB*"), "[t]he Supreme Court recently upheld the Services' determination that no further consultation is required once an agency determines that their action is non-discretionary," and hence that the Services have sweeping authority to interpret the section 7 obligation as they see fit. In reality, however, *NAHB* simply addressed the narrow situation in which ambiguity exists because compliance with section 7 would repeal by

implication a non-discretionary statutory duty established prior to enactment of the ESA. Nothing in *NAHB* supports the Services' decision to dispense with the consultation obligation in any other context, and the case plainly does not stand for the proposition that action agencies may avoid consultation when they take discretionary actions that may affect listed species or critical habitats.

88. The Services also assert that they have vast discretion to define "consultation" because "the mandatory term 'shall' in section 7(a)(2) refers to the obligation of the action agency to avoid jeopardy or destruction or adverse modification of critical habitat, not to a requirement to consult on each and every action." This interpretation of the ESA is contrary to the plain language of section 7(a)(2) which expressly provides that each federal agency "shall" avoid jeopardy and adverse modification, and consult with the Services with respect to "any [federal] action authorized, funded, or carried out."

89. With respect to the Services' proposal to afford action agencies authority to forgo consultation on actions that may affect listed species or critical habitat, many commenters raised concerns regarding the ability of federal agencies to accurately assess the impact of their actions on listed species without the assistance of the Services. In adopting the Regulations, the Services disagreed by asserting that "[m]ost major action agencies already have well-qualified staff that support their ESA compliance." This assertion essentially concedes that at least some federal agencies do not have sufficiently qualified staff to ensure ESA compliance, but the Regulations do not distinguish between qualified and unqualified agencies and staff, and do not even require that before taking advantage of these new consultation exemptions that such qualifications be established. Moreover, the Regulations fail to support the assertion that "most" action agencies have the requisite expertise to make the biological determinations entrusted to them by the Regulations, and also fail to provide any coherent explanation of how substituting self-consultation for interagency consultation comports with Congress' concern that action agencies could not be reliably trusted to place the protection of endangered and threatened species above their primary missions.

90. The lack of a minimum qualification standard is compounded by the absence of any oversight or monitoring mechanisms to ensure that federal agencies and personnel are making correct effects determinations. In lieu of meaningful oversight or monitoring, as urged by many commenters, the Services simply suggest that action agencies "can create any internal procedures they deem necessary to establish a credible administrative record to support their determinations." However, the Services never explain why such a crucial matter should be left to the discretion of action agencies, especially because the Services' only other real-world experiment with delegating to action agencies such broad authority to make their own effects determinations – involving the Forest Service's and Bureau of Land Management's implementation of the National Fire Plan – has been a conceded failure, with the Services' own review demonstrating that these agencies were consistently making erroneous determinations with regard to the effects of their actions on listed species. Moreover, these land management agencies have far more biological expertise and experience in section 7 consultations than many other action agencies that will now be free to bypass consultation with the Services for the first time.

91. Finally, the Services assert that the Regulations are "intended to introduce time frames into the informal consultation process" which would also allow action agencies to proceed with potentially harmful actions without consultation, but simply because the Services have not responded within an arbitrary time frame. The Services never explain how these new deadlines are consistent with section 7 or will promote the purposes of the ESA to conserve listed species and critical habitats. The same flaws addressed above in allowing action agencies to escape consultation entirely on a host of actions that may affect listed species or critical habitats, apply equally to the Services' decision to allow agencies to unilaterally terminate informal consultation without the Services' concurrence that an action is "not likely to adversely affect" listed species or critical habitat.

VII. CLAIMS FOR RELIEF

92. For each of the Claims in this Complaint, Plaintiffs incorporate by reference each and every allegation set forth in this Complaint as if set out in full below.

First Claim for Relief
(Violations of the APA)

93. In hastily adopting the Regulations and Final Environmental Assessment without providing the public with an adequate opportunity in which to comment on the Proposal and Draft EA; in issuing a final rule with new provisions that are not a logical outgrowth of the proposed rule and for which the public was not afforded an opportunity to comment; and in failing to adequately consider and respond to the hundreds of thousands of public comments submitted, defendants have violated the APA and abrogated the public's right under the APA to a meaningful opportunity to influence the development of substantive regulations.

Second Claim for Relief
(Violations of the ESA/APA)

94. In adopting the Final Regulations, the defendants have violated section 7 of the ESA, and have also acted arbitrarily and capriciously and contrary to law, in violation of the APA. First, the Regulations are contrary to section 7 because they authorize myriad agency actions that may have adverse impacts on listed species and critical habitats to proceed in the absence of any "consultation" with the Services, 16 U.S.C. § 1536(a)(2), or information from the Services regarding whether any listed species "may be present in the area of such proposed action." *Id.* § 1536(c). Second, they "jeopardize the continued existence" of listed species, and will "result in the destruction or adverse modification" of critical habitats, by unlawfully and illogically delimiting the direct, indirect, and cumulative effects – including effects on global climate change -- that may be considered by the Services and action agencies in making section 7 determinations. *Id.* Third, the Regulations are not themselves based on the "best available" science, and will also make it impossible for action agencies and the Services to rely on the best available science when making determinations under section 7, including determinations regarding the appropriate biological baseline for affected species. *Id.* Fourth, the Regulations are arbitrary and capricious because they establish standards that are not supported by any rationale that is consistent with the purposes of the ESA, and will undermine safeguards for endangered and threatened species without accomplishing any countervailing benefits for such

species. Finally, the Regulations are arbitrary and capricious because the need for them is not coherently explained or established by the rulemaking record but, to the contrary, is contradicted by the record.

Third Claim for Relief
(Violations of NEPA/APA)

95. In failing to prepare an EIS and/or an adequate EA in connection with the Final Regulations, defendants have violated NEPA and the APA. In addition, the Regulations violate NEPA, the NEPA implementing regulations, and the APA by affording the public an inadequate opportunity to comment on the Services' draft EA. In failing to prepare an EIS on the Regulation, defendants have also unreasonably delayed and unlawfully withheld agency action, in violation of section 706(1) of the APA.

Fourth Claim for Relief
(Violations of Regulatory Flexibility Act/Executive Order 12866/APA)

96. The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* ("RFA"), provides that agencies must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of a proposed rule on small entities, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Similarly, Executive Order ("E.O.") 12866, issued on October 4, 1993, provides that for all "significant regulatory action[s]" an agency must prepare, and make available to the public, a detailed evaluation of the effects of the action, including an "assessment of the potential costs and benefits of the regulatory action," an "assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation . . . and any adverse effects on . . . the natural environment"), and an "explanation of why the planned regulatory action is preferable" to "potential alternatives." A "significant regulatory action" is defined by the Executive Order to include any regulatory action that "[r]aises novel legal or policy issues arising out of legal

mandates," or that is likely to have an "annual effect on the economy of $ 100 million or more or adversely affect in a material way the economy, a sector of the economy . . . the environment, public health or safety, or State, local, or tribal governments or communities."

97. In adopting the Regulations, although the Office of Management and Budget made an initial determination that the Regulations are a "significant" rule within the meaning of E.O. 12866 and although the Regulations are in fact a "significant" action as defined by the Order, the Services did not prepare, or make available to the public, the documents or analyses required by the Order. Nor did the Services prepare a regulatory flexibility analysis in accordance with the RFA although the Regulations will likely have a significant adverse economic impact on small businesses, including those that engage in ecotourism and other activities that depend on the conservation of endangered and threatened species. In failing to prepare the analyses and take the other actions required by E.O. 12866 and the RFA, defendants acted in a manner that is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of section 706(2) of the APA, and have also unlawfully withheld and unreasonably delayed required agency action in violation of section 706(1) of the APA. In violating E.O. 12866, the RFA, and the APA, defendants have deprived plaintiffs of information to which they are entitled to obtain access by law, and have deprived plaintiffs of their legal rights to participate meaningfully in a significant rulemaking that will have adverse economic, environmental, and other effects on plaintiffs and their members.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request this Court:

1. declare that the Service's Final Regulations violate the APA, ESA, NEPA, E.O. 12866, and the RFA;

2. set aside and remand these regulations in accordance with the Court's ruling;

3. award plaintiffs their costs and attorneys' fees; and

4. grant plaintiffs such other and further relief as this Court may deem just and proper.

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