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The Honorable Doug Burgum, Secretary  
U.S. Department of Interior  
1849 C Street, NW  
Washington, DC 20240

The Honorable Howard Lutnik, Secretary  
U.S. Department of Commerce  
1401 Constitution Avenue, NW  
Washington, DC 20230

December 19, 2025

*Submitted via regulations.gov*

**Re: Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat  
Docket No. FWS-HQ-ES-2025-0039  
90 Fed. Reg. 52,607 (Nov. 21, 2025)**

Dear Secretary Burgum and Secretary Lutnik,

On behalf of Defenders of Wildlife (“Defenders”) and our nearly two million members and supporters, please accept the following comments regarding the U.S. Fish and Wildlife Service’s and National Marine Fisheries Service’s (“FWS” and “NMFS” or collectively, “the Services”) proposed rule to amend the Endangered Species Act’s (“ESA”) section 4 implementing regulations. 90 Fed. Reg. 52,607 (Nov. 21, 2025) (“2025 Proposed Rule”).

Defenders is a national conservation organization focused solely on conserving wildlife and habitat and safeguarding biodiversity. Defenders is concerned that many of the proposed regulatory changes are inconsistent with the ESA and Congress’s intent in enacting that statute and its specific provisions. Additionally, those regulatory changes and the supporting narrative would weaken the ESA’s role in protecting and recovering endangered and threatened species.

## **INTRODUCTION**

Biodiversity is the foundation of all life on Earth and is key to human well-being. Healthy, diverse wildlife and habitats pollinate crops, keep our waterways clean, and even buffer humans from diseases like Lyme and malaria. These critical services have wide-reaching impacts on our economies, food security, health, and more.

Yet biodiversity is in crisis. Today, approximately one million species are at risk of extinction globally. The majority of Earth's lands and seas have been significantly modified by human activity. Populations of wild species continue to decline, putting ecosystems at risk of collapse.

Biodiversity loss is not just happening elsewhere. The U.S. is gravely at risk. Over one-third of U.S. plant and animal species are at risk of extinction. Land cover conversion continues at an estimated rate of two football fields per minute. None of our ecosystems are shielded from the threats of ongoing habitat loss, climate change, pollution, and invasive species.

The U.S. does, however, benefit from the strong protections of the ESA, one of the world's most powerful laws for biodiversity conservation. When it passed the ESA, Congress sought to prevent extinction, recover imperiled species, and protect the ecosystems in which they live. Now is the time to uphold and strengthen the protections that the ESA affords.

The ESA has a strong track record; approximately 99% of U.S. species listed under the ESA are still with us, and hundreds of those species are on the road to recovery. Moreover, the ESA's protections appear to slow loss of habitat for imperiled species on federal lands.

Yet for the ESA to do the work it was intended to do, it must be implemented properly. The statute lays out a pathway for imperiled species: from science-based listing (under ESA section 4) to the prevention of harm by federal agencies (section 7) to recovery and ultimately delisting. But if implementation is thwarted—for example, if politics creep into listing or if agencies create backdoor ways to harm listed species—then this pathway to recovery is blocked.

Unless we can arrest and reverse extinction trends, species will remain listed, decline, and creep towards extinction. We will see hundreds of species listed under the ESA continue to decline, and many hundreds of species not yet listed continue to decline to the point that ESA protections may be required. We will continue to see biodiversity loss and experience the fallout of nature's collapse: more frequent pandemics, a hotter planet, and deteriorating human well-being.

Despite the urgency of the issue and the importance of the ESA as a strong tool to address it, the current rulemaking process proposes to return to previous regulatory changes from 2019 that made the statute less effective before being amended in 2024. The proposed amendments undercut many key protections for species and habitat.

The Services cite Executive and Secretarial Orders as part of their rationale for returning to the 2019 version of the rules. Yet those orders do not, standing alone, justify any of the proposed regulatory revisions. These orders simply call for the review of the section 4 regulations. They cannot and do not change the bedrock statutory guardrails that apply to all regulations: the ESA-implementing regulations must be consistent with the Administrative Procedure Act (“APA”); they must adhere to the case law interpreting the APA; and they must be consistent with the ESA itself.

As part of these requirements, agencies must recognize and explain changes in position. See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) (“*FCC v. Fox*”). Here, the Services are reconsidering every change they made to the ESA section 4 regulations just last year. The Supreme Court has held that, to satisfy the APA in such circumstances, agencies must not only “display awareness that [they are] changing position,” but must also “show that there are good reasons for the new policy” and, when “disregarding facts and circumstances that underlay or were engendered by [a] prior policy,” provide further justification. *Id.*

A similar principle holds for *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). See 2025 Proposed Rule, 90 Fed. Reg. at 52,608. *Loper Bright* merely affirmed that it is the role of the courts to determine the best meaning of a statute and to ensure that regulatory interpretations of statutory text conform to the best meaning. Nothing about *Loper Bright* requires agencies to embark on new regulatory revisions. Any ESA-implementing regulation must conform to the clear intent of Congress that the Services list species and designate critical habitat in accordance with the statute’s requirements; conserve and recover listed species; and establish procedures for federal agencies to meet their obligations to ensure that federal agency actions do not jeopardize the continued existence of listed species or destroy or adversely modify their designated critical habitat. See 16 U.S.C. §§ 1531(b), 1532(3), 1536(a)(2).

Two years ago, we celebrated the fiftieth anniversary of the ESA. This law was visionary, but it could have never foreseen where we find ourselves today—an extinction rate unprecedented in human history and one million species at risk. There is no common interest more widely shared and inclusive than healthy natural systems founded on thriving, native biodiversity. Failure to prioritize this common interest may mean continued loss of nature and its benefits to the detriment of all

Americans. Defenders calls on the Services to restore the pre-2019 regulatory framework to that support science-based listing decisions, require full and honest assessment of agency action to prevent harm to species or habitat, and advance Congress’s goal of species recovery.

## **COMMENTS**

### **50 C.F.R. § 424.11—Factors for Listing, Delisting, or Reclassifying Species**

#### **Background**

The ESA protects species that the Services have listed as endangered or threatened. An endangered species is “in danger of extinction throughout all or a significant portion of its range[.]” 16 U.S.C. § 1532(6). A threatened species is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20). Under ESA section 4(a)(1), the Services are required to list a species as endangered or threatened if they determine that the species qualifies for listing based on the individual or cumulative effects of five factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. §§ 1533(a)(1)(A)–(E). To qualify for listing, a species need only face a sufficient threat under a single factor. *Humane Soc’y of the U.S. v. Pritzker*, 75 F. Supp. 3d 1, 7 (D.D.C. 2014) (citation omitted).

By statute, the Services must make listing determinations:

*solely* on the basis of the best scientific and commercial data available to [them] after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species[.]

16 U.S.C. § 1533(b)(1)(A) (emphasis added).

The statutory mandate to make listing decisions based solely on the best available scientific data “is in keeping with congressional intent” that the agency “take preventive measures *before* a species is ‘conclusively’ headed for extinction.”

*Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679–80 (D.D.C. 1997) (emphasis in original); *Am. Wildlands v. Norton*, 193 F. Supp. 2d 244, 251 (D.D.C. 2002).

Because imperiled species receive the ESA’s statutory protections only if they are appropriately listed as endangered or threatened, it is imperative that the Services ensure the regulations implementing section 4 are fully consistent with the statute’s plain language and legislative intent. See H.R. REP. NO. 97-567, at 10 (1982), as reprinted in 1982 U.S.C.C.A.N. 2807, 2810 (“Section 4 is the keystone of the [ESA].”).

### **Proposed Revision to § 424.11(b), Economic Considerations**

*Defenders opposes the proposed revision that may improperly elevate putative economic impacts in classifying species.*

Defenders strongly opposes the removal of the phrase “without reference to possible economic or other impacts of such determination” to 50 C.F.R. § 424.11(b). 2025 Proposed Rule, 90 Fed. Reg. at 52,609. After its removal in 2019, the Services acknowledged that removing this language “created the problematic impression that the Services might . . . take such information into account directly or indirectly when making classification determinations.” 89 Fed. Reg. 24,300, 24,305 (Apr. 5, 2024) (“2024 Final Rule”).

The Services now seek to reverse position without any substantive explanation for that change. 2025 Proposed Rule, 90 Fed. Reg. at 52,609; see *FCC v. Fox*, 556 U.S. at 515–16. The sole discussion of this proposed change the Services offer is that the change is “based on our subsequent review of the 2024 rule, the language of the Act, and recent case law.” 2025 Proposed Rule, 90 Fed. Reg. at 52,609. The Services have not offered any discussion about their previous findings in reinstating the language in 2024. See *id.* Nor do the Services identify the relevant “recent case law” they have supposedly reviewed and based their determination on. See *id.*

Directly or indirectly considering economic impacts in classifying a species under the ESA is a plain statutory violation. Even in the absence of direct consideration of economic impacts in the ultimate decision-making process, any collection, analysis, or dissemination of economic impact data wastes limited agency resources, as the Services are statutorily prohibited from considering such data.

The ESA requires listing determinations to be based “solely on the basis of the best scientific and commercial data available[.]” 16 U.S.C. § 1533(b)(1)(A) (emphasis added). Congress added the word “solely” to the phrase “on the basis of the best scientific and commercial data available” in the 1982 ESA amendments. See H.R. REP. NO. 97-567, at 20 (1982), as reprinted in 1982 U.S.C.C.A.N. 2807, 2820. As explained in the House Report, “[t]he addition of the word ‘solely’ is intended to

remove from the process of the listing or delisting of species any factor not related to the biological status of the species.” *Id.* Congress was adamant that “economic considerations have no relevance to determinations regarding the status of species[.]” H.R. REP. NO. 97-835, at 20 (1982) (Conf. Rep.), *as reprinted in* 1982 U.S.C.C.A.N. 2860, 2861; *see also id.* at 19 (“The principal purpose of these amendments is to ensure that decisions in every phase of the process pertaining to the listing or delisting of species are based solely upon biological criteria and to prevent non-biological considerations from affecting such decisions.”).

Federal courts have repeatedly found that the plain language of the statute prohibits the Services from considering economic impacts in listing determinations. In *New Mexico Cattle Growers Association v. U.S. Fish & Wildlife Service*, the court noted that “the ESA clearly bars economic considerations from having a seat at the table when the listing determination is being made.” 248 F.3d 1277, 1284 (10th Cir. 2001); *see also Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1266 (11th Cir. 2007) (“One of the primary purposes of the 1982 amendments [adding the word ‘solely’ before the phrase ‘on the basis of the best scientific and commercial data available’] was to divorce from the listing decision the economic analysis that comes with critical habitat designation.”).

The Services’ proposed removal flies in the face of Congress’s intent in amending the ESA to add language specifically prohibiting them from considering economic impacts in classifying species under section 4. Doing so confuses the regulatory standard and invites its unlawful application.

Additionally, removing the language introduces the risk of incurring the unnecessary costs of developing and presenting economic cost information. The Services already lack adequate budget resources to meet their extensive responsibilities to administer section 4 and to comply with the mandatory statutory deadlines this section imposes on the rulemaking process. Undertaking additional analysis that is flatly prohibited by statute from being considered in the decision-making process is an improper use of these limited resources.

Defenders is deeply concerned that removal of the regulatory language that clearly reflects the statutory prohibition would lead the Services to ask leading questions, such as seeking information on the alleged detrimental economic impacts of listing species. The economic impacts of protecting imperiled species and habitats are not all in the red on an imaginary balance sheet. Wildlife-related recreational industries generate billions of dollars every year for the U.S. economy in sectors including hunting and fishing, ecotourism, and wildlife-watching. Similarly, the U.S. economy benefits from billions of dollars in ecosystem services every year that species and their habitats provide.

To take one example, the U.S. Geological Survey states that studies have shown that bats provide between \$3 billion and \$57 billion a year in pest control services to the U.S. agricultural sector.<sup>1</sup> Bats also provide invaluable pollination services to this sector. Yet many U.S. bat species are declining due to white-nose syndrome, habitat loss, and other threats. Protecting and recovering these imperiled species enables these critical ecosystem services to continue, preventing economic loss to U.S. industries.

The listing and ultimate recovery of the lesser long-nosed bat provides an example of how ESA listings and conservation actions ultimately benefit the U.S. economy. Listed as endangered in 1988, the species was delisted due to recovery in 2018. See 83 Fed. Reg. 17,093 (Apr. 18, 2018). The lesser long-nosed bat pollinates Southwestern cactus and succulent species such as saguaros, organ-pipe cactus, and agaves. These pollination services support healthy desert ecosystems and the desert-based ecotourism industry in Southwestern states. Further, the lesser long-nosed bat is a key pollinator of agave species, without which agave-based spirits such as tequila, mezcal, and other products would not exist. In countless other instances, the economic benefits and ecosystem services that listing and recovering imperiled species are currently unknown.

In short, describing the economic “costs” of listing is inherently one-sided and misleading. In enacting the ESA, Congress recognized that imperiled species are of “incalculable” value, in part because of “the *unknown* uses that endangered species might have and the *unforeseeable* place such creatures may have in the chain of life on this planet.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 178–79 (1978) (emphasis in original). In light of Congress’s clear statutory command, the Services should refrain from introducing cost-benefit analyses into the listing process and should withdraw their proposal to amend 50 C.F.R. § 424.11(b).

#### **Proposed Revision to § 424.11(d), Foreseeable Future**

*Defenders opposes the Services’ proposal to modify the regulatory definition of foreseeable future.*

In creating a regulatory framework that distinguishes between endangered and threatened species, Congress included the latter category to compel FWS to “take preventative measures before a species is ‘conclusively’ headed for extinction.” *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679–80 (D.D.C. 1997) (quoting S. REP. NO. 93-307 (1973)). Consistent with that purpose, the ESA defines a threatened

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<sup>1</sup> U.S. Geological Survey, “Why are bats important?” *available at* <https://www.usgs.gov/faqs/why-are-bats-important>.

species as “any species which is likely to become an endangered species within the *foreseeable future* throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20) (emphasis added). The statute does not define “foreseeable future.” However, Congress stated that the purpose of the foreseeable future language is to allow the Services to “forecast population trends” so species are listed “before the danger [of extinction] becomes imminent.” S REP. NO. 93-307, at 3.

Until 2019, the Services had never promulgated a regulation defining “foreseeable future.” In 2019, they amended the section 4 regulations to add this subsection:

In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. 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*. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species’ life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.

2019 Final Rule, 84 Fed. Reg., 45,020, 45,052 (Aug. 27, 2019) (emphasis added). In 2024, the Services revised the second sentence to read: “The foreseeable future extends 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.” 50 C.F.R. § 424.11(d) (emphasis added). In making those changes, the Services recognized that the 2019 language “created confusion” and “seemed to suggest that the Services had adopted a novel requirement.” 2024 Final Rule, 89 Fed. Reg. at 24,301. The Services clarified that the foreseeable future regulation “does not function as an independent substantive standard in the context of a listing decision.” *Id.*

The Services now seek to reinstate the same language as in 2019. Their primary justification is that it is a “policy judgment.” 2025 Proposed Rule, 90 Fed. Reg. at 52,609. The Services also state that the 2019 language aligns with “the best meaning of the Act” but offer no supporting explanation. *See id.* To the contrary, legislative history shows that Congress intended the Services to make threatened listings based on forecasts that occur well before extinction is imminent. *See* S REP. NO. 93-307, at 3.

The Services' support for the proposed reversion is that the 2019 language is "based directly on" Department of the Interior, Office of the Solicitor, Opinion M-37021 (Jan. 16, 2009) ("M-Opinion"),<sup>2</sup> but offers more clarity than the 2024 Final Rule language. See 2025 Proposed Rule, 90 Fed. Reg. at 52,609–10. The proposed language is in fact a significant departure from the M-Opinion's analytical framework because it appears to set a new, substantive standard for determining if a species is threatened that is not found in the ESA.

The Interior Solicitor issued the M-Opinion in 2009 "to provide prospective guidance as to how the [agency] can best explain how a determination under section 4(a)(1) addresses the concept of the foreseeable future." M-Opinion at 1. The Opinion finds that "Congress intended the term 'foreseeable future' to describe the extent to which the [agency] can reasonably rely on predictions about the future in making determinations about the future conservation status of the species." *Id.* Stated differently: "The net result is that the foreseeable future extends only so far as the [agency] can explain reliance on the data to formulate a reliable prediction." *Id.* at 8.

The M-Opinion emphasizes that "[T]he foreseeable future is not necessarily reducible to a particular number of years. Rather, it relates to the predictability of the impact or outcome for the specific species in question." *Id.* at 9. Given the question posed is whether a species is "likely" to become an endangered species in the foreseeable future, "the foreseeable future is not based on predictions that can be made with certainty." *Id.*

Ultimately, the M-Opinion concludes:

In summary, the foreseeable future describes the extent to which the [agency] can, in making determinations about the future conservation status of the species, reasonably rely on predictions about the future. Those predictions can be in the form of extrapolation of population or threat trends, analysis of how threats will affect the status of the species, or assessment of future events that will have a significant new impact on the species. The [agency's] ability to rely on predictions may significantly vary with the amount and substance of available data.

*Id.* at 14. In doing so, the M-Opinion analyzes how the ESA, its legislative history, departmental practice, the ordinary meanings of the phrase "foreseeable future," and relevant caselaw support this interpretation. See *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 681 (9th Cir. 2016) ("The Solicitor's advisory letter acknowledges that

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<sup>2</sup>Available at <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37021.pdf>.

its interpretation represents a change in agency policy, and it provides a thorough and reasoned explanation for its recommendation that the Service adopt a data-driven threat analysis for future harm. The letter also states explicitly that the policy change seeks to conform to federal appellate decisions requiring ESA analyses to adhere to the statute’s ‘best available data’ standard.”) (citations omitted).

Although in 2023, Defenders supported the Services’ proposal to rescind the regulatory definition of “foreseeable future” altogether, we believe that the amendatory language in the 2024 Rule better aligns with the policy in the M-Opinion based on the ESA, its legislative history, and relevant caselaw than the Services’ current proposal. The term “reliable predictions” in the current regulation is directly taken from the M-Opinion. See *generally* M-Opinion at 5, 9, 14, fn.1. The M-Opinion concludes that foreseeable future cannot be limited to “predictions that can be made with certainty.” M-Opinion at 9. Here, the proposed language’s heightened requirement of being able to “reasonably determine” concrete threats and impacts is directly at odds with the M-Opinion’s conclusion. Under the terms of the ESA, the Services’ predictions must be based on the best scientific and commercial data available, but that does not foreclose the use of reasonably reliable predictions. It merely sets the standard for what those predictions should be based on. Evaluation of future risk of endangerment inherently requires some predictive analysis and cannot be limited to near-term predictions that meet the “reasonably determine” standard.

Additionally, the Services ignore the impact of the proposed requirement that both future threats and response by species must be shown to be “likely.” See 2025 Proposed Rule, 90 Fed. Reg. at 50,609–10. The standard expressed in the ESA is that a species is “likely to become an endangered species.” The proposed language would foreclose listing a species that is likely to become endangered simply because its response to threats is uncertain. Contrary to the Services’ stated intention of “clarify[ing] that these requirements are conjunctive,” *id.* at 52,610, that standard is not found in the ESA.

The Canada lynx, a threatened species, shows the substantive impact that the conjunctive requirement might have on future listing decisions. In the 2017 Species Status Assessment for the lynx,<sup>3</sup> FWS recognized “that the lynx, as a boreal forest- and snow-associated specialist predator, is probably broadly exposed and highly sensitive to the projected impacts of continued climate warming and has limited capacity to adapt to it.”<sup>4</sup> FWS noted that specific quantification of impacts is

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<sup>3</sup> Available at <https://iris.fws.gov/APPS/ServCat/DownloadFile/213244>

<sup>4</sup> *Id.* at 20.

infeasible because of the “limited resolution and inherent uncertainty of available climate models and the inadequacy of existing demographic data” for projecting future population sizes.<sup>5</sup> In other words, there is uncertainty around the lynx’s response to future threats—but this should not preclude listing for a species that faces clear threats and has limited capability to adapt. After all, predictive modelling requires some inherently unavoidable uncertainty. The new foreseeable future standard simply cannot be met in many cases, even where future harms to the species is expected based on the best available science. While the Canada lynx did receive a threatened listing, species in a similar position would see different outcomes under the proposed regulations.

In enacting the ESA, Congress intended to protect threatened species from becoming endangered. Limiting those species that can benefit from the ESA’s protections is inherently at odds with Congress’s intent. If we fail to protect threatened species, they may become endangered and significantly harder to recover. Defenders strongly opposes the proposed changes to the regulatory definition of “foreseeable future.”

#### **Proposed Revisions to § 424.11(e), Factors Considered in Delisting Species**

*Defenders opposes the proposed amendments to the delisting regulation.*

The Services propose to modify the delisting regulations to (1) change the scope of the regulatory list of circumstances from those that *may* warrant delisting to those that mandate delisting, and (2) remove the “new information” requirement for delisting based on a species no longer meeting the definitions of threatened, endangered, or species. Both changes create shifts in the delisting process from a fact- and species-specific evaluation—as contemplated by the ESA—to categorical delisting divorced from the reality of a species’ status and need for protections. Defenders opposes both proposed changes.

*First*, the 2025 Proposed Rule’s mandatory wording creates the impression that species are at risk of premature delisting. 2025 Proposed Rule, 90 Fed. Reg. at 52,614 (“The Secretary *shall* delist a species if the Secretary finds [any of the three conditions established by (1)–(3)]”) (emphasis added). In 2024, the Services replaced the phrase “shall delist a species if” with “it is appropriate to delist a species if.” 2024 Final Rule, 89 Fed. Reg. at 24,303. This change adequately captured that any delisting process must be based not only on a status review of the best scientific and commercial data available but also on a subsequent notice-and-comment rulemaking, as required by the APA. Compliance with the APA precludes any

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<sup>5</sup> *Id.*

requirement to delist a species immediately following a status review without notice and comment if one or more of the three conditions specified by 50 C.F.R. § 424.11(e)(1)–(3) is present. The Services’ proposal to revert to the 2019 language includes no discussion of this element of the change in its position from the 2024 Final Rule. See 2025 Proposed Rule, 90 Fed. Reg. at 52,610. Consequently, the proposed change to the “it is appropriate to delist” language is entirely unsupported and would reinstate the inaccurate mandatory framing for the delisting regulatory provision without rational explanation.

*Second*, Defenders opposes the Services’ deletion of the requirement that any delisting based on the definitions of endangered or threatened species (second delisting circumstance) or the definition of species (third delisting circumstance) be based on “[n]ew information that has become available since the original listing decision.” That deletion creates opportunities for regulatory gamesmanship in inappropriately delisting species.

Considering the second delisting circumstance, removal of the “new information” language creates the opportunity for delisting a species based on technicalities (i.e., changes to the terms “endangered” and “threatened”) rather than science (i.e., changes in a species’ status or our understanding of a species). There are legitimate circumstances when delisting is appropriate based on a species no longer meeting the definition of threatened or endangered. Delisting may of course be appropriate when a species recovers and is no longer at risk of extinction or of becoming endangered. Additionally delisting may be appropriate when more populations and individuals of a species are discovered (e.g., Dismal Swamp southeastern shrew, 65 Fed. Reg. 10,420 (Feb. 28, 2000)). In such scenarios, delisting would be based on the best available science and would be consistent with the “new information” language currently in place that the Services now seek to remove. Removal of the language is not necessary to achieve the purposes of this delisting circumstance.

While removing the new information requirement has no benefit, it presents a risk of significant harm. Removal of the new information requirement may facilitate delisting based on new *legal* definitions of the terms endangered or threatened. This invites regulatory gamesmanship and risks mass delisting. In the short term, the Services’ proposal to amend the term “foreseeable future” would functionally change the definition of threatened species and would open the door to delisting on that basis. The Services should address this possibility, which so far they have entirely failed to grapple with.

Considering the third delisting circumstance (i.e., changes in the species definition), the new information language limits delisting based on species definitional changes to instances where listing is based on erroneous data. The regulation has reflected

the erroneous data approach for decades. The 1980 regulations established 50 C.F.R. § 424.11(d)(3) to read: “*Original data for classification in error.* Subsequent investigations may produce data that show that the best scientific or commercial data available at the time that the species was listed were in error.” 45 Fed. Reg. 13,010, 13,023 (Feb. 27, 1980). The 1984 regulations updated this language slightly to read: “*Original data for classification in error.* Subsequent investigations may show that the best scientific or commercial data available when the species was listed, *or the interpretation of such data,* were in error.” 49 Fed. Reg. 38,900, 38,909 (Oct. 1, 1984) (emphasis added).

The 2019 Rule rescinded this subsection, 84 Fed. Reg. at 45,052, substituting instead the new subsection reading “The listed entity does not meet the statutory definition of a species.” *Id.* In 2024, the Services added the “new information” language, explaining that this delisting provision was intended to describe “cases where we have listed species that are later shown . . . to not be taxonomically valid ‘species’ or not to be facing risk of extinction,” and that the language “better reflect[s] those circumstances.” 2024 Proposed Rule, 89 Fed. Reg. at 24,304. The Services directly addressed comments noting that the 2019 language “would allow for delisting based on other considerations, such as changes in policies or regulations governing the ESA,” noting that the regulatory language change was intended to ensure that delisting under this circumstance was “limited to instances in which new data indicate the original listing can no longer be considered accurate or valid.” *Id.* at 24,315. The Services now seek to return to the previous, problematic language.

Retaining the 2024 addition of the “new information” language is necessary to keep that provision consistent with the ESA. The importance of the new information requirement as a guardrail on unscientific delisting is firmly grounded in court decisions, including one issued during the effective period of the 2019 Rule. In *Humane Society of the United States v. Zinke*, the D.C. Circuit rejected as arbitrary a 2011 FWS regulation that designated a new Western Great Lakes distinct population segment (“DPS”) of recovered gray wolves for the purpose of immediately delisting that DPS.

While the court held that the Service has legal authority to identify a recovered DPS for delisting generally, it found this particular action unlawful because the Service failed to consider that carving out the DPS would affect the listing of gray wolves outside the DPS, as the remaining gray wolves would not constitute a protectable species and no longer qualify for the ESA’s protections. 865 F.3d 585, 600–03 (D.C. Cir. 2017). The appellate court held that the “Service’s power is to designate genuinely discrete population segments; it is not to delist an already-protected species by balkanization. The Service cannot circumvent the [ESA]’s explicit delisting

standards by riving an existing listing into a recovered sub-group and a leftover group that becomes an orphan to the law.” *Id.* at 603.

In November 2020, FWS promulgated another gray wolf delisting rule, this time finding that the two remaining ESA-protected gray wolf entities in the continental U.S., the Minnesota entity and the 44-state entity, did not meet the ESA’s statutory definitions of a species and could be removed from the list of endangered and threatened species on this independent basis. 85 Fed. Reg. 69,778, 69,783–84 (Nov. 3, 2020) (citing the 2019 Rule’s revisions at 50 C.F.R. § 424.11(e)(3)).

A federal district court rejected this and other rationales for the 2020 delisting rule in *Defenders of Wildlife v. U.S. Fish and Wildlife Service*, 584 F. Supp. 3d 812, 821–24 (N.D. Cal. 2022). As directly relevant here, the district court firmly rejected the proposition that FWS may “delist already existing entities that no longer qualify for listing because of intervening statutory and regulatory changes.” *Id.* at 822. Rejecting the agency’s attempt to distinguish the D.C. Circuit’s decision in *Humane Society*, it held:

The practical outcome of the Service’s attempt to delist the gray wolf based solely on the statutory definition of “species” is the same: the Service would effectively remove federal protections for the listed gray wolf entities without addressing the ESA’s requirements for making such a determination. This is the type of “statutory dodge” that concerned the D.C. Circuit in *Humane Society*.

*Id.* at 823 (cleaned up).

Notably, FWS had listed these two gray wolf entities by a 1978 rule, mere months before the ESA was amended the same year to revise the ESA’s statutory definition of a species to include a DPS. *Id.* at 821–22. The district court observed that “there is nothing in the statute that suggests that Congress intended the 1978 amendments to the ESA to remove protections for already-listed entities.” *Id.* at 822. To uphold the 2020 delisting rule on the grounds that the two previously listed entities no longer constituted listable entities based on the 1978 amendments, the district court found, “would amount to an impermissible ‘backdoor route to the *de facto* delisting of already-listed species.” *Id.* (quoting *Humane Society*, 865 F.3d at 602).

Thus, although it did not cite directly the 2019 Rule’s addition of 50 C.F.R. § 424.11(e)(3) (which the Services now seek to reinstate), the district court clearly rejected the Services’ rationale underlying its addition to the regulations. The Services should decline to adopt the proposed change to make clear that they do not intend to continue such backdoor routes to delisting.

Defenders strongly oppose the Services opening the door to unlawful gamesmanship in delisting species that would undermine the ESA's purpose of protecting and recovering imperiled species.

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### **50 C.F.R. § 424.12—Criteria for Designating Critical Habitat**

#### **Background**

Recognizing that species cannot survive and recover unless their habitats are protected, Congress enacted the ESA to conserve not only endangered and threatened species but also the ecosystems on which they depend. 16 U.S.C. § 1531(b). The ESA's clear recognition that protecting species and their habitats are vital to recovery is evidenced in its definitions of occupied and unoccupied critical habitat, both of which include the phrase "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A); see *also* ESA Amendments of 1978, Pub. L. No. 95-632, sec. 2, 92 Stat. 3751 1978. The statute defines "conserve" and "conservation" to mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." *Id.* § 1532(3). Critical habitat designation and protection are fundamental to the ESA's ultimate mandate: ensuring listed species fully recover.

As the Services have previously recognized, critical habitat designation serves a wide range of the ESA's conservation goals. See, e.g., 81 Fed. Reg. 7,414, 7,414–15 (Feb. 11, 2016) ("2016 Rule"). Designating critical habitat facilitates the implementation of section 7(a)(1), 16 U.S.C. § 1536(a)(1), that requires all federal agencies to use their authorities to further the ESA's conservation purposes, by identifying specific areas to focus their efforts. *Id.* at 7414. Similarly, designation also facilitates non-federal entities (state, tribal, and local governments, NGOs, and individuals) in focusing their conservation efforts on specific areas essential to recovery. *Id.* When critical habitat designation occurs concurrently with listing (as the statute generally requires, 16 U.S.C. § 1533(b)(6)(C)), "it provides a form of early conservation planning guidance . . . to bridge the gap until the Services can complete recovery planning." 2016 Rule, 81 Fed. Reg. at 7,414–15.

Finally, and fundamentally, critical habitat designation is central to the "heart of the ESA," *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011), the substantive section 7(a)(2) requirement that all federal agencies ensure, in consultation with the Services, that their actions are not likely to destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). See 2016 Rule, 81 Fed. Reg. at 7,415 (critical habitat designation provides a "significant regulatory protection" given the

federal government's role in land, water, and resource management; regulation of extractive and other industries; and "the funding, authorization, and implementation of myriad other activities" likely to affect critical habitat).

The Services' proposed regulations seek to limit the circumstances in which critical habitat is designated. For many species, designation of critical habitat could be the difference between recovery and continued decline. Defenders strongly opposes the proposed regulatory changes to the critical habitat regulations.

### **Proposed Revisions to § 424.12(a)(1), Not-Prudent Determinations**

The Services' proposed regulatory changes regarding the not-prudent exception to designating critical habitat seek to expand the set of circumstances where critical habitat is not designated under that exception. Congress intended the not-prudent exception to be narrow and invoked only rarely based on specific facts. Codifying general circumstances for not-prudent findings opens the door to avoiding critical habitat designation in a broad suite of circumstances. Defenders strongly opposes these proposed regulatory changes.

The ESA establishes that the Secretary, "to the *maximum extent prudent and determinable*," 16 U.S.C. § 1533(a)(3)(A) (emphasis added), "shall . . . designate any habitat of any such [endangered or threatened] species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A)(1) (emphasis added). In designating critical habitat, "[t]he Secretary *may* exclude any area . . . if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," so long as doing so would not "result in the extinction of the species concerned." *Id.* § 1533(b)(2) (emphasis added). Under the statutory framework, the mandatory, first-order duty to establish critical habitat to the *maximum extent prudent and determinable* is separate from the discretionary, second-order ability to exclude *particular* areas from that designation based on a cost-benefit analysis, but only if such exclusions will not result in extinction.

Congress intended the not-prudent exception to be narrowly drawn and applied only in those instances where designation would not benefit the species, as the legislative history of the 1978 Amendments that first established 16 U.S.C. § 1533(a)(3)(A) makes clear. H.R. REP. NO. 95-1625, at 16–17 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 9453, 9466–67 ("The phrase 'to the maximum extent prudent' is intended to give the Secretary the discretion to decide not to designate critical habitat . . . where it would not be in the best interests of the species to do so. . . . It is only in rare circumstances where the specification of critical habitat . . . would not be beneficial to the species."). See also S. REP. NO. 106-126, at 10 (1999) ("[T]he Secretary's authority to determine that designation is not prudent is retained,

although it is with the express understanding that this authority is to be exercised only in rare situations.”).

As the Services previously recognized, Congress intended that a not-prudent determination focus solely on the effects of designation on the species. In proposing implementing regulations, the Services explained that “[t]he Endangered Species Act Amendments of 1978 established a *standard of benefit to the species* in determining whether it is prudent to designate Critical Habitat for that species.” 48 Fed. Reg. 36,062, 36,063 (Aug. 8, 1983) (emphasis added). As the Services stated in the final 1984 Rule:

[T]he Services will examine the balance between risk *to a species* that might be a consequence of designating its critical habitat and benefits that the species might derive from such designation. . . . To the extent possible, the Services will attempt to undertake only those regulatory actions of *net benefit* to the conservation of species and their habitats. In those cases in which the *possible adverse consequences* would *outweigh the benefits* of designation of crucial habitat, the Services may forego such designation as a matter of prudence.

49 Fed. Reg. at 38,903 (emphasis added).

Federal courts have recognized this clearly expressed legislative intent. See, e.g., *Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 443 (5th Cir. 2001) (“[t]his result [being more likely to make a not-prudent determination based on challenged regulations] is in tension with the avowed intent of Congress that a ‘not prudent’ finding regarding critical habitat would only occur under ‘rare’ or ‘limited’ circumstances.”); *Conservation Council for Haw. v. Babbitt*, 2 F. Supp. 2d 1280, 1284 (D. Haw. 1998) (quoting H.R. REP. NO. 95-1625 and concluding that “[t]he ESA thereby establishes a general rule that designation should be made unless there is evidence that such a designation is not beneficial”).

Consistent with congressional intent, the Services initially issued regulations in 1984 defining only two circumstances when designating critical habitat is not prudent: (1) “The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species,” or (2) “Such designation of critical habitat would not be beneficial to the species.” 49 Fed. Reg. at 38,909 (promulgating 50 C.F.R. § 424.12(a)(1) (1984)). The first was included because “the risk [was] immediate and obvious.” *Id.* at 38,903. The second provides the standard for making case-by-case not-prudent determinations.

Both circumstances had clear foundations in explicit congressional statements about not-prudent determinations. See H.R. REP. NO. 95-1625 at 16 (“The phrase ‘to the maximum extent prudent’ is intended to give the Secretary the discretion to decide not to designate critical habitat concurrently with the listing where it would not be in the best interests of the species to do so.”); *id.* at 17 (“As an example, the designation of critical habitat for some endangered plants may only encourage individuals to collect these plants to the species’ ultimate detriment.”). In issuing the 1984 regulations, the Services explicitly declined to expand this limited list because “such decisions must be made on a case-by-case basis. Because of the variation in circumstances, it is not possible to formulate strict criteria according to which decisions regarding the prudence of a critical habitat designation might be made.” 49 Fed. Reg. at 38,903.

In the 2019 Final Rule, despite paying lip service to Congress’s clearly stated intent, see 84 Fed. Reg. at 45,040 (“Congress intended for the Services to designate critical habitat except in those rare instances when critical habitat would not be ‘beneficial to’ or ‘in the best interests of’ the species.”), the Services nevertheless impermissibly expanded the list of circumstances in which they may make a not-prudent determination. *Id.* at 45,053 (finalizing 50 C.F.R. § 424.12(a)(1) (2019)).

This revision was in direct conflict with both the statutory mandate requiring the Services to designate critical habitat to the “maximum extent prudent and determinable” and congressional intent that they narrowly construe and rarely invoke the not-prudent exception only when designation would not benefit the species. Congress did not intend the not-prudent exception as a catch-all provision granting the Services broad discretion not to designate critical habitat. Defenders strongly opposes the Services’ proposed return to the 2019 language.

*Defenders opposes the Services’ proposed revisions to 50 C.F.R. § 424.12(a)(1)(ii).*

The proposed amendments would substantively change the standard of 50 C.F.R. § 424.12(a)(1)(ii), adding new sets of circumstances in which the Services would find a not-prudent determination is appropriate. The proposed provision reads:

The 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 consultations under section 7(a)(2) of the Act.*

2025 Proposed Rule, 90 Fed. Reg. at 52,615 (italics added). Specifically, the Services propose to add the second half of the clause (italicized), a proposal Defenders strongly opposes.

In 2018, the Services originally proposed to add this language on the grounds that critical habitat designation in such circumstances would not “provid[e] any conservation value to the species concerned.” 2018 Proposed Rule, 83 Fed. Reg. at 35,197. The Services argued that “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.* The Services’ proposal to reinstate that language points back to their proffered justification in 2018.

In rescinding the language in the 2024 Final Rule—as explained in the 2023 Proposed Rule—the Services recognized that this explicit language, which would exclude critical habitat designations for species experiencing adverse impacts solely from climate-driven threats, was “not supported by the language of the Act or court decisions[.]” 88 Fed. Reg. 40,764, 40,768 (June 22, 2023) (“2023 Proposed Rule”). Defenders concurs.

The italicized language above that the Services propose to add back improperly centers the prudency analysis solely on speculation concerning benefits from section 7(a)(2) consultation, a rationale that the courts have rejected as inconsistent with the statute. *See, e.g., Nat. Res. Def. Council v. U.S. Dep’t of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997) (rejecting agency’s rationale for a not-prudent determination that the proposed area was primarily on private land and would not benefit from section 7(a)(2) consultation as an improper “expan[sion of] the narrow statutory exception for imprudent designations into a broad exemption for imperfect designations.”).

Prudency analyses must consider *all* benefits of designating critical habitat, not just those derived from section 7(a)(2)’s substantive protections. As the court in *Conservation Council for Hawaii* recognized, “there are significant substantive and procedural protections that result from the designation of a critical habitat outside of the consultation requirements of Section 7.” 2 F. Supp. 2d at 1288. These include protecting critical habitat on private land that later has federal activity occur on it; informing the public and state and local governments to allow for participation in the designation process; and establishing a uniform protection plan prior to consultation to avoid piecemeal determinations on the importance of a species’ environment. *Id.* at 1285–86, 1288. *See also* 2016 Rule, 81 Fed. Reg. 7414–15 (describing wide range of critical habitat benefits).

Moreover, critical habitat designation is an essential part of informing effective and coordinated recovery planning and conservation efforts across state and tribal wildlife agencies, conservation NGOs, and the public. Research shows that a species is more likely to receive a recovery plan if it has critical habitat designated and that there is better recovery plan task implementation for species with designated critical habitat.<sup>6</sup>

Expanding the not-prudent exception as proposed has no basis in the ESA's statutory text or legislative history, is contrary to congressional intent, and presupposes, without any basis whatsoever, that protecting critical habitat is meaningless in the face of addressing climate change and other large-scale habitat threats. The Services offer no explanation for any of these concerns that Defenders and others raised in previous rounds of revision to this provision. Nor do the Services now acknowledge, let alone provide good reasons for, the proposed change, ignoring the detailed explanation they themselves offered in 2024 in reversing course. See *FCC v. Fox*, 556 U.S. at 515–16. Nor do the Services address how this regulatory amendment is lawful in light of the relevant caselaw rejecting the identical reasoning behind this proposed change. The sole explanation the Services offer for the change is that “it is clearer and more transparent to include this possible situation in the enumerated list.” 2025 Proposed Rule, 90 Fed. Reg. at 52,611. But clarity and transparency do not outweigh the practical reality that once this circumstance is enumerated, it makes reflexively invoking the not-prudent exception in that circumstance more likely than if the Services were required to justify an exclusion based on that reasoning in a species-specific way.

The 2019 Final Rule language ushered in just this sort of reflexive avoidance of critical habitat designation. For example, FWS invoked the 2019 version of 50 C.F.R. § 424.12(a)(1)(ii) to decline designating critical habitat for the meltwater lednian stonefly and western glacier stonefly, aquatic species that rely on cold glacial springs. When FWS initially considered critical habitat designation in 2016, it determined that designation would be prudent. 81 Fed. Reg. 68,379, 68,396 (Oct. 4, 2016). When finalizing the proposal in 2019, FWS reversed course and found that critical habitat was not prudent because “[t]here are no management actions resulting from consultations under section 7(a)(2) of the Act that could address the impacts of climate change and drought on the meltwater sources that supply the habitats for these species.” 84 Fed. Reg. 64,210, 64,226 (Nov. 21, 2019). FWS

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<sup>6</sup> Erik Harvey *et al.*, *Recovery Plan Revisions: Progress or Due Process?*, 12 *ECOLOGICAL APPLICATIONS* 682, 688 (2002); Carolyn J. Lundquist *et al.*, *Factors Affecting Implementation of Recovery Plans*, 12 *ECOLOGICAL APPLICATIONS* 713, 715 (2002).

explicitly cited the change in regulatory language as the reason for its change in its prudency analysis. In other words, under the exact same factual circumstances, and without new scientific information, FWS changed its prudency finding. The proposal to reinstate that language will inappropriately increase the number of not-prudent findings based on factors that courts have already found unlawful under the ESA.

*Defenders opposes the proposed addition of 50 C.F.R. § 424.12(a)(1)(v)*

The proposed amendments add a catch-all provision, stating that critical habitat designation may not be prudent where “[t]he Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.” 2025 Proposed Rule, 90 Fed. Reg. at 52,611. The Services removed that language only last year, noting that it “gave the appearance that the Services might overstep their authority under the Act by issuing ‘not prudent’ determinations for any number of unspecified reasons.” 2024 Final Rule 89 Fed. Reg. at 24,317. The Services offer no meaningful justification for why they now find the proposed language to “more clearly explain” the non-exhaustive nature of the list of not-prudent circumstances, in direct contradiction to their express findings in 2024. See 2025 Proposed Rule, 90 Fed. Reg. at 52,611. Defenders opposes the reinstatement of the proposed catch-all provision.

#### **Proposed Revisions to § 424.12(b)(2), Designating Unoccupied Critical Habitat**

*Defenders opposes the proposed amendments to add an arbitrary stepwise process and additional criteria for designating unoccupied critical habitat.*

The proposed regulations would substantially revise the regulatory approach to designating unoccupied critical habitat by implementing a “stepwise” process. Under the proposed language, the Services would first be required to designate occupied areas and then evaluate and designate unoccupied areas only upon determining that “a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species.” 2025 Proposed Rule, 90 Fed. Reg. at 52,611. Additionally, the proposed amendments would establish two requirements for finding that unoccupied areas are essential: there exists a “reasonable certainty” both (1) that “the area will contribute to the conservation of the species” and (2) “that the area contains one or more of those physical or biological features essential to the conservation of the species.” *Id.* at 52,612. Both proposed changes were originally implemented in 2019 but later removed as “not mandated by the language or structure of the ESA[.]” 2024 Final Rule, 89 Fed. Reg. at 24,323. In proposing to reinstate this language, the Services have not addressed the rationale and given good reasons for determining to reverse course from removing this language in the 2024 Final Rule. Instead, they merely

assert that the proposed changes are the “best policy judgment” in line with the “best meaning of the Act.” 2025 Proposed Rule, 90 Fed. Reg. at 52,612.

We agree with the Services’ recent assessment that the two requirements for which the Services established the “reasonable certainty” standard for finding unoccupied areas essential to species conservation in the 2019 Final Rule should be eliminated because they “go beyond, and could potentially conflict with, the science-based determination required by the statute and the Act’s mandate to designate critical habitat to the maximum extent prudent and determinable based on the best scientific data available[.]” 2023 Proposed Rule, 88 Fed. Reg. at 40,769.

We also agree with the Services’ recent assessment that imposing a “reasonable certainty” standard is unnecessary in light of the ESA’s best available scientific data standard. *Id.* Indeed, as the Services previously pointed out, the best available data standard as interpreted by the courts does not require the “high degree” of certainty the agencies now cite to justify these additions. *Id.* at 40,769–70. The proposed additions are unnecessary and unlawful as inconsistent with the statute.

In fact, the proposed language is not simply “not mandated”—it is in direct conflict with the statute. The ESA establishes both the standard for unoccupied areas to be designated as critical habitat and considerations for making that determination. Critical habitat includes unoccupied areas that the Services determine are “essential for the conservation of the species,” 16 U.S.C. § 1532(5)(A)(ii). A critical habitat designation must be based on “the best scientific data available . . . after taking into consideration the economic impact, and any other relevant impacts.” *Id.* § 1533(b)(2). The statute does not require the Services, in designating unoccupied areas, to determine that occupied habitat is insufficient to conserve the species or make a specific showing that the area will contribute to the conservation of the species and contains at least one essential biological or physical feature.

The Services posit that these amendments will “further[] Congress’s intent to place greater importance on habitat within . . . areas occupied by the species when it originally defined ‘critical habitat.’” 90 Fed. Reg. at 52,612. In support, the Services cite a House Report on the 1978 amendments to the ESA, see *id.* (citing H.R. Rep. No. 95-1804, at 18) but the cited language in no way establishes that Congress intended to prioritize the designation of occupied over unoccupied critical habitat. Tellingly, the Services can cite no language in the ESA itself—and it is the statute, not the legislative history, that establishes their legal obligations—demonstrating that Congress intended this prioritization.

Rather, the statutory definition already defines the requirements for designating unoccupied habitat as critical habitat, i.e., that it be essential for conservation. The

Services' stepwise approach in the proposed amendment unnecessarily exceeds those statutory requirements. Adding additional bars to designating unoccupied habitat undermines Congress's recognition that unoccupied habitat is essential to conservation and recovery for many species and its intentional inclusion of unoccupied habitat as eligible for critical habitat designation in the ESA.

Congress's determination that unoccupied habitat may be essential to recovery makes biological and practical sense. Unoccupied areas may be just as important to conserve as occupied areas, especially when habitat destruction, alone or in conjunction with other threats, caused the species to warrant listing in the first instance. Species exist within an intricate web of their ecosystem. The areas necessary for a species to survive and recover may extend beyond the limited areas where the species currently survives. Given the myriad regulatory and non-regulatory benefits critical habitat designation has for species' survival and recovery prospects, see, e.g., 2016 Rule, 81 Fed. Reg. at 7,414–15, the Services must take a holistic approach to designation consistent with the law and the science.

Unoccupied critical habitat areas can play a vital role in ensuring species conservation. There are three primary scenarios where designating unoccupied areas as critical habitat is essential to species conservation: (1) where unoccupied areas are ecologically connected to important features of occupied critical habitat areas; (2) where a species' range has been significantly reduced and previously-occupied areas are needed for recovery; and (3) where species may need to shift or expand their current ranges to respond to climate change or other human-caused or natural pressures.

In the first scenario, unoccupied areas may have important ecological connections to occupied critical habitat areas, such that conditions in the former must be protected to maintain conditions in the latter. In designating critical habitat for the Santa Ana sucker, FWS recognized that upstream reaches of certain rivers and creeks that themselves are not occupied by the fish provide stream and sediment flows necessary for the survival of the species in downstream occupied areas. 75 Fed. Reg. 77,961, 77,972–73 (Dec. 14, 2010). Although the sucker cannot access these upstream areas due to natural topographical barriers or human-created water control structures, they are nevertheless vital to maintaining the conditions that make the downstream areas habitable for the species.

In litigation over this designation, the Ninth Circuit expressly rejected the argument that unoccupied but essential upstream areas should be excluded because these areas are not occupied (or occupiable) habitat. It held that “[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to [only] show that the area is ‘essential’ . . . .” *Bear Valley Mut. Water Co.*

*v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015). For the Santa Ana sucker, the unoccupied and unoccupiable upstream areas are nonetheless essential to the conservation of the species. For this and similarly situated species, the 2025 Proposed Rule’s imposition of a higher barrier to designating unoccupied critical habitat might inappropriately lead the Services to exclude currently unoccupied (and potentially unoccupiable) areas that are nevertheless essential for conservation.

In the second scenario, many species with previously larger ranges have been reduced to a small area of presently suitable habitat by the “destruction [or] modification ... of [their] habitat,” 16 U.S.C. § 1533(a)(1)(A). In this circumstance, recovery may necessarily require the protection of both the dwindling areas where the species still occurs and other areas needed for its conservation, including historically occupied areas capable of being restored and recolonized. For such species, designation of unoccupied critical habitat plays an indispensable role in their recovery. Examples of species that require restoration of unoccupied critical habitat areas for their conservation include the dusky gopher frog, the New Mexico meadow jumping mouse, and Hawaiian bird species.

*Dusky gopher frog.* FWS designated unoccupied but potentially restorable habitat for the dusky gopher frog because a panel of scientists found that existing occupied areas would not provide for the conservation of the frog. The original proposed critical habitat designation only included occupied sites within Mississippi. See 75 Fed. Reg. 31,387, 31,395–96 (June 3, 2010). But scientific peer reviewers “were united in their assessment that this proposal was inadequate for the conservation of the dusky gopher frog.” 77 Fed. Reg. 35,118, 35,123–24 (June 12, 2012). Before designating unoccupied areas, FWS examined recorded sightings of the frog throughout its historic range and followed up on those leads with detailed aerial and on-the-ground surveys of potential remnant habitat. *Id.* at 35,133 (noting that the five ponds on Unit 1 were of “remarkable quality”). It also ruled out many other areas in both Alabama and Louisiana that lacked the breeding ponds that are so important to the frog’s lifecycle. *Id.* at 35,132–33. Finally, FWS weighed the economic burden of designating Unit 1 against the conservation benefit from such action and determined that it was not appropriate to exclude these tracts.<sup>7</sup> *Id.* at 35,140–41.

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<sup>7</sup> Both the decisions to designate Unit 1 as unoccupied habitat and not to exclude it based on weighing economic burdens were challenged in a case that made it to the Supreme Court in *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, 586 U.S. 9 (2018). The Court made no substantive determinations about the propriety of including Unit 1 in the species’ critical habitat designation and remanded the case to the lower courts. *Id.* at 369, 372. The case subsequently settled via consent decree with no further merits opinions.

*New Mexico meadow jumping mouse*. FWS designated unoccupied critical habitat for the New Mexico meadow jumping mouse along riparian tracts degraded by years of overgrazing. 81 Fed. Reg. 14,264, 14,267 (Mar. 16, 2016). Thereafter, the U.S. Forest Service engaged with conservation partners and local ranchers to install a series of cattle exclusion fences and alternative water sources that allowed these degraded areas to return to their natural condition and once again host the mouse, demonstrating the utility of designating unoccupied critical habitat to promote recovery.

*‘Ākohekohe (crested honeycreeper) and kiwikiu (Maui parrotbill)*. FWS designated unoccupied critical habitat in need of restoration for two Hawaiian birds, the *‘ākohekohe (crested honeycreeper) and kiwikiu (Maui parrotbill)*, explicitly finding that “additional unoccupied but potentially suitable habitat will require restoration.” 81 Fed. Reg. 17,790, 17,816 (Mar. 30, 2016). Endemic Hawaiian birds and plants have suffered enormous habitat modification and destruction. Their survival and recovery depend on reclaiming areas currently unavailable to them. *See also Palila v. Hawai’i Dep’t of Land and Natural Resources*, 639 F.2d 495, 496 (9th Cir. 1981) (upholding a plan to eradicate sheep and goats to “achieve the regeneration of the forest and restoration of the Palila”).

If the high (and statutorily impermissible) burden for designating unoccupied areas as critical habitat the Services now propose to reinstate is finalized, it may be impossible to recover listed species that are imperiled by habitat destruction without the designation and subsequent restoration of their currently unoccupied critical habitat.

In the third scenario, species may need to shift or expand their current or historical ranges in response to climate change or other natural or human-caused changes. FWS explicitly recognized climate change as a driver of species range shift in its 2023 section 10(j) regulations: “We have since learned that climate change is causing, or is anticipated to cause, many species’ suitable habitat to shift outside of their historical range.” 88 Fed. Reg. 42,642, 42,643 (July 3, 2023). The Service discussed the threat of saltwater intrusion from sea-level rise to the last remaining habitat for Florida Key deer and likely need to relocate that species outside of the Florida Keys and concluded “it is clear that climate change is presently affecting—and will continue to affect— species and their habitats, and that tools such as the establishment of experimental populations outside of their historical range will become increasingly important for the conservation and recovery of ESA-listed species.” *Id.*

Consistent with these findings, FWS included unoccupied areas in need of restoration when revising designated critical habitat for the Western snowy plover

based in part on climate change impacts. 77 Fed. Reg. 36,728, 36,750–73 (June 19, 2012). It explained that such areas needed to be designated specifically to “off-set the anticipated loss and degradation of habitat due to sea-level rise expected from the effects of climate change or due to development offset expected habitat loss and degradation from future sea-level rise.” *Id.* at 36,749.

FWS used a similar rationale when designating critical habitat for the Florida leafwing butterfly, including unoccupied areas that “retain areas that are still suitable for the butterfly or that could be restored.” 79 Fed. Reg. 47,179, 47,188 (Aug. 12, 2014). The agency reasoned such areas “would help to offset the anticipated loss and degradation of habitat occurring or expected from the effects of climate change.” *Id.*

In the same issue of the Federal Register, FWS also designated critical habitat for Bartram’s scrub-hairstreak butterfly to account for the “dynamic ecological nature of [its] pineland rockland habitat,” where natural and prescribed burns mean that pineland rockland areas shift between suitability and unsuitability for the butterfly over time. *Id.* at 47,192.

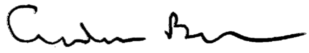
By the Services’ own admission in proposing and ultimately promulgating the identical language in the 2019 Final Rule, the rule’s “rigid step-wise approach” was not about improving conservation outcomes but rather alleviating alleged “continued perceptions” that they might designate “expansive” areas of unoccupied habitat. 2018 Proposed Rule, 83 Fed. Reg. at 35,197–98. In the examples discussed above, the agency designated unoccupied areas as critical habitat after a careful case-by-case analysis of the best available scientific data determined those areas essential to the species’ conservation.

The 2025 Proposed Rule’s presumption against designating unoccupied critical habitat places political and cost considerations above consistency with the ESA’s plain language and its mandate that critical habitat be designated “to the maximum extent prudent and determinable.” The statute already confers ample discretion on the agencies to exclude areas from designated critical habitat based on a cost-benefit analysis of economic, national security, and other relevant impacts, 16 U.S.C. § 1533(b)(2), but that discretion does not extend to ratifying the agencies’ attempts to avoid designating critical habitat in the first instance, as the 2025 Proposed Rule clearly attempts to do. Therefore, Defenders strongly opposes the Services’ proposed amendments to subsection 424.12(b)(2).

\* \* \*

We appreciate your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Bowman". The signature is fluid and cursive, with a prominent initial "A" and a long, sweeping tail.

Andrew Bowman  
President & CEO  
Defenders of Wildlife