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Subject: [EXTERNAL] Meeting request: Climate change consultations under the Endangered Species Act

Date: Thu, 15 Jul 2021 16:13:18 -0400

Importance: Normal

Attachments: Scientists_and_Legal_Scholars_Letter_on_the_Endangered_Species_Act_and_Climate_Change.pdf; ESA_Climate_Consultations_White_Paper.pdf

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Greetings all,

The Center for Biological Diversity and Harvard Animal Law Clinic would like to set up a meeting with you all to discuss completing climate consultation under the Endangered Species Act. A few months back we sent the attached letter about the legal framework of completing these types of consultations to some of you that were already onboarded with the Biden administration. Today, we are also including an informal white paper which complements that letter and sets forth a reasonable and practical approach to such consultations so that they are achievable and impactful.

In addition to our belief that climate consultations are required under the law, we believe they align with President Biden's call for a "whole of government" approach to addressing the climate crisis. Our white paper acknowledges the challenges and complexities of such consultations, but we believe that if done correct such consultations could lead to better, more climate-friendly decisions across the Department of Interior. Just as important perhaps, if done well, they would serve as an important safeguard against any attempted rollbacks by a future administration that is hostile to environmental protections.

We would like to request that this meeting occur at the political level with you or a subset of those I am emailing now. Frankly, we do not have confidence that upper-level management within the career staff at the Fish and Wildlife Service believe that the Endangered Species Act can be useful in the fight against climate change. This is informed by numerous decisions over the past 12 years from the previous two administrations where species that are threatened by climate change were wrongly denied protections under the Act.

We are happy to meet with you (virtually) to discuss this at your convenience. It would likely be a few of us from the Center and a few folks from Harvard Law School.

Thanks in advance,

Brett Hartl
Government Affairs Director
Center *for* Biological Diversity
202-817-8121

Climate Consultations Under the Endangered Species Act

Anthropogenic climate change is causing severe and widespread harm to life across the planet. It is now one of the leading global threats to species survival and is accelerating the Earth's sixth mass extinction event.[1] Scientists have warned that we must slash greenhouse gas emissions by at least 50-70% in the next 10 years to have any hope of keeping global warming to below 1.5 degrees Celsius by 2050.[2]

The Endangered Species Act represents "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[3] The provisions of the Act, and in particular the Section 7 consultation process, can provide an important additional mechanism in ensuring federal agencies make the correct decisions relating to greenhouse gas emissions. While more complex than a typical consultation, completing climate consultations would ensure a "whole of government" approach to climate change and align with President Biden's stated goal to "organize and deploy the full capacity of agencies to combat the climate crisis."[4] Completing climate consultations would provide meaningful conservation benefits to species that are the most harmed by climate change, such as corals, Arctic species like polar bears, and species vulnerable to sea-level rise. Climate consultations would also help ensure better agency decision-making across the board in the face of the existential threat that climate change represents.

While an informal and non-binding policy enacted during the Bush administration has blocked climate consultations,[5] that policy can be quickly and unilaterally reversed. This paper outlines a practical approach for the U.S. Fish and Wildlife Service, National Marine Fisheries Service (the "Services") and federal action agencies to deal with the procedural and substantive steps involved in a climate consultation once the Services rescind the memo. Specifically, this paper outlines (1) how to define the action area of a climate consultation, (2) determining reasonable *de minimis* thresholds for GHG emissions to make defensible "no effect" and "not likely to adversely affect" findings, (3) estimating take for climate-impacted species, and (4) developing Incidental Take Statements, Reasonable and Prudent Measures (RPMs), and Reasonable and Prudent Alternatives (RPAs) for climate-threatened species.

Climate consultations will be complex. How should, for example, the Services address harms to listed corals in the Caribbean resulting from federal oil and gas leasing in the Northern Great Plains? Nevertheless, the Services have assessed geographically remote impacts from other types of pollution, and have completed nationwide consultations on other challenging threats, including invasive species in ballast water and the nation's wildland firefighting program. The Endangered Species Act's mandate that extinction be halted "whatever the cost" means that the Services cannot shy away from this challenge.[6]

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[1] Karl, T.R., J.M. Melillo, T.C. Peterson and S.J. Hassol. 2009. *Global climate change impacts in the United States*. Cambridge University Press.
[2] IPCC, 2018: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty.
[3] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).
[4] *Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14,008*, 86 Fed. Reg. 7619 (Jan. 27, 2021)
[5] *See* U.S. Dep't of the Interior, Office of the Solicitor, *Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the Emissions of Greenhouse Gases* (Oct. 3, 2008).
[6] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

I. Defining the Action Area

Because the effects of greenhouse gas emissions are global and result in harmful impacts far removed from the actual source of emissions, the "action area" in a climate consultation is going to be more expansive in reach than the action area in a typical consultation. For example, the action area for a new nationwide EPA regulation on stationary source emissions would encompass not only the footprints of the facilities themselves, but would extend from Alaska due to the indirect effects on polar bears that depend on sea ice to survive, to the beaches of Hawaii where Hawaiian monk seals raise their pups, to the Florida Keys where 86% of the Key deer's habitat is less than 3 feet above sea level.

Indeed, because of the global nature of climate change, climate consultations will require the federal action agency to consider the possible impacts of its action on every threatened and endangered species in the United States and its territories.[7] This is not unprecedented. National consultations on pesticides and other nationwide "programmatic rulemakings" already require this and starting out at this national scale is not exceptional.[8] The Services have sufficient data and information from other nationwide consultations where the action area encompasses all domestic listed species, and they can assist federal agencies at this initial step.

II. Science-based Greenhouse Gas Emission Thresholds for "No Effect" and "Not Likely to Adversely Affect" Findings

A. Thresholds for No Effect Determinations

As the IPBES report makes clear, one million species are at risk of going extinct in the next few decades because of climate change and other human-driven activities.[9] Thus, it is likely true that climate change will impact almost every listed species in a cumulative manner. However, the fact that a species is impacted by climate change *does not* necessarily entail that every single federal agency action that emits GHGs causes a measurable effect on a particular species. Thus, the Services must determine when GHG emissions from agency action cross the "very low threshold" of the "no effect" determination versus the "may affect" determination.[10] As the Joint Consultation Handbook explains, a "no effect" finding is only properly made "when the action agency determines its proposed action will not affect a listed species or designated critical habitat."[11] In contrast, a "may affect" determination is appropriate when an action has any effect

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[7] This does not include foreign species that have been excluded via regulation already.

[8] *See* U.S. Fish and Wildlife Service, Draft Biological and Conference Opinion on the Registration of Malathion Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (Feb. 2021), *available at* https://www.epa.gov/endangered-species/biological-opinions-available-public-comment; National Marine Fisheries Service, Biological Opinion on the United States Coast Guard's National Ballast Water Management Program and Initial Numerical Standard (June 2012).

[9] S. Diaz, J. Settele, E. Brondizio, *Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (2019) *available at*: https://www.ipbes.net/news/Media-Release-Global-Assessment

[10] *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012).

[11] U.S. Fish and Wildlife Service & National Marine Fisheries Service, Consultation Handbook: Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act, at xvi.

on a listed species "*whether beneficial, benign, adverse or of an undetermined character*."[12]

The Services and action agencies could easily become bogged down in an "how many angels can dance on the head of a pin?" exercise trying to determine if every conceivable agency action crosses the *undetermined character* within the "may affect" threshold or instead represents a legitimate "no effect" determination.[13] A more efficient and effective approach here would be to develop science-based guidance that sets a threshold GHG emission level for which the Services determine that a "no effect" determination is appropriate. Unless emissions exceed a particular level, then an agency action would not cross the "may affect" threshold and a "no effect" determination can be safely made by the action agencies without further concurrence by Services.

We believe that a *de minimis* threshold level of GHG emissions for "no effect" determinations is appropriate, whereby any GHG emissions — whether calculated based on annual or cumulative amount — below the threshold would allow action agencies to proceed without consultation. This type of approach would not be unprecedented. The Council on Environmental Quality (CEQ) set forth draft guidance in 2014 for when federal action agencies should conduct a climate analysis under the National Environmental Policy Act (NEPA).[14] The CEQ proposed a threshold level of 25,000 metric tons of carbon dioxide equivalents per year as the *de facto* threshold for significance. Likewise, under the EPA's "Tailoring" Rule, the EPA set a limit of emissions of 100,000 metric tons of carbon dioxide equivalents per year that required compliance with the PSD and Title V provisions of the Clean Air Act.[15] While the Tailoring Rule was invalidated based on statutory interpretation grounds, nonetheless, it illustrates that federal agencies can, and do, draw lines for significance with respect to greenhouse gases.

We recommend the Services review the best available science and develop a similar type of threshold for GHGs above which an agency action would cross the "no effect" threshold. Under this approach, it is likely that modest and small-scale agency actions such as permitting a discrete logging project, a new drilling well, or the construction of a new highway overpass would not fall within the climate consultation scope. On the other hand, agency actions that have the potential to emit very large levels of GHGs — such as setting the nationwide corporate average fuel economy (CAFE) standards or reviews of national fossil fuel programs including coal, oil or gas — would likely reach the threshold for triggering the need to consult.

Just as EPA had set a different threshold than the CEQ for its Tailoring Rule, the Services "no effect" threshold could be different than those thresholds set by other agencies. This is because the Section 7 consultation inquiry asks a different question than other environmental statutes. Under NEPA, for example, federal action agencies are mainly required to narratively discuss the environmental impact of and alternatives to major federal actions significantly affecting the

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[12] *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018 (9th Cir.2009) (quoting 51 Fed.Reg. 19,926, 19,949 (June 3, 1986)); *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F. 3d 1006 (9th Cir. 2012); *see* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)).

[13] We note that the1986 regulatory preamble is not binding, and setting a threshold would not conflict with existing caselaw so long as it clearly focused on defining when an impact is unknown in nature versus not having any effect.

[14] Council on Environmental Quality Office of NEPA Policy and Compliance, Revised Draft Guidance on Consideration of Greenhouse Gas Emissions and Climate Change in NEPA Reviews (Dec. 18, 2014).

[15] *Action To Ensure Authority To Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 82,254 (Dec. 30, 2010).

environment to help ensure an action agency takes a "hard look" at the proposed action's environmental impacts.[16] On the other hand, consultations under the Endangered Species Act have both procedural and substantive requirements.[17] The Services must assess and determine the amount of anticipated take caused by a proposed action and determine if the harm would result in jeopardy to a species, or if the impacts would destroy or adversely modify critical habitat. This science-driven inquiry should be guided by the best available climate science, in order to set an appropriate threshold for when and where consultations are needed.

Once such guidance is established by the Services, for those agency actions that fall below this GHG threshold, there would be a clear and consistent approach that all federal agencies could follow to determine when their actions will have no effect on listed species from an emissions perspective, and no consultation or concurrence is required from the Services.[18]

B. Not Likely to Adversely Affect Determinations

For agency actions that exceed the "no effect" GHG thresholds, climate consultations should focus mainly on those species substantially impacted by climate change. Significant numbers of species are likely to have impacts that are discountable or insignificant.[19] Here too, the Services could provide guidance to the action agencies regarding making "not likely to adversely affect" determinations or "likely to adversely affect determinations" in order to focus the assessments on the subset of species that are most harmed by climate change.

For climate change consultations, it is reasonable to use the best available science and determine appropriate thresholds about discountable or insignificant effects. As the Handbook already notes, insignificant effects "relate to the size of the impact and should never reach the scale where take occurs."[20] While discountable effects are "those extremely unlikely to occur," based on the best scientific judgment that effects are not possible to "meaningfully measure, detect, or evaluate."[21]

For the majority of listed species, climate change is not a primary or even secondary threat driving their declines, and thus the impacts likely wouldn't rise to the level of take or require consultation for those species. For instance, the impacts to the Mississippi Sandhill Crane from climate change are at best indirect and speculative. For species like these, the action agencies can reasonably make an NLAA determination.

For a subset of listed species, climate change is a primary reason for their decline. Ice seals and polar bears are clearly harmed by the loss of sea ice throughout their habitats. Coral reefs are harmed by warming temperatures and ocean acidification. Florida Keys species are harmed by sea level rise, and other coastal species like the eastern black rail are rapidly losing its coastal marsh habitat due to increased flooding. Diminishing snowpack in the mountains caused by warming temperatures is significantly harming the western glacier stonefly. For this subset of

[16] *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).
[17] *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985).
[18] This would not alleviate the requirement to consider the other cumulative impacts on listed species within the traditional, non-climate action area.
[19] Consultation Handbook at xvi
[20] *Id.*
[21] *Id.*

climate-threatened species, the impacts of climate change are likely to rise to the level of take and consultation is necessary because the action "is likely to adversely affect" them.[22]

We believe therefore that the Services can again draw science-based thresholds and threat-assessment screens that focus the climate consultation squarely on those species whose impacts are meaningful and substantial. The Services should develop guidance that describes which species are most likely to be harmed by specific threats from climate change: sea level rise, loss of sea ice, habitat loss/degradation from rising temperatures, and ocean acidification. By examining recovery plans, listing rules, five-year reviews, and Species Status Assessments, the Services can determine whether any species faces a clear and significant threat from climate change rather than discountable or insignificant threat.

III. Estimating Take for Climate-Impacted Species and Assessing Impacts to Critical Habitat

Once the formal consultation process begins for the subset of species identified at the NLAA/LAA stage, the Services must evaluate the greenhouse gas pollution and climate impacts of the proposed action and address any anticipated "take" of listed species, including those that are geographically remote from the action but are nonetheless still affected due to the action's role in exacerbating climate change. We recognize that estimating take in climate consultations may be difficult; a huge number of sources emit greenhouse gases at any given time, and each source emits only a fraction of global emissions. However, that does not obviate the need for the Services to complete consultations. Federal agencies must confront the problems that the law requires them to address, even if they do so in an "incremental" manner towards solving the climate crisis.[23]

Thus, the Services must first attempt to quantify any take of listed species, and if such take cannot be quantified, to address take caused by climate impacts qualitatively through surrogates. Here too, such an approach would not be unprecedented, and in fact was expressly contemplated by Congress when it passed the 1982 amendments to the Endangered Species Act. The legislative history of those amendments reflects Congress' recognition that a numerical determination of take would not always be obtainable — such as when the eggs of listed species are boiled alive in power plant cooling systems —and intended that such challenges not represent an insurmountable barrier to completing consultations.[24] The Services have regularly relied on surrogates such as habitat, ecological conditions, or a similarly affected species that is easier to monitor in instances where the biology of a listed species or the nature of the proposed action makes it difficult to detect or monitor take of individual animals. This is not only a practical solution but also often a necessary one. Courts have also found that the use of surrogates by the Services "is reasonable so long as [the surrogates] are linked to the take of the protected species."[25]

Similarly, the Services have an independent obligation to assess the negative impacts of

[22] *Id.* at xv.
[23] *Massachusetts v. Environmental Protection Agency*, 549 U.S. 49 (2007) ("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop… They instead whittle away at them over time.").
[24] H.R. Rep. No. 97-567, at 27 (1982).
[25] *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F. 3d 1229, 1250 (9th Cir. 2001).

greenhouse gases on critical habitat. Assessing the loss of critical habitat in a climate consultation is complex, but no more difficult than assessing critical habitat in other nationwide programmatic consultations. One significant difference between this assessment and other consultations is the relatively homogenous nature of climate change impacts. Under the Services' regulations,[26] critical habitat is only adversely modified or destroyed when it appreciably diminishes the value of the "whole" designation. In many cases, climate impacts to critical habitat will affect the entirety of a designation — likely to the same extent — in a relatively similar manner. For example, acidification impacts to a listed coral are likely to be roughly equivalent across the range of each species, , and sea level rise would likely harm the habitat of Florida Keys species relatively equally across the range, making it more likely that an adverse modification determination would be needed at the end of the assessment process. But the fact that the outcome of such an analysis is a positive adverse modification or destruction determination is not a legal justification for not conducting an analysis at all. Thus, to the extent that the impacts to critical habitat are significant, the Services must develop RPAs and RPMs — including through surrogate metrics — to address the habitat degradation that climate change is bringing.

For both the jeopardy analysis and critical habitat analysis, the Services will have to develop solutions that meet the standards of the Endangered Species Act, just as it does in traditional consultations. Just like how the FWS used the number of ponds and pools that the fairy shrimp occupy as a surrogate to infer their status in southern California's vanishing vernal pool complexes,[27] or the number of acres of spotted owl habitat removed as a surrogate for the number of spotted owls likely to be taken from a particular timber project,[28] the Services can take the same approach with climate-threatened species. For example, NMFS can use the amount of sea ice lost as a surrogate for determining anticipated take of bearded seals, or the FWS can use declining stream-flows and increasing water temperatures as a surrogate to infer the status of the western glacier stonefly or its critical habitat. This has been a pre-existing practice and the Services already have the knowledge and expertise to do this.

IV. Setting Forth Incidental Take Statements and Preparing Reasonable and Prudent Measures (RPMs) and Reasonable and Prudent Alternatives (RPAs) for Climate-impacted Species.

If the Services determine that the proposed action will result in jeopardy or the destruction or adverse modification of critical habitat, then they must issue Reasonable and Prudent Alternatives (RPAs) to the action. For actions that do not jeopardize a species but result in take, they must provide an Incidental Take Statement ("ITS") and Reasonable and Prudent Measures ("RPMs") to *minimize* such take. These mechanisms are the heart of the consultation process and what make the Endangered Species Act so successful.

If through consultation the Services determine the proposed action will result in jeopardy, the Services must provide the federal action agency with RPAs that will allow the agency to move

[26] These regulations are being challenged in federal court and the Administration has signaled it may revise them in the near future.
[27] *See* 57 Fed. Reg. 19856 (May 8, 1992), *available at*: https://ecos.fws.gov/docs/federal_register/fr2043.pdf.
[28] *See* Northern Spotted Owl Biological Opinion, Westside Fire Recovery Project, Klamath National Forest, California, U.S. Fish and Wildlife Service Region 8, (Feb. 19, 2016), *available at*: https://www.biologicaldiversity.org/species/birds/northern_spotted_owl/pdfs/USFWS_Westside_BO.pdf.

forward in a way that avoids jeopardy to the species or destruction or adverse modification of designated critical habitat.[29] While jeopardy determinations are rare, in the context of climate consultations they are all the more critical to the survival of not only listed species, but of humanity itself. If a federal agency action substantially increases the likelihood of overshooting the 1.5 degree Celsius goal of the Paris Accords, that is likely to not only jeopardize climate-threatened species, but people everywhere. As the Endangered Species Act makes clear, the action agency must not take such an action, or it must implement RPAs that ensure GHG emissions decrease such that they are consistent with the IPCC and the best available science. Therefore consultations would provide a powerful mechanism to achieve President Biden's stated policy to "reduce climate pollution in every sector of the economy; increase resilience to the impacts of climate change; protect public health" and "conserve our lands, waters, and biodiversity."[30]

In most instances, federal agency actions will not rise to the level of jeopardy but will result in incidental take. In these circumstances, the Services must issue RPMs to minimize the take of climate-threatened species.[31] In fact, Congress explicitly recognized the importance of providing agencies with ways to minimize take when it amended the Act in 1982:

> "[I]n many cases in which a proposed action will not result in jeopardy, there may be minor modifications to the project which will minimize the effects on the species and which the action agency could easily and inexpensively adopt. We believe that providing such information to the action agency is important for the continued protection of endangered species and assists other federal agencies in fulfilling their obligations under section 7(a)(1) of the Act."[32]

Preparing RPMs and the accompanying ITS for a climate consultation to ensure an agency minimizes the climate-induced harms is just as achievable as in a non-climate consultation. The Services already have mechanisms whereby action agencies are allowed to mitigate harms offsite from where such harms occur. Over the years, the Services have enacted numerous policies including for the harms resulting from their geographically remote actions on listed species, regardless of where they are found.

The most durable and effective approach for climate consultations to implement RPMs would be for the Services to condition the receipt of an ITS through the implementation of RPMs within a climate-focused Section 7(a)(1) conservation program for each climate-threatened species identified in the biological opinion where the Services anticipate take. Section 7(a)(1)—often referred to as the affirmative conservation duty—requires all federal agencies to "utilize their authorities…by carrying out programs for the conservation of endangered and threatened species."[33] "Conservation" as used in the Act means "the use of all methods and procedures which are necessary to bring endangered species or threatened species to the point at which [the Act's protections] are no longer necessary."[34] In other words, the goal of conservation is species recovery. As the Supreme Court in *Tennessee Valley Authority v. Hill* noted, section 7(a)(1) is no

[29] 16 U.S.C. 1536(b)(3)(A).
[30] *Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14,008*, 86 Fed. Reg. 7619 (Jan. 27, 2021).
[31] *Id.* at 1536(b)(4)(C)(ii).
[32] H.R. Rep. No 97-567, at 44.
[33] 16 U.S.C. 1536(a)(1).
[34] *Id.* at 1532(3).

less than "stringent, mandatory language,"[35] that "reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species."[36]

The value of Section 7(a)(1)'s affirmative mandate is that it adds endangered species conservation to the purposes of every single federal agency in a way that is accountable and meaningful. Yet despite the clear requirements of the law, agencies have all but ignored their obligation to conserve listed animals and plants. By requiring agencies to develop a climate-focused Section 7(a)(1) conservation program as a condition to obtaining an ITS, the Services can require agencies to finally comply with the law and ensure that their activities are consistent with the recovery of listed species.

Because most climate-threatened species are also harmed by conventional threats such as habitat degradation, pollution, or invasive species, a Section 7(a)(1) program for climate-impacted species could, for example, carry out other conservation measures identified in a species recovery plan, recommendations from recent 5-year reviews, or Species Status Assessments. The Service's Consultation Handbook references section 7(a)(1) as "a blueprint for conservation activities including…section 10 permits, assistance in developing and implementing recovery plans, and assistance in candidate monitoring and management programs."[37] A Section 7(a)(1) program could also include the acquisition, restoration, or management of habitat that results in net conservation benefits to a listed species. "Conservation benefit" means the program should "produce cumulative benefits for each endangered/threatened species that it can affect within its authorities through conservation measures designed to improve the conservation status of the species."[38]

Land management agencies can incorporate Section 7(a)(1) planning into their statutory planning process. For example, such a program could be incorporated into the Forest Service's Land Management Plan process and the National Park Service's General Management Plan process. If implemented properly by each federal agency, Section 7(a)(1) programs could even be a valuable tool to help accomplish the Biden Administration's goal of protecting 30% of U.S. lands and waters by 2030 while helping save climate-threatened species from extinction.[39] The Services will need to establish minimum requirements as to what agency Section 7(a)(1) conservation programs should include, but the goal and guiding principle of any such program must ultimately be the proactive, landscape-level conservation and recovery of the species in the face of climate change.

Conclusion

When enacting the Act, Congress intended to "halt and reverse the trend towards species

[35] TVA v. Hill, 437 U.S. at 183.
[36] *Id.* at 185.
[37] *Supra* note 12, at 5-1.
[38] U.S. Fish and Wildlife Service Northeast Region, Better Conservation More Efficiently: A Guide for Federal Agency Compliance with Section 7(a)(1) of the Endangered Species Act, at 2 (2018), *available at*: https://test.el.erdc.dren.mil/pdfs/conservation/resources/2018_Jan_USFWS_Guide_for_Federal_Compliance.pdf
[39] Conserving and Restoring America the Beautiful (May 2021), *available at*: https://www.doi.gov/sites/doi.gov/files/report-conserving-and-restoring-america-the-beautiful-2021.pdf

extinction, whatever the cost."[40] Now more than ever, all federal agencies must actively consider the impacts of their actions on climate change and climate-impacted species and ameliorate any adverse effects whenever possible. Section 7 of the Endangered Species Act represents a remarkably powerful yet underutilized tool for the federal government—which is responsible for a large portion of the country's overall emissions—to meaningfully address greenhouse gas emissions. The planet itself can no longer afford policies that merely tinker around the edges. The dire nature of the climate crisis requires nothing less than bold, immediate action, and climate consultations can provide an invaluable tool to address this crisis.

[40] *TVA v. Hill*, 437 U.S. at 184.

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February X, 2021

President Joseph R. Biden Jr.
1600 Pennsylvania Ave., N.W.
Washington, DC 20001

Re: Request to Revoke Memoranda and Regulations Regarding Consideration of Greenhouse Emissions under the Endangered Species Act

Dear President Biden,

Congratulations on your historic Presidential election win and thank you for the crucial steps you have already taken to address the climate crisis in your first ten days in office. We write with suggestions to help accomplish your laudatory policy "to organize and deploy the full capacity of [federal] agencies to combat the climate crisis."[1] As you note in your Executive Order on Tackling the Climate Crisis at Home and Abroad, doing so will conserve our lands, waters, and biodiversity, in addition to accomplishing many other essential goals. It is indeed critically important for federal agencies to roll up their sleeves and examine all ways to reduce the greenhouse pollution from their approvals and actions. By revoking guidance instituted by the George W. Bush administration and regulations adopted by the Trump administration that were intended to frustrate this goal, you can jumpstart a new era of science-based analysis to advance practical ways to reduce greenhouse emissions across all federal agencies. In furtherance of this vital goal, we urge you to rescind the ill-advised memoranda and Endangered Species Act regulations as detailed further below.

The Endangered Species Act is our nation's safety net for plants and animals on the brink of extinction. It is the world's strongest and most successful biodiversity protection law. Since its passage in 1973, it has worked to protect more than 99 percent of the more than 1,600 plants and animals protected as "threatened" or "endangered." Now more than ever, as climate change drives

[1] Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021) ("It is the policy of my Administration to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a Government-wide approach that reduces climate pollution in every sector of the economy; increases resilience to the impacts of climate change; protects public health; conserves our lands, waters, and biodiversity; delivers environmental justice; and spurs well-paying union jobs and economic growth, especially through innovation, commercialization, and deployment of clean energy technologies and infrastructure.").

the Earth's sixth mass extinction event, we urgently need all federal agencies to steadfastly implement all of the law's provisions as Congress intended.

Since 2008, however, the U.S. Department of the Interior has been relying on memoranda in its enforcement of the Endangered Species Act (ESA) that purport to instruct federal agencies to *ignore* greenhouse gas emissions when making certain listing decisions under the statute, and undermine the inter-agency consultation process for "insur[ing]" that federal actions are not likely to jeopardize or adversely modify the critical habitat of protected species, as required by Section 7 of the statute (16 U.S.C. § 1536(a)(2)). The George W. Bush administration issued the 2008 Bernhardt Memorandum, so named because it was issued by then Interior Solicitor David Bernhardt. This was followed by the Polar Bear Listing Memorandum, so named because it was issued during the course of litigation over the 2008 listing of the polar bear as a threatened species.

During the Trump administration, David Bernhardt, now as Interior Secretary, enshrined the principles first developed in the memoranda into new Endangered Species Act regulations which may threaten implementation of the law in unprecedented ways. Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44976 (Aug. 27, 2019) (codified at 50 C.F.R. § 402). The new regulations may be construed and implemented by agencies in a manner that undermines their ability to meaningfully evaluate climate-change related injuries that federal agencies must consider during consultation.

The memoranda and regulations are factually and legally flawed and directly contrary to the purposes of the Endangered Species Act. Given the evidence showing that climate change harms endangered and threatened species, the memoranda directing agencies to ignore its effects also contradict the Act's affirmative requirement that every federal agency "utilize" its authorities "in furtherance of the purposes" of the ESA. 16 U.S.C. § 1536(a)(1).

As explained more fully in the Supporting Analysis, attached as Exhibit A, immediately rescinding the guidance memoranda and the 2019 Endangered Species Act regulations will greatly assist federal agencies in considering the effects of climate change on imperiled species, and in effectuating your important promise "to require any federal permitting decision to consider the effects of greenhouse gas emissions and climate change."[2]

Please contact Kassie Siegel at ksiegel@biologicaldiversity.org or (951) 961-7972 if you would like to discuss any of these important issues further. Thank you very much for your consideration.

Signed,

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[2] *The Biden Plan for a Clean Energy Revolution and Environmental Justice*, https://joebiden.com/climate-plan.

Affiliations of additional signatories are provided for identification purposes only:

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Enclosures

Exhibit A: Supporting Analysis Re: Request to Revoke Memoranda and Regulations Regarding Consideration of Greenhouse Emissions under the Endangered Species Act.

Exhibit B: U.S. Dep't of the Interior, Office of the Solicitor, *Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the*

Emissions of Greenhouse Gases (Oct. 3, 2008) (Bernhardt Memorandum); including referenced memorandum entitled *Expectations for Consultations on Actions that Would Emit Greenhouse Gases* (May 14, 2008) (FWS Memorandum).

Exhibit C: *Supplemental Explanation for the Legal Basis of the Department's May 15, 2008 Determination of Threatened Status for Polar Bears* (Dec. 22, 2010) (Polar Bear Listing Memorandum).

CC:

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White House National Climate Advisor
Ali Zaidi
Deputy White House National Climate Advisor

Scott de la Vega
Acting Secretary of the Interior

Wynn Coggins
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Exhibit A: Supporting Analysis Re: Request to Revoke Memoranda and Regulations Regarding Consideration of Greenhouse Emissions under the Endangered Species Act by Harvard Law School's Animal Law and Policy Clinic

The U.S. Department of Interior (DOI) should rescind the 2008 "Bernhardt Memorandum," as well as the 2010 Polar Bear Listing Memorandum. Likewise, DOI should rescind amended Section 7 regulations promulgated by the Trump Administration in 2019. In addition to rescinding these policies, all federal agencies should be directed to actively consider the impact of all of their actions on climate change, in keeping with their additional *affirmative* obligation under Section 7 to "utilize" their authorities "in furtherance of the purposes" of the Endangered Species Act (ESA). 16 U.S.C. § 1536(a)(1). Considering climate change and its effects on listed species is both necessary and vital to enforcing the ESA according to Congress' overriding concern—expressed over forty years ago—that "endangered species . . . *be afforded the highest of priorities*." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978) (emphasis added).

I. The DOI Should Rescind the 2008 Bernhardt Memorandum.

On October 3, 2008, David Bernhardt, then Solicitor of DOI, issued a memorandum purporting to "clarify" DOI's obligation to consider climate change effects in the Section 7 context. U.S. Dep't of the Interior, Office of the Solicitor, *Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the Emissions of Greenhouse Gases* (Oct. 3, 2008) (Bernhardt Memorandum). Section 7 requires all agencies to "consult" with either the Fish and Wildlife Service (FWS) (for terrestrial species) or the National Marine Fisheries Service (NMFS) (for marine species) to "insure" that their actions are "not likely to jeopardize the continued existence" of any species listed as either endangered or threatened under the Act. 16 U.S.C. § 1536(a)(2). This duty to consult is triggered whenever a federal action "may affect" a listed species. 50 C.F.R. § 402.14. Courts have held that this sets an extremely "low" bar for initiation of consultation. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481, 496 (9th Cir. 2011); *see also* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (explaining that "[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement").

Nonetheless, the Bernhardt Memorandum adopted language from an earlier memorandum from the Director of the Fish and Wildlife Service, which stated that "the Service does not anticipate that the mere fact that a Federal agency authorizes a project that is likely to emit [greenhouse gases (GHG)] will require the initiation of section 7 consultation." *Expectations for Consultations on Actions that Would Emit Greenhouse Gases* (May 14, 2008) (FWS Memorandum), 1. The FWS Memorandum asserted that there was no definitive evidence "establish[ing]" that emission of greenhouse gases (GHGs) "cause[s] an indirect effect to listed species or critical habitat," and that without "sufficient data to establish the required causal connection . . . between a new facility's GHG emissions and impacts to listed species or critical habitat, section 7 consultation would not be required to address impacts of a facility's GHG emissions." *Id.* at 1–2. The Bernhardt Memorandum concluded that greenhouse gas emissions or the effects of climate change "cannot pass the 'may affect' test" and are therefore "not subject to consultation under the ESA." Bernhardt Memorandum at 2. However, this directive does not comport with the mandates of the ESA, as it directs federal agencies to exclude from their analyses a critical factor that has affected, and will continue to negatively affect, listed species.

The Bernhardt Memorandum was incorrect in its assessment that considering greenhouse gas emissions and their effects on climate change at the outset is impossible because of the many contributing factors to climate change. The memorandum reasons that emissions of greenhouse gases, insofar as they contribute to climate change, are not to be considered "direct" or "indirect effects" of an agency action, because climate change is not conclusively "caused by" any individual action, and hence the effects are not "reasonably certain to occur." Bernhardt Memorandum at 5–6. The Bernhardt Memorandum's assertions that scientific research had "not yet developed tools specifically intended for evaluating or quantifying end-point impacts attributable to the emissions of GHGs from a single source," and that "requisite causal connections cannot be made between the emissions of GHGs from a proposed agency action and specific localized climate change as it impacts listed species or critical habitat," Bernhardt Memorandum at 5–6, were at the time, and continue to be, both scientifically and legally incorrect.

It is beyond dispute that emissions of greenhouse gases significantly contribute to global climate change and are causing widespread and intensifying harms.[1] Moreover, the fact that there are many sources of greenhouse gas emissions does not mean that federal agencies and the Services

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[1] *See, e.g.*, Intergovernmental Panel on Climate Change, *Climate Change 2014 Synthesis Report Summary for Policymakers*, https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf ("Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems."); U.S. Global Change Research Program, Impacts, Risks, and Adaptation in the United States, Fourth National Climate Assessment, Volume II (2018), https://nca2018.globalchange.gov/ ("It concludes that the evidence of human-caused climate change is overwhelming and continues to strengthen, that the impacts of climate change are intensifying across the country, and that climate-related threats to Americans' physical, social, and economic well-being are rising"; "fossil fuel combustion accounts for approximately 85 percent of total U.S. greenhouse gas emissions" which is "driving an increase in global surface temperatures and other widespread changes in Earth's climate that are unprecedented in the history of modern civilization."); Anna Moritz, Kassie Siegel, Brendan Cummings, and William Rodgers, Jr., *Biodiversity: Baking and Boiling, Endangered Species Act Turning Down the Heat*, 44 Tulsa L. Rev. 205, 222 (2008), https://digitalcommons.law.uw.edu/faculty-articles/240 ("The notion that there is no causal connection between greenhouse gas emissions and the decline of the polar bear (or other species) is demonstrably incorrect.").

are free to ignore the negative impacts of *additional* greenhouse gas emissions. In other words, while the Bernhardt Memorandum asserted that it was impossible to "quantify[] end-point impacts attributable to" a single source, agencies nevertheless have a statutory obligation to take incremental steps towards furthering their mandate to conserve endangered species. *See Massachusetts v. EPA*, 549 U.S. 497, 499 (2007) ("[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop . . . They instead whittle away at them over time."); *see also Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 598 (D.C. Cir. 2019) ("EPA['s] conclu[sion] that it is impossible to know whether the…Rule will affect listed species or critical habitat…is not the same as determining that the 2018 Rule 'will not' affect them").

The law has additionally developed mechanisms by which the "end-point impacts" of a particular action can be identified and analyzed. Most notably, in *Massachusetts v. EPA*, the Supreme Court employed a "meaningful contribution" standard to determine and attribute a contributor's emissions to their effects on climate change. 549 U.S. at 523–25 (determining that domestic motor-vehicles make a "meaningful contribution" to GHG concentrations at 6% of global carbon dioxide emissions, thus establishing sufficient causation for standing).

Similarly, both FWS and NMFS have considered climate change impacts once the Section 7 consultation process has been initiated for reasons unrelated to climate change—thus, the action agencies, the Services, and the courts that may review any determinations resulting from the consultation are all capable of making assessments about causation and attribution in the context of climate change.[2] Indeed, courts have already been requiring the federal government to assess the effects of climate change, including its additive harm, under these standards. *E.g.*, *Nat'l Wildlife Federation v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 917 (D. Ore. 2016) (finding a biological opinion did not "properly analyze the effects of climate change, including its *additive harm*, how it may reduce the effectiveness of [mitigating] actions, particularly habitat actions that are not expected to achieve full benefits for 'decades,' and how it increases the chances of a catastrophic event") (emphasis added)[3]; *Nat. Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 370 (E.D. Cal. 2007) (granting summary judgment to plaintiffs because the "absence of *any* discussion in the BiOp of how to deal with any climate change is a failure to analyze a potentially 'important aspect of the problem.'") (emphasis in original); *South Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247. 1273–74 (E.D. Cal. 2010) ("The court cannot conclude that global warming's potential impacts are so slight that NMFS could ignore them without discussion.").

[2] Under a Section 7 consultation, the Services must analyze: (1) "the current status and environmental baseline of the listed species or critical habitat;" and (2) "the effects of the action and cumulative effects on the listed species or critical habitat," adding them together to determine "whether the action is likely to jeopardize the continued existence of the listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g); *see also* 50 C.F.R. § 402.14(h) (listing requirements for biological opinions).

[3] The court in *National Wildlife Federation* listed various reasons the biological opinion failed to adequately consider climate change, including assuming climate conditions would remain the same in the future, lack of quantitative analysis, and failure to use the best available scientific information to estimate impacts of climate change. *Id.* at 917–923. If courts see value in addressing climate change at the consultation process, and actually are able to assess climate change and its effects at the consultation stage, the Services must not exclude considerations of climate change at the initial step of determining whether or not to initiate the Section 7 consultation process.

For the foregoing reasons, it is clear that the Bernhardt Memorandum, insofar as it directs the Services not to consider greenhouse gas emissions or the effects of climate change on listed species when determining whether to initiate the Section 7 consultation process, is neither scientifically nor legally sound. Accordingly, the Biden Administration should revoke it, and the 2008 FWS Memorandum on which it relies, as soon as possible, and direct federal agencies to fully comply with the ESA by considering the greenhouse pollution and climate impacts of all federal actions, and to conduct the analysis with the care and urgency required by the dire nature of the climate crisis.

II. The DOI Should Rescind the 2010 Polar Bear Listing Memorandum.

In December 2010, FWS also published a memorandum severely limiting the extent to which climate change should factor into determinations as to when a species should be listed under the ESA as "endangered," defined by the Act as "in danger of extinction." 16 U.S.C. § 1532(6). Until a species is listed as either endangered or threatened, it receives no protection at all under the statute.[4]

In May 2008, against the urging of conservationists that the polar bear should be listed as "endangered" under the Act due to declining global sea ice, upon which the polar bear depends for all of its essential life functions, FWS listed the polar bear as only "threatened," 73 Fed. Reg. 28,212 (May 15, 2008)—a determination that was upheld by the courts. 818 F. Supp. 2d 214 (D.D.C. 2011) (*affirmed* 720 F.3d 354 (D.C. Cir. 2013)). During the course of that litigation, at the request of the district court judge, FWS issued a memorandum clarifying that "in danger of extinction" means "*currently* on the brink of extinction in the wild[.]" *Supplemental Explanation for the Legal Basis of the Department's May 15, 2008 Determination of Threatened Status for Polar Bears* (Dec. 22, 2010) ("Polar Bear Listing Memo").

This interpretation—essentially requiring that a species' extinction be imminent, certain, and currently looming—represents a dramatic and unnecessary narrowing of the circumstances under which a species can be classified as endangered. It also severely undermines the efficacy of the ESA, a statute whose purpose is to provide a program for the survival and *recovery* of endangered and threatened species. 16 U.S.C. § 1531(b); 16 U.S.C. § 1532(3). If a species cannot be afforded the life-saving protections associated with being listed as endangered until its populations are so far gone that recovery is an all but impossible task, then one of the ESA's primary purposes would effectively be undone.

As part of its reasoning for why the polar bear did not meet this new standard, FWS found that climate change, and the resulting loss of sea ice habitat, would be "incremental," thereby decreasing the "polar bear's ability to sustain itself . . . over time," but that polar bear populations did not *currently* suffer to the point where they could be considered "on the brink of extinction." Polar Bear Listing Memorandum 17–18.

This interpretation of the role of climate change in the listing context is both scientifically unsupportable and legally insufficient. The ESA requires the Services to rely on the "best available scientific and commercial data available" in making a listing determination. 16 U.S.C. § 1533(b)(1). Scientific data clearly support that climate change creates both an *acute* and *current*

[4] A "threatened" species is one that is one that is "likely to become endangered in the foreseeable future." 16 U.S.C. § 1532(20).

threat, as well as an accelerating and rapidly growing threat that will only worsen with time. *See* Fourth National Climate Assessment (2018), https://nca2018.globalchange.gov/; The Intergovernmental Panel on Climate Change, *Global Warming of 1.5ºC* (2018), https://www.ipcc.ch/sr15/download/#chapter. Dismissing the effects of climate change as too distant or geographically remote necessarily ignores the best available science.[5]

Therefore, the Biden Administration should also rescind the Polar Bear Listing Memo, consistent with the mandates of the ESA and the best available science.

III. The Services Should Rescind the 2019 Section 7 Regulations.

In 2019, the Trump Administration amended regulations pertaining to Section 7 consultations. Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019) (codified at 50 C.F.R. § 402). The new regulations amended the definition of "effects of the action" that the action agency and Services must consider when engaging in Section 7 consultation, *see* 50 C.F.R. § 402.14(a)), by adding a restrictive "but for" requirement: "A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur." 50 C.F.R. § 402.02(d). The 2019 amendments to the regulations also added § 402.17, which defines "activities that are reasonably certain to occur" and "consequences caused by the proposed action," both of which are terms used to determine the scope of effects that must be considered during consultation to "insure" that agency actions are not likely to jeopardize any listed species. 50 C.F.R. § 402.17.[6]

Although the regulations provide that "[e]ffects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action," 50 C.F.R. § 402.2(d)—thus potentially encompassing climate change-related impacts—the amendments may be construed and implemented by agencies in a manner that undermines their ability to meaningfully evaluate climate-change related injuries that federal agencies must consider during consultation.

The Biden Administration should thus rescind these recently promulgated regulations.[7]

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[5] The Services' narrow interpretation of "endangered" in the Polar Bear Listing Memorandum is additionally inconsistent with the statute's requirement that the Services consider "the present *or threatened* destruction, modification, or curtailment of [the species'] habitat or range," and "*manmade factors* affecting [the species'] continued existence" as part of the listing determination, clearly including climate change. 16 U.S.C. § 1533(a)(1)(A) and (E) (emphasis added).

[6] The latter definition includes specific types of harms *not* caused by the proposed agency action: (1) when "the consequence is so remote in time from the action under consultation that it is not reasonably certain to occur;" (2) when "the consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur;" or (3) when "the consequence is only reached through a lengthy causal chain that involves so may steps as to make the consequence not reasonably certain to occur." *Id*.

[7] These regulations are currently being challenged in court. Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity v. Bernhardt*, No. 3:19-cv-05206 (N.D. Cal. Aug. 21, 2019).

IV. Federal Agencies Should Be Directed to Take Climate Change Into Account in Complying with Their Affirmative Obligation to Promote Conservation Under the ESA.

DOI and the Services should not only rescind these harmful policies, but the new Administration should go a step further and make clear to all federal agencies that they must take affirmative actions to ameliorate the adverse effects of climate change whenever possible. Such a directive would be entirely consistent with the ESA's requirement that all federal agencies, in consultation with the Services, "utilize their authorities in furtherance of the purposes of" the ESA, namely "conservation of endangered species." 16 U.S.C. § 1536(a)(1).

Therefore, it is clear that every agency, as part of this affirmative duty, should be *required* to consider—and reduce, whenever possible—the effects of climate change on endangered or threatened species. *See Tenn. Valley Auth. v. Hill*, 437 U.S. at 185 ("the legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species . . . over the 'primary missions' of federal agencies."). Climate change has negative impacts on countless threatened and endangered species. At this juncture, it is simply not possible in most instances to promote "conservation" of listed species, which requires the use of "*all* methods and procedures which are necessary" to recover species to the point where they no longer need the protections of the Act, without considering climate change. 16 U.S.C. § 1532(c).

V. Conclusion

For all of the foregoing reasons, rescinding the guidance memoranda and 2019 Endangered Species Regulations will greatly assist federal agencies in considering the effects of climate change on endangered species, and in carrying out your excellent broader mandate "to require any federal permitting decision to consider the effects of greenhouse gas emissions and climate change."

From: Brett Hartl <BHartl@biologicaldiversity.org>
To: "Shannon Estenoz (shannon_estenoz@ios.doi.gov)" <shannon_estenoz@ios.doi.gov>, "Williams, Martha M" <martha_williams@fws.gov>, "robert.anderson@sol.doi.gov" <robert.anderson@sol.doi.gov>, "elizabeth_klein@ios.doi.gov" <elizabeth_klein@ios.doi.gov>, "sarah.krakoff@sol.doi.gov" <sarah.krakoff@sol.doi.gov>
Subject: [EXTERNAL] RE: Meeting request: Climate change consultations under the Endangered Species Act
Date: Wed, 28 Jul 2021 13:32:59 -0400
Importance: Normal
Attachments: ESA_Climate_Consultations_White_Paper.pdf; Scientists_and_Legal_Scholars_Letter_on_the_Endangered_Species_Act_and_Climate_Change.pdf

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This email has been received from outside of DOI - Use caution before clicking on links, opening attachments, or responding.

Hello,

I am resending this meeting request to you all with the hope of scheduling this at some point either this August or September.

Please let me know if you have decided to reject this meeting request.

Thank you,

Brett Hartl
Government Affairs Director
Center *for* Biological Diversity
202-817-8121

From: Brett Hartl
Sent: Thursday, July 15, 2021 1:13 PM
To: Shannon Estenoz (shannon_estenoz@ios.doi.gov) <shannon_estenoz@ios.doi.gov>; 'Williams, Martha M' <martha_williams@fws.gov>; 'robert.anderson@sol.doi.gov' <robert.anderson@sol.doi.gov>; 'elizabeth_klein@ios.doi.gov' <elizabeth_klein@ios.doi.gov>; 'sarah.krakoff@sol.doi.gov' <sarah.krakoff@sol.doi.gov>
Subject: Meeting request: Climate change consultations under the Endangered Species Act

Greetings all,

The Center for Biological Diversity and Harvard Animal Law Clinic would like to set up a meeting with you all to discuss completing climate consultation under the Endangered Species Act. A few months back we sent the attached letter about the legal framework of completing these types of consultations to some of you that were already onboarded with the

Biden administration. Today, we are also including an informal white paper which complements that letter and sets forth a reasonable and practical approach to such consultations so that they are achievable and impactful.

In addition to our belief that climate consultations are required under the law, we believe they align with President Biden's call for a "whole of government" approach to addressing the climate crisis. Our white paper acknowledges the challenges and complexities of such consultations, but we believe that if done correct such consultations could lead to better, more climate-friendly decisions across the Department of Interior. Just as important perhaps, if done well, they would serve as an important safeguard against any attempted rollbacks by a future administration that is hostile to environmental protections.

We would like to request that this meeting occur at the political level with you or a subset of those I am emailing now. Frankly, we do not have confidence that upper-level management within the career staff at the Fish and Wildlife Service believe that the Endangered Species Act can be useful in the fight against climate change. This is informed by numerous decisions over the past 12 years from the previous two administrations where species that are threatened by climate change were wrongly denied protections under the Act.

We are happy to meet with you (virtually) to discuss this at your convenience. It would likely be a few of us from the Center and a few folks from Harvard Law School.

Thanks in advance,

Brett Hartl
Government Affairs Director
Center *for* Biological Diversity
202-817-8121

Climate Consultations Under the Endangered Species Act

Anthropogenic climate change is causing severe and widespread harm to life across the planet. It is now one of the leading global threats to species survival and is accelerating the Earth's sixth mass extinction event.[1] Scientists have warned that we must slash greenhouse gas emissions by at least 50-70% in the next 10 years to have any hope of keeping global warming to below 1.5 degrees Celsius by 2050.[2]

The Endangered Species Act represents "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[3] The provisions of the Act, and in particular the Section 7 consultation process, can provide an important additional mechanism in ensuring federal agencies make the correct decisions relating to greenhouse gas emissions. While more complex than a typical consultation, completing climate consultations would ensure a "whole of government" approach to climate change and align with President Biden's stated goal to "organize and deploy the full capacity of agencies to combat the climate crisis."[4] Completing climate consultations would provide meaningful conservation benefits to species that are the most harmed by climate change, such as corals, Arctic species like polar bears, and species vulnerable to sea-level rise. Climate consultations would also help ensure better agency decision-making across the board in the face of the existential threat that climate change represents.

While an informal and non-binding policy enacted during the Bush administration has blocked climate consultations,[5] that policy can be quickly and unilaterally reversed. This paper outlines a practical approach for the U.S. Fish and Wildlife Service, National Marine Fisheries Service (the "Services") and federal action agencies to deal with the procedural and substantive steps involved in a climate consultation once the Services rescind the memo. Specifically, this paper outlines (1) how to define the action area of a climate consultation, (2) determining reasonable *de minimis* thresholds for GHG emissions to make defensible "no effect" and "not likely to adversely affect" findings, (3) estimating take for climate-impacted species, and (4) developing Incidental Take Statements, Reasonable and Prudent Measures (RPMs), and Reasonable and Prudent Alternatives (RPAs) for climate-threatened species.

Climate consultations will be complex. How should, for example, the Services address harms to listed corals in the Caribbean resulting from federal oil and gas leasing in the Northern Great Plains? Nevertheless, the Services have assessed geographically remote impacts from other types of pollution, and have completed nationwide consultations on other challenging threats, including invasive species in ballast water and the nation's wildland firefighting program. The Endangered Species Act's mandate that extinction be halted "whatever the cost" means that the Services cannot shy away from this challenge.[6]

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[1] Karl, T.R., J.M. Melillo, T.C. Peterson and S.J. Hassol. 2009. *Global climate change impacts in the United States*. Cambridge University Press.
[2] IPCC, 2018: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty.
[3] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).
[4] *Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14,008*, 86 Fed. Reg. 7619 (Jan. 27, 2021)
[5] *See* U.S. Dep't of the Interior, Office of the Solicitor, *Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the Emissions of Greenhouse Gases* (Oct. 3, 2008).
[6] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

I. Defining the Action Area

Because the effects of greenhouse gas emissions are global and result in harmful impacts far removed from the actual source of emissions, the "action area" in a climate consultation is going to be more expansive in reach than the action area in a typical consultation. For example, the action area for a new nationwide EPA regulation on stationary source emissions would encompass not only the footprints of the facilities themselves, but would extend from Alaska due to the indirect effects on polar bears that depend on sea ice to survive, to the beaches of Hawaii where Hawaiian monk seals raise their pups, to the Florida Keys where 86% of the Key deer's habitat is less than 3 feet above sea level.

Indeed, because of the global nature of climate change, climate consultations will require the federal action agency to consider the possible impacts of its action on every threatened and endangered species in the United States and its territories.[7] This is not unprecedented. National consultations on pesticides and other nationwide "programmatic rulemakings" already require this and starting out at this national scale is not exceptional.[8] The Services have sufficient data and information from other nationwide consultations where the action area encompasses all domestic listed species, and they can assist federal agencies at this initial step.

II. Science-based Greenhouse Gas Emission Thresholds for "No Effect" and "Not Likely to Adversely Affect" Findings

A. Thresholds for No Effect Determinations

As the IPBES report makes clear, one million species are at risk of going extinct in the next few decades because of climate change and other human-driven activities.[9] Thus, it is likely true that climate change will impact almost every listed species in a cumulative manner. However, the fact that a species is impacted by climate change *does not* necessarily entail that every single federal agency action that emits GHGs causes a measurable effect on a particular species. Thus, the Services must determine when GHG emissions from agency action cross the "very low threshold" of the "no effect" determination versus the "may affect" determination.[10] As the Joint Consultation Handbook explains, a "no effect" finding is only properly made "when the action agency determines its proposed action will not affect a listed species or designated critical habitat."[11] In contrast, a "may affect" determination is appropriate when an action has any effect

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[7] This does not include foreign species that have been excluded via regulation already.

[8] *See* U.S. Fish and Wildlife Service, Draft Biological and Conference Opinion on the Registration of Malathion Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (Feb. 2021), *available at* https://www.epa.gov/endangered-species/biological-opinions-available-public-comment; National Marine Fisheries Service, Biological Opinion on the United States Coast Guard's National Ballast Water Management Program and Initial Numerical Standard (June 2012).

[9] S. Diaz, J. Settele, E. Brondizio, *Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (2019) *available at*: https://www.ipbes.net/news/Media-Release-Global-Assessment

[10] *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012).

[11] U.S. Fish and Wildlife Service & National Marine Fisheries Service, Consultation Handbook: Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act, at xvi.

on a listed species "*whether beneficial, benign, adverse or of an undetermined character*."[12]

The Services and action agencies could easily become bogged down in an "how many angels can dance on the head of a pin?" exercise trying to determine if every conceivable agency action crosses the *undetermined character* within the "may affect" threshold or instead represents a legitimate "no effect" determination.[13] A more efficient and effective approach here would be to develop science-based guidance that sets a threshold GHG emission level for which the Services determine that a "no effect" determination is appropriate. Unless emissions exceed a particular level, then an agency action would not cross the "may affect" threshold and a "no effect" determination can be safely made by the action agencies without further concurrence by Services.

We believe that a *de minimis* threshold level of GHG emissions for "no effect" determinations is appropriate, whereby any GHG emissions — whether calculated based on annual or cumulative amount — below the threshold would allow action agencies to proceed without consultation. This type of approach would not be unprecedented. The Council on Environmental Quality (CEQ) set forth draft guidance in 2014 for when federal action agencies should conduct a climate analysis under the National Environmental Policy Act (NEPA).[14] The CEQ proposed a threshold level of 25,000 metric tons of carbon dioxide equivalents per year as the *de facto* threshold for significance. Likewise, under the EPA's "Tailoring" Rule, the EPA set a limit of emissions of 100,000 metric tons of carbon dioxide equivalents per year that required compliance with the PSD and Title V provisions of the Clean Air Act.[15] While the Tailoring Rule was invalidated based on statutory interpretation grounds, nonetheless, it illustrates that federal agencies can, and do, draw lines for significance with respect to greenhouse gases.

We recommend the Services review the best available science and develop a similar type of threshold for GHGs above which an agency action would cross the "no effect" threshold. Under this approach, it is likely that modest and small-scale agency actions such as permitting a discrete logging project, a new drilling well, or the construction of a new highway overpass would not fall within the climate consultation scope. On the other hand, agency actions that have the potential to emit very large levels of GHGs — such as setting the nationwide corporate average fuel economy (CAFE) standards or reviews of national fossil fuel programs including coal, oil or gas — would likely reach the threshold for triggering the need to consult.

Just as EPA had set a different threshold than the CEQ for its Tailoring Rule, the Services "no effect" threshold could be different than those thresholds set by other agencies. This is because the Section 7 consultation inquiry asks a different question than other environmental statutes. Under NEPA, for example, federal action agencies are mainly required to narratively discuss the environmental impact of and alternatives to major federal actions significantly affecting the

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[12] *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018 (9th Cir.2009) (quoting 51 Fed.Reg. 19,926, 19,949 (June 3, 1986)); *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F. 3d 1006 (9th Cir. 2012); *see* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)).

[13] We note that the1986 regulatory preamble is not binding, and setting a threshold would not conflict with existing caselaw so long as it clearly focused on defining when an impact is unknown in nature versus not having any effect.

[14] Council on Environmental Quality Office of NEPA Policy and Compliance, Revised Draft Guidance on Consideration of Greenhouse Gas Emissions and Climate Change in NEPA Reviews (Dec. 18, 2014).

[15] *Action To Ensure Authority To Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 82,254 (Dec. 30, 2010).

environment to help ensure an action agency takes a "hard look" at the proposed action's environmental impacts.[16] On the other hand, consultations under the Endangered Species Act have both procedural and substantive requirements.[17] The Services must assess and determine the amount of anticipated take caused by a proposed action and determine if the harm would result in jeopardy to a species, or if the impacts would destroy or adversely modify critical habitat. This science-driven inquiry should be guided by the best available climate science, in order to set an appropriate threshold for when and where consultations are needed.

Once such guidance is established by the Services, for those agency actions that fall below this GHG threshold, there would be a clear and consistent approach that all federal agencies could follow to determine when their actions will have no effect on listed species from an emissions perspective, and no consultation or concurrence is required from the Services.[18]

B. Not Likely to Adversely Affect Determinations

For agency actions that exceed the "no effect" GHG thresholds, climate consultations should focus mainly on those species substantially impacted by climate change. Significant numbers of species are likely to have impacts that are discountable or insignificant.[19] Here too, the Services could provide guidance to the action agencies regarding making "not likely to adversely affect" determinations or "likely to adversely affect determinations" in order to focus the assessments on the subset of species that are most harmed by climate change.

For climate change consultations, it is reasonable to use the best available science and determine appropriate thresholds about discountable or insignificant effects. As the Handbook already notes, insignificant effects "relate to the size of the impact and should never reach the scale where take occurs."[20] While discountable effects are "those extremely unlikely to occur," based on the best scientific judgment that effects are not possible to "meaningfully measure, detect, or evaluate."[21]

For the majority of listed species, climate change is not a primary or even secondary threat driving their declines, and thus the impacts likely wouldn't rise to the level of take or require consultation for those species. For instance, the impacts to the Mississippi Sandhill Crane from climate change are at best indirect and speculative. For species like these, the action agencies can reasonably make an NLAA determination.

For a subset of listed species, climate change is a primary reason for their decline. Ice seals and polar bears are clearly harmed by the loss of sea ice throughout their habitats. Coral reefs are harmed by warming temperatures and ocean acidification. Florida Keys species are harmed by sea level rise, and other coastal species like the eastern black rail are rapidly losing its coastal marsh habitat due to increased flooding. Diminishing snowpack in the mountains caused by warming temperatures is significantly harming the western glacier stonefly. For this subset of

[16] *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).
[17] *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985).
[18] This would not alleviate the requirement to consider the other cumulative impacts on listed species within the traditional, non-climate action area.
[19] Consultation Handbook at xvi
[20] *Id.*
[21] *Id.*

climate-threatened species, the impacts of climate change are likely to rise to the level of take and consultation is necessary because the action "is likely to adversely affect" them.[22]

We believe therefore that the Services can again draw science-based thresholds and threat-assessment screens that focus the climate consultation squarely on those species whose impacts are meaningful and substantial. The Services should develop guidance that describes which species are most likely to be harmed by specific threats from climate change: sea level rise, loss of sea ice, habitat loss/degradation from rising temperatures, and ocean acidification. By examining recovery plans, listing rules, five-year reviews, and Species Status Assessments, the Services can determine whether any species faces a clear and significant threat from climate change rather than discountable or insignificant threat.

III. Estimating Take for Climate-Impacted Species and Assessing Impacts to Critical Habitat

Once the formal consultation process begins for the subset of species identified at the NLAA/LAA stage, the Services must evaluate the greenhouse gas pollution and climate impacts of the proposed action and address any anticipated "take" of listed species, including those that are geographically remote from the action but are nonetheless still affected due to the action's role in exacerbating climate change. We recognize that estimating take in climate consultations may be difficult; a huge number of sources emit greenhouse gases at any given time, and each source emits only a fraction of global emissions. However, that does not obviate the need for the Services to complete consultations. Federal agencies must confront the problems that the law requires them to address, even if they do so in an "incremental" manner towards solving the climate crisis.[23]

Thus, the Services must first attempt to quantify any take of listed species, and if such take cannot be quantified, to address take caused by climate impacts qualitatively through surrogates. Here too, such an approach would not be unprecedented, and in fact was expressly contemplated by Congress when it passed the 1982 amendments to the Endangered Species Act. The legislative history of those amendments reflects Congress' recognition that a numerical determination of take would not always be obtainable — such as when the eggs of listed species are boiled alive in power plant cooling systems —and intended that such challenges not represent an insurmountable barrier to completing consultations.[24] The Services have regularly relied on surrogates such as habitat, ecological conditions, or a similarly affected species that is easier to monitor in instances where the biology of a listed species or the nature of the proposed action makes it difficult to detect or monitor take of individual animals. This is not only a practical solution but also often a necessary one. Courts have also found that the use of surrogates by the Services "is reasonable so long as [the surrogates] are linked to the take of the protected species."[25]

Similarly, the Services have an independent obligation to assess the negative impacts of

[22] *Id.* at xv.
[23] *Massachusetts v. Environmental Protection Agency*, 549 U.S. 49 (2007) ("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop… They instead whittle away at them over time.").
[24] H.R. Rep. No. 97-567, at 27 (1982).
[25] *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F. 3d 1229, 1250 (9th Cir. 2001).

greenhouse gases on critical habitat. Assessing the loss of critical habitat in a climate consultation is complex, but no more difficult than assessing critical habitat in other nationwide programmatic consultations. One significant difference between this assessment and other consultations is the relatively homogenous nature of climate change impacts. Under the Services' regulations,[26] critical habitat is only adversely modified or destroyed when it appreciably diminishes the value of the "whole" designation. In many cases, climate impacts to critical habitat will affect the entirety of a designation — likely to the same extent — in a relatively similar manner. For example, acidification impacts to a listed coral are likely to be roughly equivalent across the range of each species, , and sea level rise would likely harm the habitat of Florida Keys species relatively equally across the range, making it more likely that an adverse modification determination would be needed at the end of the assessment process. But the fact that the outcome of such an analysis is a positive adverse modification or destruction determination is not a legal justification for not conducting an analysis at all. Thus, to the extent that the impacts to critical habitat are significant, the Services must develop RPAs and RPMs — including through surrogate metrics — to address the habitat degradation that climate change is bringing.

For both the jeopardy analysis and critical habitat analysis, the Services will have to develop solutions that meet the standards of the Endangered Species Act, just as it does in traditional consultations. Just like how the FWS used the number of ponds and pools that the fairy shrimp occupy as a surrogate to infer their status in southern California's vanishing vernal pool complexes,[27] or the number of acres of spotted owl habitat removed as a surrogate for the number of spotted owls likely to be taken from a particular timber project,[28] the Services can take the same approach with climate-threatened species. For example, NMFS can use the amount of sea ice lost as a surrogate for determining anticipated take of bearded seals, or the FWS can use declining stream-flows and increasing water temperatures as a surrogate to infer the status of the western glacier stonefly or its critical habitat. This has been a pre-existing practice and the Services already have the knowledge and expertise to do this.

IV. Setting Forth Incidental Take Statements and Preparing Reasonable and Prudent Measures (RPMs) and Reasonable and Prudent Alternatives (RPAs) for Climate-impacted Species.

If the Services determine that the proposed action will result in jeopardy or the destruction or adverse modification of critical habitat, then they must issue Reasonable and Prudent Alternatives (RPAs) to the action. For actions that do not jeopardize a species but result in take, they must provide an Incidental Take Statement ("ITS") and Reasonable and Prudent Measures ("RPMs") to *minimize* such take. These mechanisms are the heart of the consultation process and what make the Endangered Species Act so successful.

If through consultation the Services determine the proposed action will result in jeopardy, the Services must provide the federal action agency with RPAs that will allow the agency to move

[26] These regulations are being challenged in federal court and the Administration has signaled it may revise them in the near future.
[27] *See* 57 Fed. Reg. 19856 (May 8, 1992), *available at*: https://ecos.fws.gov/docs/federal_register/fr2043.pdf.
[28] *See* Northern Spotted Owl Biological Opinion, Westside Fire Recovery Project, Klamath National Forest, California, U.S. Fish and Wildlife Service Region 8, (Feb. 19, 2016), *available at*: https://www.biologicaldiversity.org/species/birds/northern_spotted_owl/pdfs/USFWS_Westside_BO.pdf.

forward in a way that avoids jeopardy to the species or destruction or adverse modification of designated critical habitat.[29] While jeopardy determinations are rare, in the context of climate consultations they are all the more critical to the survival of not only listed species, but of humanity itself. If a federal agency action substantially increases the likelihood of overshooting the 1.5 degree Celsius goal of the Paris Accords, that is likely to not only jeopardize climate-threatened species, but people everywhere. As the Endangered Species Act makes clear, the action agency must not take such an action, or it must implement RPAs that ensure GHG emissions decrease such that they are consistent with the IPCC and the best available science. Therefore consultations would provide a powerful mechanism to achieve President Biden's stated policy to "reduce climate pollution in every sector of the economy; increase resilience to the impacts of climate change; protect public health" and "conserve our lands, waters, and biodiversity."[30]

In most instances, federal agency actions will not rise to the level of jeopardy but will result in incidental take. In these circumstances, the Services must issue RPMs to minimize the take of climate-threatened species.[31] In fact, Congress explicitly recognized the importance of providing agencies with ways to minimize take when it amended the Act in 1982:

> "[I]n many cases in which a proposed action will not result in jeopardy, there may be minor modifications to the project which will minimize the effects on the species and which the action agency could easily and inexpensively adopt. We believe that providing such information to the action agency is important for the continued protection of endangered species and assists other federal agencies in fulfilling their obligations under section 7(a)(1) of the Act."[32]

Preparing RPMs and the accompanying ITS for a climate consultation to ensure an agency minimizes the climate-induced harms is just as achievable as in a non-climate consultation. The Services already have mechanisms whereby action agencies are allowed to mitigate harms offsite from where such harms occur. Over the years, the Services have enacted numerous policies including for the harms resulting from their geographically remote actions on listed species, regardless of where they are found.

The most durable and effective approach for climate consultations to implement RPMs would be for the Services to condition the receipt of an ITS through the implementation of RPMs within a climate-focused Section 7(a)(1) conservation program for each climate-threatened species identified in the biological opinion where the Services anticipate take. Section 7(a)(1)—often referred to as the affirmative conservation duty—requires all federal agencies to "utilize their authorities…by carrying out programs for the conservation of endangered and threatened species."[33] "Conservation" as used in the Act means "the use of all methods and procedures which are necessary to bring endangered species or threatened species to the point at which [the Act's protections] are no longer necessary."[34] In other words, the goal of conservation is species recovery. As the Supreme Court in *Tennessee Valley Authority v. Hill* noted, section 7(a)(1) is no

[29] 16 U.S.C. 1536(b)(3)(A).
[30] *Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14,008*, 86 Fed. Reg. 7619 (Jan. 27, 2021).
[31] *Id.* at 1536(b)(4)(C)(ii).
[32] H.R. Rep. No 97-567, at 44.
[33] 16 U.S.C. 1536(a)(1).
[34] *Id.* at 1532(3).

less than "stringent, mandatory language,"[35] that "reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species."[36]

The value of Section 7(a)(1)'s affirmative mandate is that it adds endangered species conservation to the purposes of every single federal agency in a way that is accountable and meaningful. Yet despite the clear requirements of the law, agencies have all but ignored their obligation to conserve listed animals and plants. By requiring agencies to develop a climate-focused Section 7(a)(1) conservation program as a condition to obtaining an ITS, the Services can require agencies to finally comply with the law and ensure that their activities are consistent with the recovery of listed species.

Because most climate-threatened species are also harmed by conventional threats such as habitat degradation, pollution, or invasive species, a Section 7(a)(1) program for climate-impacted species could, for example, carry out other conservation measures identified in a species recovery plan, recommendations from recent 5-year reviews, or Species Status Assessments. The Service's Consultation Handbook references section 7(a)(1) as "a blueprint for conservation activities including…section 10 permits, assistance in developing and implementing recovery plans, and assistance in candidate monitoring and management programs."[37] A Section 7(a)(1) program could also include the acquisition, restoration, or management of habitat that results in net conservation benefits to a listed species. "Conservation benefit" means the program should "produce cumulative benefits for each endangered/threatened species that it can affect within its authorities through conservation measures designed to improve the conservation status of the species."[38]

Land management agencies can incorporate Section 7(a)(1) planning into their statutory planning process. For example, such a program could be incorporated into the Forest Service's Land Management Plan process and the National Park Service's General Management Plan process. If implemented properly by each federal agency, Section 7(a)(1) programs could even be a valuable tool to help accomplish the Biden Administration's goal of protecting 30% of U.S. lands and waters by 2030 while helping save climate-threatened species from extinction.[39] The Services will need to establish minimum requirements as to what agency Section 7(a)(1) conservation programs should include, but the goal and guiding principle of any such program must ultimately be the proactive, landscape-level conservation and recovery of the species in the face of climate change.

Conclusion

When enacting the Act, Congress intended to "halt and reverse the trend towards species

[35] TVA v. Hill, 437 U.S. at 183.
[36] *Id.* at 185.
[37] *Supra* note 12, at 5-1.
[38] U.S. Fish and Wildlife Service Northeast Region, Better Conservation More Efficiently: A Guide for Federal Agency Compliance with Section 7(a)(1) of the Endangered Species Act, at 2 (2018), *available at*: https://test.el.erdc.dren.mil/pdfs/conservation/resources/2018_Jan_USFWS_Guide_for_Federal_Compliance.pdf
[39] Conserving and Restoring America the Beautiful (May 2021), *available at*: https://www.doi.gov/sites/doi.gov/files/report-conserving-and-restoring-america-the-beautiful-2021.pdf

extinction, whatever the cost."[40] Now more than ever, all federal agencies must actively consider the impacts of their actions on climate change and climate-impacted species and ameliorate any adverse effects whenever possible. Section 7 of the Endangered Species Act represents a remarkably powerful yet underutilized tool for the federal government—which is responsible for a large portion of the country's overall emissions—to meaningfully address greenhouse gas emissions. The planet itself can no longer afford policies that merely tinker around the edges. The dire nature of the climate crisis requires nothing less than bold, immediate action, and climate consultations can provide an invaluable tool to address this crisis.

[40] *TVA v. Hill*, 437 U.S. at 184.

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February X, 2021

President Joseph R. Biden Jr.
1600 Pennsylvania Ave., N.W.
Washington, DC 20001

Re: Request to Revoke Memoranda and Regulations Regarding Consideration of Greenhouse Emissions under the Endangered Species Act

Dear President Biden,

Congratulations on your historic Presidential election win and thank you for the crucial steps you have already taken to address the climate crisis in your first ten days in office. We write with suggestions to help accomplish your laudatory policy "to organize and deploy the full capacity of [federal] agencies to combat the climate crisis."[1] As you note in your Executive Order on Tackling the Climate Crisis at Home and Abroad, doing so will conserve our lands, waters, and biodiversity, in addition to accomplishing many other essential goals. It is indeed critically important for federal agencies to roll up their sleeves and examine all ways to reduce the greenhouse pollution from their approvals and actions. By revoking guidance instituted by the George W. Bush administration and regulations adopted by the Trump administration that were intended to frustrate this goal, you can jumpstart a new era of science-based analysis to advance practical ways to reduce greenhouse emissions across all federal agencies. In furtherance of this vital goal, we urge you to rescind the ill-advised memoranda and Endangered Species Act regulations as detailed further below.

The Endangered Species Act is our nation's safety net for plants and animals on the brink of extinction. It is the world's strongest and most successful biodiversity protection law. Since its passage in 1973, it has worked to protect more than 99 percent of the more than 1,600 plants and animals protected as "threatened" or "endangered." Now more than ever, as climate change drives

[1] Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021) ("It is the policy of my Administration to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a Government-wide approach that reduces climate pollution in every sector of the economy; increases resilience to the impacts of climate change; protects public health; conserves our lands, waters, and biodiversity; delivers environmental justice; and spurs well-paying union jobs and economic growth, especially through innovation, commercialization, and deployment of clean energy technologies and infrastructure.").

the Earth's sixth mass extinction event, we urgently need all federal agencies to steadfastly implement all of the law's provisions as Congress intended.

Since 2008, however, the U.S. Department of the Interior has been relying on memoranda in its enforcement of the Endangered Species Act (ESA) that purport to instruct federal agencies to *ignore* greenhouse gas emissions when making certain listing decisions under the statute, and undermine the inter-agency consultation process for "insur[ing]" that federal actions are not likely to jeopardize or adversely modify the critical habitat of protected species, as required by Section 7 of the statute (16 U.S.C. § 1536(a)(2)). The George W. Bush administration issued the 2008 Bernhardt Memorandum, so named because it was issued by then Interior Solicitor David Bernhardt. This was followed by the Polar Bear Listing Memorandum, so named because it was issued during the course of litigation over the 2008 listing of the polar bear as a threatened species.

During the Trump administration, David Bernhardt, now as Interior Secretary, enshrined the principles first developed in the memoranda into new Endangered Species Act regulations which may threaten implementation of the law in unprecedented ways. Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44976 (Aug. 27, 2019) (codified at 50 C.F.R. § 402). The new regulations may be construed and implemented by agencies in a manner that undermines their ability to meaningfully evaluate climate-change related injuries that federal agencies must consider during consultation.

The memoranda and regulations are factually and legally flawed and directly contrary to the purposes of the Endangered Species Act. Given the evidence showing that climate change harms endangered and threatened species, the memoranda directing agencies to ignore its effects also contradict the Act's affirmative requirement that every federal agency "utilize" its authorities "in furtherance of the purposes" of the ESA. 16 U.S.C. § 1536(a)(1).

As explained more fully in the Supporting Analysis, attached as Exhibit A, immediately rescinding the guidance memoranda and the 2019 Endangered Species Act regulations will greatly assist federal agencies in considering the effects of climate change on imperiled species, and in effectuating your important promise "to require any federal permitting decision to consider the effects of greenhouse gas emissions and climate change."[2]

Please contact Kassie Siegel at ksiegel@biologicaldiversity.org or (951) 961-7972 if you would like to discuss any of these important issues further. Thank you very much for your consideration.

Signed,

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[2] *The Biden Plan for a Clean Energy Revolution and Environmental Justice*, https://joebiden.com/climate-plan.

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Enclosures

Exhibit A: Supporting Analysis Re: Request to Revoke Memoranda and Regulations Regarding Consideration of Greenhouse Emissions under the Endangered Species Act.

Exhibit B: U.S. Dep't of the Interior, Office of the Solicitor, *Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the*

Emissions of Greenhouse Gases (Oct. 3, 2008) (Bernhardt Memorandum); including referenced memorandum entitled *Expectations for Consultations on Actions that Would Emit Greenhouse Gases* (May 14, 2008) (FWS Memorandum).

Exhibit C: *Supplemental Explanation for the Legal Basis of the Department's May 15, 2008 Determination of Threatened Status for Polar Bears* (Dec. 22, 2010) (Polar Bear Listing Memorandum).

CC:

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Exhibit A: Supporting Analysis Re: Request to Revoke Memoranda and Regulations Regarding Consideration of Greenhouse Emissions under the Endangered Species Act by Harvard Law School's Animal Law and Policy Clinic

The U.S. Department of Interior (DOI) should rescind the 2008 "Bernhardt Memorandum," as well as the 2010 Polar Bear Listing Memorandum. Likewise, DOI should rescind amended Section 7 regulations promulgated by the Trump Administration in 2019. In addition to rescinding these policies, all federal agencies should be directed to actively consider the impact of all of their actions on climate change, in keeping with their additional *affirmative* obligation under Section 7 to "utilize" their authorities "in furtherance of the purposes" of the Endangered Species Act (ESA). 16 U.S.C. § 1536(a)(1). Considering climate change and its effects on listed species is both necessary and vital to enforcing the ESA according to Congress' overriding concern—expressed over forty years ago—that "endangered species . . . *be afforded the highest of priorities*." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978) (emphasis added).

I. The DOI Should Rescind the 2008 Bernhardt Memorandum.

On October 3, 2008, David Bernhardt, then Solicitor of DOI, issued a memorandum purporting to "clarify" DOI's obligation to consider climate change effects in the Section 7 context. U.S. Dep't of the Interior, Office of the Solicitor, *Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the Emissions of Greenhouse Gases* (Oct. 3, 2008) (Bernhardt Memorandum). Section 7 requires all agencies to "consult" with either the Fish and Wildlife Service (FWS) (for terrestrial species) or the National Marine Fisheries Service (NMFS) (for marine species) to "insure" that their actions are "not likely to jeopardize the continued existence" of any species listed as either endangered or threatened under the Act. 16 U.S.C. § 1536(a)(2). This duty to consult is triggered whenever a federal action "may affect" a listed species. 50 C.F.R. § 402.14. Courts have held that this sets an extremely "low" bar for initiation of consultation. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481, 496 (9th Cir. 2011); *see also* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (explaining that "[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement").

Nonetheless, the Bernhardt Memorandum adopted language from an earlier memorandum from the Director of the Fish and Wildlife Service, which stated that "the Service does not anticipate that the mere fact that a Federal agency authorizes a project that is likely to emit [greenhouse gases (GHG)] will require the initiation of section 7 consultation." *Expectations for Consultations on Actions that Would Emit Greenhouse Gases* (May 14, 2008) (FWS Memorandum), 1. The FWS Memorandum asserted that there was no definitive evidence "establish[ing]" that emission of greenhouse gases (GHGs) "cause[s] an indirect effect to listed species or critical habitat," and that without "sufficient data to establish the required causal connection . . . between a new facility's GHG emissions and impacts to listed species or critical habitat, section 7 consultation would not be required to address impacts of a facility's GHG emissions." *Id.* at 1–2. The Bernhardt Memorandum concluded that greenhouse gas emissions or the effects of climate change "cannot pass the 'may affect' test" and are therefore "not subject to consultation under the ESA." Bernhardt Memorandum at 2. However, this directive does not comport with the mandates of the ESA, as it directs federal agencies to exclude from their analyses a critical factor that has affected, and will continue to negatively affect, listed species.

The Bernhardt Memorandum was incorrect in its assessment that considering greenhouse gas emissions and their effects on climate change at the outset is impossible because of the many contributing factors to climate change. The memorandum reasons that emissions of greenhouse gases, insofar as they contribute to climate change, are not to be considered "direct" or "indirect effects" of an agency action, because climate change is not conclusively "caused by" any individual action, and hence the effects are not "reasonably certain to occur." Bernhardt Memorandum at 5–6. The Bernhardt Memorandum's assertions that scientific research had "not yet developed tools specifically intended for evaluating or quantifying end-point impacts attributable to the emissions of GHGs from a single source," and that "requisite causal connections cannot be made between the emissions of GHGs from a proposed agency action and specific localized climate change as it impacts listed species or critical habitat," Bernhardt Memorandum at 5–6, were at the time, and continue to be, both scientifically and legally incorrect.

It is beyond dispute that emissions of greenhouse gases significantly contribute to global climate change and are causing widespread and intensifying harms.[1] Moreover, the fact that there are many sources of greenhouse gas emissions does not mean that federal agencies and the Services

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[1] *See, e.g.*, Intergovernmental Panel on Climate Change, *Climate Change 2014 Synthesis Report Summary for Policymakers*, https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf ("Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems."); U.S. Global Change Research Program, Impacts, Risks, and Adaptation in the United States, Fourth National Climate Assessment, Volume II (2018), https://nca2018.globalchange.gov/ ("It concludes that the evidence of human-caused climate change is overwhelming and continues to strengthen, that the impacts of climate change are intensifying across the country, and that climate-related threats to Americans' physical, social, and economic well-being are rising"; "fossil fuel combustion accounts for approximately 85 percent of total U.S. greenhouse gas emissions" which is "driving an increase in global surface temperatures and other widespread changes in Earth's climate that are unprecedented in the history of modern civilization."); Anna Moritz, Kassie Siegel, Brendan Cummings, and William Rodgers, Jr., *Biodiversity: Baking and Boiling, Endangered Species Act Turning Down the Heat*, 44 Tulsa L. Rev. 205, 222 (2008), https://digitalcommons.law.uw.edu/faculty-articles/240 ("The notion that there is no causal connection between greenhouse gas emissions and the decline of the polar bear (or other species) is demonstrably incorrect.").

are free to ignore the negative impacts of *additional* greenhouse gas emissions. In other words, while the Bernhardt Memorandum asserted that it was impossible to "quantify[] end-point impacts attributable to" a single source, agencies nevertheless have a statutory obligation to take incremental steps towards furthering their mandate to conserve endangered species. *See Massachusetts v. EPA*, 549 U.S. 497, 499 (2007) ("[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop . . . They instead whittle away at them over time."); *see also Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 598 (D.C. Cir. 2019) ("EPA['s] conclu[sion] that it is impossible to know whether the…Rule will affect listed species or critical habitat…is not the same as determining that the 2018 Rule 'will not' affect them").

The law has additionally developed mechanisms by which the "end-point impacts" of a particular action can be identified and analyzed. Most notably, in *Massachusetts v. EPA*, the Supreme Court employed a "meaningful contribution" standard to determine and attribute a contributor's emissions to their effects on climate change. 549 U.S. at 523–25 (determining that domestic motor-vehicles make a "meaningful contribution" to GHG concentrations at 6% of global carbon dioxide emissions, thus establishing sufficient causation for standing).

Similarly, both FWS and NMFS have considered climate change impacts once the Section 7 consultation process has been initiated for reasons unrelated to climate change—thus, the action agencies, the Services, and the courts that may review any determinations resulting from the consultation are all capable of making assessments about causation and attribution in the context of climate change.[2] Indeed, courts have already been requiring the federal government to assess the effects of climate change, including its additive harm, under these standards. *E.g.*, *Nat'l Wildlife Federation v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 917 (D. Ore. 2016) (finding a biological opinion did not "properly analyze the effects of climate change, including its *additive harm*, how it may reduce the effectiveness of [mitigating] actions, particularly habitat actions that are not expected to achieve full benefits for 'decades,' and how it increases the chances of a catastrophic event") (emphasis added)[3]; *Nat. Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 370 (E.D. Cal. 2007) (granting summary judgment to plaintiffs because the "absence of *any* discussion in the BiOp of how to deal with any climate change is a failure to analyze a potentially 'important aspect of the problem.'") (emphasis in original); *South Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247. 1273–74 (E.D. Cal. 2010) ("The court cannot conclude that global warming's potential impacts are so slight that NMFS could ignore them without discussion.").

[2] Under a Section 7 consultation, the Services must analyze: (1) "the current status and environmental baseline of the listed species or critical habitat;" and (2) "the effects of the action and cumulative effects on the listed species or critical habitat," adding them together to determine "whether the action is likely to jeopardize the continued existence of the listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g); *see also* 50 C.F.R. § 402.14(h) (listing requirements for biological opinions).

[3] The court in *National Wildlife Federation* listed various reasons the biological opinion failed to adequately consider climate change, including assuming climate conditions would remain the same in the future, lack of quantitative analysis, and failure to use the best available scientific information to estimate impacts of climate change. *Id.* at 917–923. If courts see value in addressing climate change at the consultation process, and actually are able to assess climate change and its effects at the consultation stage, the Services must not exclude considerations of climate change at the initial step of determining whether or not to initiate the Section 7 consultation process.

For the foregoing reasons, it is clear that the Bernhardt Memorandum, insofar as it directs the Services not to consider greenhouse gas emissions or the effects of climate change on listed species when determining whether to initiate the Section 7 consultation process, is neither scientifically nor legally sound. Accordingly, the Biden Administration should revoke it, and the 2008 FWS Memorandum on which it relies, as soon as possible, and direct federal agencies to fully comply with the ESA by considering the greenhouse pollution and climate impacts of all federal actions, and to conduct the analysis with the care and urgency required by the dire nature of the climate crisis.

II. The DOI Should Rescind the 2010 Polar Bear Listing Memorandum.

In December 2010, FWS also published a memorandum severely limiting the extent to which climate change should factor into determinations as to when a species should be listed under the ESA as "endangered," defined by the Act as "in danger of extinction." 16 U.S.C. § 1532(6). Until a species is listed as either endangered or threatened, it receives no protection at all under the statute.[4]

In May 2008, against the urging of conservationists that the polar bear should be listed as "endangered" under the Act due to declining global sea ice, upon which the polar bear depends for all of its essential life functions, FWS listed the polar bear as only "threatened," 73 Fed. Reg. 28,212 (May 15, 2008)—a determination that was upheld by the courts. 818 F. Supp. 2d 214 (D.D.C. 2011) (*affirmed* 720 F.3d 354 (D.C. Cir. 2013)). During the course of that litigation, at the request of the district court judge, FWS issued a memorandum clarifying that "in danger of extinction" means "*currently* on the brink of extinction in the wild[.]" *Supplemental Explanation for the Legal Basis of the Department's May 15, 2008 Determination of Threatened Status for Polar Bears* (Dec. 22, 2010) ("Polar Bear Listing Memo").

This interpretation—essentially requiring that a species' extinction be imminent, certain, and currently looming—represents a dramatic and unnecessary narrowing of the circumstances under which a species can be classified as endangered. It also severely undermines the efficacy of the ESA, a statute whose purpose is to provide a program for the survival and *recovery* of endangered and threatened species. 16 U.S.C. § 1531(b); 16 U.S.C. § 1532(3). If a species cannot be afforded the life-saving protections associated with being listed as endangered until its populations are so far gone that recovery is an all but impossible task, then one of the ESA's primary purposes would effectively be undone.

As part of its reasoning for why the polar bear did not meet this new standard, FWS found that climate change, and the resulting loss of sea ice habitat, would be "incremental," thereby decreasing the "polar bear's ability to sustain itself . . . over time," but that polar bear populations did not *currently* suffer to the point where they could be considered "on the brink of extinction." Polar Bear Listing Memorandum 17–18.

This interpretation of the role of climate change in the listing context is both scientifically unsupportable and legally insufficient. The ESA requires the Services to rely on the "best available scientific and commercial data available" in making a listing determination. 16 U.S.C. § 1533(b)(1). Scientific data clearly support that climate change creates both an *acute* and *current*

[4] A "threatened" species is one that is one that is "likely to become endangered in the foreseeable future." 16 U.S.C. § 1532(20).

threat, as well as an accelerating and rapidly growing threat that will only worsen with time. *See* Fourth National Climate Assessment (2018), https://nca2018.globalchange.gov/; The Intergovernmental Panel on Climate Change, *Global Warming of 1.5ºC* (2018), https://www.ipcc.ch/sr15/download/#chapter. Dismissing the effects of climate change as too distant or geographically remote necessarily ignores the best available science.[5]

Therefore, the Biden Administration should also rescind the Polar Bear Listing Memo, consistent with the mandates of the ESA and the best available science.

III. The Services Should Rescind the 2019 Section 7 Regulations.

In 2019, the Trump Administration amended regulations pertaining to Section 7 consultations. Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019) (codified at 50 C.F.R. § 402). The new regulations amended the definition of "effects of the action" that the action agency and Services must consider when engaging in Section 7 consultation, *see* 50 C.F.R. § 402.14(a)), by adding a restrictive "but for" requirement: "A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur." 50 C.F.R. § 402.02(d). The 2019 amendments to the regulations also added § 402.17, which defines "activities that are reasonably certain to occur" and "consequences caused by the proposed action," both of which are terms used to determine the scope of effects that must be considered during consultation to "insure" that agency actions are not likely to jeopardize any listed species. 50 C.F.R. § 402.17.[6]

Although the regulations provide that "[e]ffects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action," 50 C.F.R. § 402.2(d)—thus potentially encompassing climate change-related impacts—the amendments may be construed and implemented by agencies in a manner that undermines their ability to meaningfully evaluate climate-change related injuries that federal agencies must consider during consultation.

The Biden Administration should thus rescind these recently promulgated regulations.[7]

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[5] The Services' narrow interpretation of "endangered" in the Polar Bear Listing Memorandum is additionally inconsistent with the statute's requirement that the Services consider "the present *or threatened* destruction, modification, or curtailment of [the species'] habitat or range," and "*manmade factors* affecting [the species'] continued existence" as part of the listing determination, clearly including climate change. 16 U.S.C. § 1533(a)(1)(A) and (E) (emphasis added).

[6] The latter definition includes specific types of harms *not* caused by the proposed agency action: (1) when "the consequence is so remote in time from the action under consultation that it is not reasonably certain to occur;" (2) when "the consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur;" or (3) when "the consequence is only reached through a lengthy causal chain that involves so may steps as to make the consequence not reasonably certain to occur." *Id*.

[7] These regulations are currently being challenged in court. Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity v. Bernhardt*, No. 3:19-cv-05206 (N.D. Cal. Aug. 21, 2019).

IV. Federal Agencies Should Be Directed to Take Climate Change Into Account in Complying with Their Affirmative Obligation to Promote Conservation Under the ESA.

DOI and the Services should not only rescind these harmful policies, but the new Administration should go a step further and make clear to all federal agencies that they must take affirmative actions to ameliorate the adverse effects of climate change whenever possible. Such a directive would be entirely consistent with the ESA's requirement that all federal agencies, in consultation with the Services, "utilize their authorities in furtherance of the purposes of" the ESA, namely "conservation of endangered species." 16 U.S.C. § 1536(a)(1).

Therefore, it is clear that every agency, as part of this affirmative duty, should be *required* to consider—and reduce, whenever possible—the effects of climate change on endangered or threatened species. *See Tenn. Valley Auth. v. Hill*, 437 U.S. at 185 ("the legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species . . . over the 'primary missions' of federal agencies."). Climate change has negative impacts on countless threatened and endangered species. At this juncture, it is simply not possible in most instances to promote "conservation" of listed species, which requires the use of "*all* methods and procedures which are necessary" to recover species to the point where they no longer need the protections of the Act, without considering climate change. 16 U.S.C. § 1532(c).

V. Conclusion

For all of the foregoing reasons, rescinding the guidance memoranda and 2019 Endangered Species Regulations will greatly assist federal agencies in considering the effects of climate change on endangered species, and in carrying out your excellent broader mandate "to require any federal permitting decision to consider the effects of greenhouse gas emissions and climate change."

From: "Meyer, Katherine Anne" <kmeyer@law.harvard.edu>
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Cc: Kassie Siegel <ksiegel@biologicaldiversity.org>, 'Brett Hartl' <BHartl@biologicaldiversity.org>, Jason Rylander <jrylander@biologicaldiversity.org>
Subject: [EXTERNAL] Request to Revoke Policies Regarding Greenhouse Emissions and the Endangered Species Act
Date: Thu, 12 Jan 2023 12:23:33 -0500
Importance: High
Attachments: Scientists_and_Legal_Scholars_Letter_on_the_Endangered_Species_Act_and_Climate_Change.pdf; Exhibits_B_and_C_to_Letter_Re_Climate_and_Endangered_Species.pdf

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Hello Solicitor Anderson,

Congratulations on your appointment!

In February 2021, soon after the Biden Administration took office, with the Center for Biological Diversity we sent President Biden and other officials in the government, including the Department of Interior, a request on behalf of scientists and environmental scholarst to revoke certain policies that have been in effect for years that restrict agencies from taking into account greenhouse gases when administering the Endangered Species Act. As our submission explains, these policies are harmful to wildlife and way overdue for revisiting. To date, we have not received a substantive response to our request.

I have attached our submission here. We would very much like to meet with you at your convenience to discuss this matter. I will be returning to Harvard soon for the Spring Semester, but can easily make a trip to DC (where I actually live when I'm not teaching). I have copied some of our colleagues at the Center for Biological Diversity who may also wish to attend this meeting.

Please let us know if you need any additional information and when you would be available to meet with us.

Thank you and Happy New Year!

Katherine Meyer

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February 11, 2021

President Joseph R. Biden Jr.
1600 Pennsylvania Ave., N.W.
Washington, DC 20001

Re: Request to Revoke Memoranda and Regulations Regarding Consideration of Greenhouse Emissions under the Endangered Species Act

Dear President Biden,

Congratulations on your historic Presidential election win and thank you for the crucial steps you have already taken to address the climate crisis in your first ten days in office. We write with suggestions to help accomplish your laudatory policy "to organize and deploy the full capacity of [federal] agencies to combat the climate crisis."[1] As you note in your Executive Order on Tackling the Climate Crisis at Home and Abroad, doing so will conserve our lands, waters, and biodiversity, in addition to accomplishing many other essential goals. It is indeed critically important for federal agencies to roll up their sleeves and examine all ways to reduce the greenhouse pollution from their approvals and actions. By revoking guidance instituted by the George W. Bush administration and regulations adopted by the Trump administration that were intended to frustrate this goal, you can jumpstart a new era of science-based analysis to advance practical ways to reduce greenhouse emissions across all federal agencies. In furtherance of this vital goal, we urge you to rescind the ill-advised memoranda and Endangered Species Act regulations as detailed further below.

The Endangered Species Act is our nation's safety net for plants and animals on the brink of extinction. It is the world's strongest and most successful biodiversity protection law. Since its passage in 1973, it has worked to protect more than 99 percent of the more than 1,600 plants and animals protected as "threatened" or "endangered." Now more than ever, as climate change drives

[1] Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021) ("It is the policy of my Administration to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a Government-wide approach that reduces climate pollution in every sector of the economy; increases resilience to the impacts of climate change; protects public health; conserves our lands, waters, and biodiversity; delivers environmental justice; and spurs well-paying union jobs and economic growth, especially through innovation, commercialization, and deployment of clean energy technologies and infrastructure.").

the Earth's sixth mass extinction event, we urgently need all federal agencies to steadfastly implement all of the law's provisions as Congress intended.

Since 2008, however, the U.S. Department of the Interior has been relying on memoranda in its enforcement of the Endangered Species Act (ESA) that purport to instruct federal agencies to *ignore* greenhouse gas emissions when making certain listing decisions under the statute, and undermine the inter-agency consultation process for "insur[ing]" that federal actions are not likely to jeopardize or adversely modify the critical habitat of protected species, as required by Section 7 of the statute (16 U.S.C. § 1536(a)(2)). The George W. Bush administration issued the 2008 Bernhardt Memorandum, so named because it was issued by then Interior Solicitor David Bernhardt. This was followed by the Polar Bear Listing Memorandum, so named because it was issued during the course of litigation over the 2008 listing of the polar bear as a threatened species.

During the Trump administration, David Bernhardt, now as Interior Secretary, enshrined the principles first developed in the memoranda into new Endangered Species Act regulations which may threaten implementation of the law in unprecedented ways. Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44976 (Aug. 27, 2019) (codified at 50 C.F.R. § 402). The new regulations may be construed and implemented by agencies in a manner that undermines their ability to meaningfully evaluate climate-change related injuries that federal agencies must consider during consultation.

The memoranda and regulations are factually and legally flawed and directly contrary to the purposes of the Endangered Species Act. Given the evidence showing that climate change harms endangered and threatened species, the memoranda directing agencies to ignore its effects also contradict the Act's affirmative requirement that every federal agency "utilize" its authorities "in furtherance of the purposes" of the ESA. 16 U.S.C. § 1536(a)(1).

As explained more fully in the Supporting Analysis, attached as Exhibit A, immediately rescinding the guidance memoranda and the 2019 Endangered Species Act regulations will greatly assist federal agencies in considering the effects of climate change on imperiled species, and in effectuating your important promise "to require any federal permitting decision to consider the effects of greenhouse gas emissions and climate change."[2]

Please contact Kassie Siegel at ksiegel@biologicaldiversity.org or (951) 961-7972 if you would like to discuss any of these important issues further. Thank you very much for your consideration.

Signed,

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[2] *The Biden Plan for a Clean Energy Revolution and Environmental Justice*, https://joebiden.com/climate-plan.

Affiliations of additional signatories are provided for identification purposes only:

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Enclosures

Exhibit A: Supporting Analysis Re: Request to Revoke Memoranda and Regulations Regarding Consideration of Greenhouse Emissions under the Endangered Species Act.

Exhibit B: U.S. Dep't of the Interior, Office of the Solicitor, *Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the*

Emissions of Greenhouse Gases (Oct. 3, 2008) (Bernhardt Memorandum); including referenced memorandum entitled *Expectations for Consultations on Actions that Would Emit Greenhouse Gases* (May 14, 2008) (FWS Memorandum).

Exhibit C: *Supplemental Explanation for the Legal Basis of the Department's May 15, 2008 Determination of Threatened Status for Polar Bears* (Dec. 22, 2010) (Polar Bear Listing Memorandum).

CC:

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White House National Climate Advisor
Ali Zaidi
Deputy White House National Climate Advisor

Scott de la Vega
Acting Secretary of the Interior

Wynn Coggins
Acting Secretary of Commerce

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The U.S. Department of Interior (DOI) should rescind the 2008 "Bernhardt Memorandum," as well as the 2010 Polar Bear Listing Memorandum. Likewise, DOI should rescind amended Section 7 regulations promulgated by the Trump Administration in 2019. In addition to rescinding these policies, all federal agencies should be directed to actively consider the impact of all of their actions on climate change, in keeping with their additional *affirmative* obligation under Section 7 to "utilize" their authorities "in furtherance of the purposes" of the Endangered Species Act (ESA). 16 U.S.C. § 1536(a)(1). Considering climate change and its effects on listed species is both necessary and vital to enforcing the ESA according to Congress' overriding concern—expressed over forty years ago—that "endangered species . . . *be afforded the highest of priorities*." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978) (emphasis added).

I. The DOI Should Rescind the 2008 Bernhardt Memorandum.

On October 3, 2008, David Bernhardt, then Solicitor of DOI, issued a memorandum purporting to "clarify" DOI's obligation to consider climate change effects in the Section 7 context. U.S. Dep't of the Interior, Office of the Solicitor, *Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the Emissions of Greenhouse Gases* (Oct. 3, 2008) (Bernhardt Memorandum). Section 7 requires all agencies to "consult" with either the Fish and Wildlife Service (FWS) (for terrestrial species) or the National Marine Fisheries Service (NMFS) (for marine species) to "insure" that their actions are "not likely to jeopardize the continued existence" of any species listed as either endangered or threatened under the Act. 16 U.S.C. § 1536(a)(2). This duty to consult is triggered whenever a federal action "may affect" a listed species. 50 C.F.R. § 402.14. Courts have held that this sets an extremely "low" bar for initiation of consultation. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481, 496 (9th Cir. 2011); *see also* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (explaining that "[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement").

Nonetheless, the Bernhardt Memorandum adopted language from an earlier memorandum from the Director of the Fish and Wildlife Service, which stated that "the Service does not anticipate that the mere fact that a Federal agency authorizes a project that is likely to emit [greenhouse gases (GHG)] will require the initiation of section 7 consultation." *Expectations for Consultations on Actions that Would Emit Greenhouse Gases* (May 14, 2008) (FWS Memorandum), 1. The FWS Memorandum asserted that there was no definitive evidence "establish[ing]" that emission of greenhouse gases (GHGs) "cause[s] an indirect effect to listed species or critical habitat," and that without "sufficient data to establish the required causal connection . . . between a new facility's GHG emissions and impacts to listed species or critical habitat, section 7 consultation would not be required to address impacts of a facility's GHG emissions." *Id.* at 1–2. The Bernhardt Memorandum concluded that greenhouse gas emissions or the effects of climate change "cannot pass the 'may affect' test" and are therefore "not subject to consultation under the ESA." Bernhardt Memorandum at 2. However, this directive does not comport with the mandates of the ESA, as it directs federal agencies to exclude from their analyses a critical factor that has affected, and will continue to negatively affect, listed species.

The Bernhardt Memorandum was incorrect in its assessment that considering greenhouse gas emissions and their effects on climate change at the outset is impossible because of the many contributing factors to climate change. The memorandum reasons that emissions of greenhouse gases, insofar as they contribute to climate change, are not to be considered "direct" or "indirect effects" of an agency action, because climate change is not conclusively "caused by" any individual action, and hence the effects are not "reasonably certain to occur." Bernhardt Memorandum at 5–6. The Bernhardt Memorandum's assertions that scientific research had "not yet developed tools specifically intended for evaluating or quantifying end-point impacts attributable to the emissions of GHGs from a single source," and that "requisite causal connections cannot be made between the emissions of GHGs from a proposed agency action and specific localized climate change as it impacts listed species or critical habitat," Bernhardt Memorandum at 5–6, were at the time, and continue to be, both scientifically and legally incorrect.

It is beyond dispute that emissions of greenhouse gases significantly contribute to global climate change and are causing widespread and intensifying harms.[1] Moreover, the fact that there are many sources of greenhouse gas emissions does not mean that federal agencies and the Services

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[1] *See, e.g.*, Intergovernmental Panel on Climate Change, *Climate Change 2014 Synthesis Report Summary for Policymakers*, https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf ("Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems."); U.S. Global Change Research Program, Impacts, Risks, and Adaptation in the United States, Fourth National Climate Assessment, Volume II (2018), https://nca2018.globalchange.gov/ ("It concludes that the evidence of human-caused climate change is overwhelming and continues to strengthen, that the impacts of climate change are intensifying across the country, and that climate-related threats to Americans' physical, social, and economic well-being are rising"; "fossil fuel combustion accounts for approximately 85 percent of total U.S. greenhouse gas emissions" which is "driving an increase in global surface temperatures and other widespread changes in Earth's climate that are unprecedented in the history of modern civilization."); Anna Moritz, Kassie Siegel, Brendan Cummings, and William Rodgers, Jr., *Biodiversity: Baking and Boiling, Endangered Species Act Turning Down the Heat*, 44 Tulsa L. Rev. 205, 222 (2008), https://digitalcommons.law.uw.edu/faculty-articles/240 ("The notion that there is no causal connection between greenhouse gas emissions and the decline of the polar bear (or other species) is demonstrably incorrect.").

are free to ignore the negative impacts of *additional* greenhouse gas emissions. In other words, while the Bernhardt Memorandum asserted that it was impossible to "quantify[] end-point impacts attributable to" a single source, agencies nevertheless have a statutory obligation to take incremental steps towards furthering their mandate to conserve endangered species. *See Massachusetts v. EPA*, 549 U.S. 497, 499 (2007) ("[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop . . . They instead whittle away at them over time."); *see also Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 598 (D.C. Cir. 2019) ("EPA['s] conclu[sion] that it is impossible to know whether the…Rule will affect listed species or critical habitat…is not the same as determining that the 2018 Rule 'will not' affect them").

The law has additionally developed mechanisms by which the "end-point impacts" of a particular action can be identified and analyzed. Most notably, in *Massachusetts v. EPA*, the Supreme Court employed a "meaningful contribution" standard to determine and attribute a contributor's emissions to their effects on climate change. 549 U.S. at 523–25 (determining that domestic motor-vehicles make a "meaningful contribution" to GHG concentrations at 6% of global carbon dioxide emissions, thus establishing sufficient causation for standing).

Similarly, both FWS and NMFS have considered climate change impacts once the Section 7 consultation process has been initiated for reasons unrelated to climate change—thus, the action agencies, the Services, and the courts that may review any determinations resulting from the consultation are all capable of making assessments about causation and attribution in the context of climate change.[2] Indeed, courts have already been requiring the federal government to assess the effects of climate change, including its additive harm, under these standards. *E.g.*, *Nat'l Wildlife Federation v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 917 (D. Ore. 2016) (finding a biological opinion did not "properly analyze the effects of climate change, including its *additive harm*, how it may reduce the effectiveness of [mitigating] actions, particularly habitat actions that are not expected to achieve full benefits for 'decades,' and how it increases the chances of a catastrophic event") (emphasis added)[3]; *Nat. Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 370 (E.D. Cal. 2007) (granting summary judgment to plaintiffs because the "absence of *any* discussion in the BiOp of how to deal with any climate change is a failure to analyze a potentially 'important aspect of the problem.'") (emphasis in original); *South Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247. 1273–74 (E.D. Cal. 2010) ("The court cannot conclude that global warming's potential impacts are so slight that NMFS could ignore them without discussion.").

[2] Under a Section 7 consultation, the Services must analyze: (1) "the current status and environmental baseline of the listed species or critical habitat;" and (2) "the effects of the action and cumulative effects on the listed species or critical habitat," adding them together to determine "whether the action is likely to jeopardize the continued existence of the listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g); *see also* 50 C.F.R. § 402.14(h) (listing requirements for biological opinions).

[3] The court in *National Wildlife Federation* listed various reasons the biological opinion failed to adequately consider climate change, including assuming climate conditions would remain the same in the future, lack of quantitative analysis, and failure to use the best available scientific information to estimate impacts of climate change. *Id.* at 917–923. If courts see value in addressing climate change at the consultation process, and actually are able to assess climate change and its effects at the consultation stage, the Services must not exclude considerations of climate change at the initial step of determining whether or not to initiate the Section 7 consultation process.

For the foregoing reasons, it is clear that the Bernhardt Memorandum, insofar as it directs the Services not to consider greenhouse gas emissions or the effects of climate change on listed species when determining whether to initiate the Section 7 consultation process, is neither scientifically nor legally sound. Accordingly, the Biden Administration should revoke it, and the 2008 FWS Memorandum on which it relies, as soon as possible, and direct federal agencies to fully comply with the ESA by considering the greenhouse pollution and climate impacts of all federal actions, and to conduct the analysis with the care and urgency required by the dire nature of the climate crisis.

II. The DOI Should Rescind the 2010 Polar Bear Listing Memorandum.

In December 2010, FWS also published a memorandum severely limiting the extent to which climate change should factor into determinations as to when a species should be listed under the ESA as "endangered," defined by the Act as "in danger of extinction." 16 U.S.C. § 1532(6). Until a species is listed as either endangered or threatened, it receives no protection at all under the statute.[4]

In May 2008, against the urging of conservationists that the polar bear should be listed as "endangered" under the Act due to declining global sea ice, upon which the polar bear depends for all of its essential life functions, FWS listed the polar bear as only "threatened," 73 Fed. Reg. 28,212 (May 15, 2008)—a determination that was upheld by the courts. 818 F. Supp. 2d 214 (D.D.C. 2011) (*affirmed* 720 F.3d 354 (D.C. Cir. 2013)). During the course of that litigation, at the request of the district court judge, FWS issued a memorandum clarifying that "in danger of extinction" means "*currently* on the brink of extinction in the wild[.]" *Supplemental Explanation for the Legal Basis of the Department's May 15, 2008 Determination of Threatened Status for Polar Bears* (Dec. 22, 2010) ("Polar Bear Listing Memo").

This interpretation—essentially requiring that a species' extinction be imminent, certain, and currently looming—represents a dramatic and unnecessary narrowing of the circumstances under which a species can be classified as endangered. It also severely undermines the efficacy of the ESA, a statute whose purpose is to provide a program for the survival and *recovery* of endangered and threatened species. 16 U.S.C. § 1531(b); 16 U.S.C. § 1532(3). If a species cannot be afforded the life-saving protections associated with being listed as endangered until its populations are so far gone that recovery is an all but impossible task, then one of the ESA's primary purposes would effectively be undone.

As part of its reasoning for why the polar bear did not meet this new standard, FWS found that climate change, and the resulting loss of sea ice habitat, would be "incremental," thereby decreasing the "polar bear's ability to sustain itself . . . over time," but that polar bear populations did not *currently* suffer to the point where they could be considered "on the brink of extinction." Polar Bear Listing Memorandum 17–18.

This interpretation of the role of climate change in the listing context is both scientifically unsupportable and legally insufficient. The ESA requires the Services to rely on the "best available scientific and commercial data available" in making a listing determination. 16 U.S.C. § 1533(b)(1). Scientific data clearly support that climate change creates both an *acute* and *current*

[4] A "threatened" species is one that is one that is "likely to become endangered in the foreseeable future." 16 U.S.C. § 1532(20).

threat, as well as an accelerating and rapidly growing threat that will only worsen with time. *See* Fourth National Climate Assessment (2018), https://nca2018.globalchange.gov/; The Intergovernmental Panel on Climate Change, *Global Warming of 1.5ºC* (2018), https://www.ipcc.ch/sr15/download/#chapter. Dismissing the effects of climate change as too distant or geographically remote necessarily ignores the best available science.[5]

Therefore, the Biden Administration should also rescind the Polar Bear Listing Memo, consistent with the mandates of the ESA and the best available science.

III. The Services Should Rescind the 2019 Section 7 Regulations.

In 2019, the Trump Administration amended regulations pertaining to Section 7 consultations. Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019) (codified at 50 C.F.R. § 402). The new regulations amended the definition of "effects of the action" that the action agency and Services must consider when engaging in Section 7 consultation, *see* 50 C.F.R. § 402.14(a)), by adding a restrictive "but for" requirement: "A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur." 50 C.F.R. § 402.02(d). The 2019 amendments to the regulations also added § 402.17, which defines "activities that are reasonably certain to occur" and "consequences caused by the proposed action," both of which are terms used to determine the scope of effects that must be considered during consultation to "insure" that agency actions are not likely to jeopardize any listed species. 50 C.F.R. § 402.17.[6]

Although the regulations provide that "[e]ffects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action," 50 C.F.R. § 402.2(d)—thus potentially encompassing climate change-related impacts—the amendments may be construed and implemented by agencies in a manner that undermines their ability to meaningfully evaluate climate-change related injuries that federal agencies must consider during consultation.

The Biden Administration should thus rescind these recently promulgated regulations.[7]

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[5] The Services' narrow interpretation of "endangered" in the Polar Bear Listing Memorandum is additionally inconsistent with the statute's requirement that the Services consider "the present *or threatened* destruction, modification, or curtailment of [the species'] habitat or range," and "*manmade factors* affecting [the species'] continued existence" as part of the listing determination, clearly including climate change. 16 U.S.C. § 1533(a)(1)(A) and (E) (emphasis added).

[6] The latter definition includes specific types of harms *not* caused by the proposed agency action: (1) when "the consequence is so remote in time from the action under consultation that it is not reasonably certain to occur;" (2) when "the consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur;" or (3) when "the consequence is only reached through a lengthy causal chain that involves so may steps as to make the consequence not reasonably certain to occur." *Id.*

[7] These regulations are currently being challenged in court. Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity v. Bernhardt*, No. 3:19-cv-05206 (N.D. Cal. Aug. 21, 2019).

IV. Federal Agencies Should Be Directed to Take Climate Change Into Account in Complying with Their Affirmative Obligation to Promote Conservation Under the ESA.

DOI and the Services should not only rescind these harmful policies, but the new Administration should go a step further and make clear to all federal agencies that they must take affirmative actions to ameliorate the adverse effects of climate change whenever possible. Such a directive would be entirely consistent with the ESA's requirement that all federal agencies, in consultation with the Services, "utilize their authorities in furtherance of the purposes of" the ESA, namely "conservation of endangered species." 16 U.S.C. § 1536(a)(1).

Therefore, it is clear that every agency, as part of this affirmative duty, should be *required* to consider—and reduce, whenever possible—the effects of climate change on endangered or threatened species. *See Tenn. Valley Auth. v. Hill*, 437 U.S. at 185 ("the legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species . . . over the 'primary missions' of federal agencies."). Climate change has negative impacts on countless threatened and endangered species. At this juncture, it is simply not possible in most instances to promote "conservation" of listed species, which requires the use of "*all* methods and procedures which are necessary" to recover species to the point where they no longer need the protections of the Act, without considering climate change. 16 U.S.C. § 1532(c).

V. Conclusion

For all of the foregoing reasons, rescinding the guidance memoranda and 2019 Endangered Species Regulations will greatly assist federal agencies in considering the effects of climate change on endangered species, and in carrying out your excellent broader mandate "to require any federal permitting decision to consider the effects of greenhouse gas emissions and climate change."

From: "Annatoyn, Travis J" <travis.annatoyn@sol.doi.gov>
To: "Alison Flint" <alison_flint@tws.org>, "Landreth, Natalie A" <natalie.landreth@sol.doi.gov>
Cc: "Ben Tettlebaum" <Ben_Tettlebaum@tws.org>
Subject: RE: [EXTERNAL] follow-up meeting request
Date: Tue, 21 Feb 2023 09:48:08 -0500
Importance: Normal

Hi Alison:

Good to be back in touch! Let me connect with Natalie to pin down some availability.

From: Alison Flint <alison_flint@tws.org>
Sent: Friday, February 17, 2023 1:28 PM
To: Landreth, Natalie A <natalie.landreth@sol.doi.gov>; Annatoyn, Travis J <travis.annatoyn@sol.doi.gov>
Cc: Ben Tettlebaum <Ben_Tettlebaum@tws.org>
Subject: [EXTERNAL] follow-up meeting request

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Dear Natalie and Travis,

I'm hoping to take you both up on Natalie's offer for a follow-up discussion (via Teams or Zoom) on a few items we've touched on in meetings over the past weeks. I'd like to introduce you both to Ben Tettlebaum, Director and Sr. Staff Attorney for TWS, who leads our climate solutions and emissions reduction legal and policy work. I'm hoping Ben and I could connect with you both – ideally the week of February 27 – to further discuss needs and opportunities for BLM to address climate and emissions management through upcoming rulemakings, and also touch base on Badger-Two Medicine, following your conversation with Jennifer Ferenstein. Please let me know what might work.

Sincerely,

Alison Flint *(she/her/hers)*
Senior Legal Director
The Wilderness Society | **The Wilderness Society Action Fund**
ph 720 647-9491

I acknowledge that I live and work on traditional Crow, Salish, Cheyenne, and Blackfoot lands.

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From: Alison Flint <alison_flint@tws.org>
To: "Annatoyn, Travis J" <travis.annatoyn@sol.doi.gov>, "Landreth, Natalie A" <natalie.landreth@sol.doi.gov>
Cc: Ben Tettlebaum <Ben_Tettlebaum@tws.org>
Subject: RE: [EXTERNAL] follow-up meeting request
Date: Wed, 22 Feb 2023 17:56:40 -0500
Importance: Normal

Hi Travis,

Just bumping this back up in your inbox to see if you and Natalie might have time to connect next week – ideally Tuesday, Wednesday, or Friday.

Thanks!

Alison

From: Annatoyn, Travis J <travis.annatoyn@sol.doi.gov>
Sent: Tuesday, February 21, 2023 7:48 AM
To: Alison Flint <alison_flint@tws.org>; Landreth, Natalie A <natalie.landreth@sol.doi.gov>
Cc: Ben Tettlebaum <Ben_Tettlebaum@tws.org>
Subject: RE: [EXTERNAL] follow-up meeting request

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From: "Annatoyn, Travis J" <travis.annatoyn@sol.doi.gov>
To: "Ben Tettlebaum" <Ben_Tettlebaum@tws.org>
Cc: "Caminiti, Mariagrazia" <Marigrace.Caminiti@sol.doi.gov>
Subject: Re: [EXTERNAL] Follow-up meeting request
Date: Wed, 24 May 2023 19:18:22 -0400
Importance: Normal

Hi Ben:

Thanks for the email. Let me chat with some folks internally, but wanted to at least acknowledge that we received your message.

Get Outlook for iOS

From: Ben Tettlebaum <Ben_Tettlebaum@tws.org>
Sent: Monday, May 22, 2023 10:31:40 AM
To: Annatoyn, Travis J <travis.annatoyn@sol.doi.gov>
Cc: Caminiti, Mariagrazia <Marigrace.Caminiti@sol.doi.gov>
Subject: [EXTERNAL] Follow-up meeting request

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Dear Travis,

I hope this finds you well. As you may recall, Alison Flint and I met with you and Natalie earlier this year to discuss, among other issues, climate and greenhouse gas emissions management. I would greatly appreciate a follow-up with you to discuss several additional related items.

Recognizing we have the holiday weekend coming up, might you have time for a remote meeting next week or the following week of June 5? If so, please let me know times that might work with your schedule.

Much appreciated,

Ben

Ben Tettlebaum (he/him/his)
Director & Senior Staff Attorney
The Wilderness Society | **The Wilderness Society Action Fund**
ph (720) 647-9568

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To: "Ben Tettlebaum" <Ben_Tettlebaum@tws.org>
Cc: "Alison Flint" <alison_flint@tws.org>
Subject: RE: [EXTERNAL] Follow-up meeting request
Date: Thu, 15 Jun 2023 08:51:12 -0400
Importance: Normal

Hi Ben and Alison:

Circling back here: do you have 30 minutes tomorrow or Tuesday/Wednesday?

From: Ben Tettlebaum <Ben_Tettlebaum@tws.org>
Sent: Wednesday, May 24, 2023 9:13 PM
To: Annatoyn, Travis J <travis.annatoyn@sol.doi.gov>
Cc: Caminiti, Mariagrazia <Marigrace.Caminiti@sol.doi.gov>
Subject: RE: [EXTERNAL] Follow-up meeting request

Understood – thank you for the update, Travis.

Ben

Ben Tettlebaum (he/him/his)
Director & Senior Staff Attorney
The Wilderness Society | **The Wilderness Society Action Fund**
ph (720) 647-9568

From: Annatoyn, Travis J <travis.annatoyn@sol.doi.gov>
Sent: Wednesday, May 24, 2023 6:18 PM
To: Ben Tettlebaum <Ben_Tettlebaum@tws.org>
Cc: Caminiti, Mariagrazia <Marigrace.Caminiti@sol.doi.gov>
Subject: Re: [EXTERNAL] Follow-up meeting request

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To: Annatoyn, Travis J <travis.annatoyn@sol.doi.gov>
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Recognizing we have the holiday weekend coming up, might you have time for a remote meeting next week or the following week of June 5? If so, please let me know times that might work with your schedule.

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To: "Alison Flint" <alison_flint@tws.org>, "Ben Tettlebaum" <Ben_Tettlebaum@tws.org>
Subject: RE: [EXTERNAL] Follow-up meeting request
Date: Thu, 15 Jun 2023 09:54:24 -0400
Importance: Normal

Thanls

From: Alison Flint <alison_flint@tws.org>
Sent: Thursday, June 15, 2023 9:49 AM
To: Ben Tettlebaum <Ben_Tettlebaum@tws.org>; Annatoyn, Travis J <travis.annatoyn@sol.doi.gov>
Subject: RE: [EXTERNAL] Follow-up meeting request

And I will also look forward to seeing you at the Pelosi award dinner on Wednesday evening, Travis (saw that you're on the RSVP list).

Best,

Alison

From: Ben Tettlebaum <Ben_Tettlebaum@tws.org>
Sent: Thursday, June 15, 2023 9:44 AM
To: Annatoyn, Travis J <travis.annatoyn@sol.doi.gov>
Cc: Alison Flint <alison_flint@tws.org>
Subject: RE: [EXTERNAL] Follow-up meeting request

Hi Travis,

Thanks for circling back.

Tomorrow is difficult for me, but next Wednesday is wide open at the moment. Please just let me know what time works best for you to connect on a call. Alison will likely not join. Coincidentally, however, she will be in D.C. next Wednesday through Friday and has an outstanding meeting request into Natalie to touch base on the BLM public lands rule and miscellaneous other items in her portfolio. You are welcome to join that meeting, but we think it probably makes sense to keep that meeting and our meeting separate.

Much appreciated,

Ben

Ben Tettlebaum (he/him/his)
Director & Senior Staff Attorney
The Wilderness Society | **The Wilderness Society Action Fund**
ph (720) 647-9568

From: Annatoyn, Travis J <travis.annatoyn@sol.doi.gov>
Sent: Thursday, June 15, 2023 8:51 AM
To: Ben Tettlebaum <Ben_Tettlebaum@tws.org>
Cc: Alison Flint <alison_flint@tws.org>
Subject: RE: [EXTERNAL] Follow-up meeting request

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Ben

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From: Annatoyn, Travis J <travis.annatoyn@sol.doi.gov>
Sent: Wednesday, May 24, 2023 6:18 PM
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Cc: Caminiti, Mariagrazia <Marigrace.Caminiti@sol.doi.gov>
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Sent: Monday, May 22, 2023 10:31:40 AM
To: Annatoyn, Travis J <travis.annatoyn@sol.doi.gov>
Cc: Caminiti, Mariagrazia <Marigrace.Caminiti@sol.doi.gov>
Subject: [EXTERNAL] Follow-up meeting request

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Dear Travis,

I hope this finds you well. As you may recall, Alison Flint and I met with you and Natalie earlier this year to discuss, among other issues, climate and greenhouse gas emissions management. I would greatly appreciate a follow-up with you to discuss several additional related items.

Recognizing we have the holiday weekend coming up, might you have time for a remote meeting next week or the following week of June 5? If so, please let me know times that might work with your schedule.

Much appreciated,

Ben

Ben Tettlebaum (he/him/his)
Director & Senior Staff Attorney
The Wilderness Society | **The Wilderness Society Action Fund**
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Subject: [EXTERNAL] Conservation Lands Foundation Wash DC event

Date: Tue, 02 Apr 2024 12:51:49 -0400

Importance: Normal

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Dear friend:

I am writing to extend to you a personal invitation to the Conservation Lands Foundation's marquee event in Washington, DC on Wednesday, April 17th. We will be hosting a panel of leading voices on the importance of protecting our public lands. The event starts at 5:30pm at the Decatur House. It would be an honor to have you in attendance. Please RSVP at the link below.

Yours truly,

Hilary Tompkins
CLF Board Member

Join Us

A Call-To-Action Event:
The power of U.S. public lands to bridge divisions and help solve the urgent climate and biodiversity crises

We hope you can join us for an intimate conversation about how public lands can be a unifying force for the nation and how you can support the greatest opportunity to protect nature in the U.S within a timeframe that matters.

When: Wednesday, April 17 at 5:30 p.m. ET
Where: The Historic Decatur House, Washington, D.C.

In Conversation with:

- Patagonia CEO Ryan Gellert
- New Mexico Senator Martin Heinrich
- Conservation Lands Foundation Co-Interim Executive Director and Chief Conservation Officer Jocelyn Torres

Moderated by:

John Leshy, former solicitor for the U.S. Department of the Interior and author of *Our Common Ground: A History of America's Public Lands*
Please register today using the button below. Space is limited.

Register Today

With gratitude,

Mark Headley
Chair, Board of Trustees

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