

1 CLEMENT ROBERTS (CSBA # 209203)
2 DANIEL S. GUERRA (CSBA # 267559)
3 KOUROSH JAHANSOUZ (CSBA # 292559)
4 ORRICK, HERRINGTON & SUTCLIFFE LLP
5 405 Howard Street
6 San Francisco, CA 94105
7 Telephone: (415) 773-5700
8 Facsimile: (415) 773-5759
9 croberts@orrick.com
10 dguerra@orrick.com
11 kjahansouz@orrick.com

7 EMMANUEL FUA (CSBA # 284563)
8 ORRICK, HERRINGTON & SUTCLIFFE LLP
9 51 West 52nd Street
10 New York, NY 10019
11 Telephone: (212) 506-5000
12 Facsimile: (212) 506-5151
13 efua@orrick.com

11 *Attorneys for Plaintiff*

12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 OAKLAND DIVISION

16 ANIMAL LEGAL DEFENSE FUND,

17 Plaintiff,

18 v.

19 DAVID BERNHARDT, U.S. Secretary of the
20 Interior; U.S. FISH AND WILDLIFE
21 SERVICE; WILBUR ROSS, U.S. Secretary of
22 Commerce; and NATIONAL MARINE
23 FISHERIES SERVICE,

24 Defendants.

Case No. 4:19-cv-06812-JST

Related Cases: No. 4:19-cv-06013-JST
No. 4:19-cv-06812-JST

**FIRST AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

(Administrative Procedure Act, 5 U.S.C.
§ 551, et seq.)

INTRODUCTION

1
2 1. Congress passed the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*,
3 in 1973 to provide a program for the conservation of the nation’s endangered and threatened
4 species, and their ecosystems. Congress defined “conservation” expansively to include the use
5 of all methods and procedures necessary to recover threatened and endangered species to the
6 point that their survival is not reliant upon the ESA’s protections. 16 U.S.C. § 1532(3). The
7 ESA promotes conservation by prioritizing the survival and recovery of these species and their
8 habitats.

9 2. For over 40 years, the Department of the Interior and the Department of
10 Commerce, acting through the U.S. Fish and Wildlife Service (“FWS”) and the National Marine
11 Fisheries Service (“NMFS”) (collectively, “the Services”), have administered the ESA through
12 duly promulgated joint regulations, and to great success: their efforts have effectively conserved
13 99% of species listed under the law.

14 3. This action challenges recent regulatory revisions promulgated by FWS and
15 NMFS on August 12, 2019, which amend the regulations that implement ESA Sections 4 and 7,
16 16 U.S.C. §§ 1533, 1536. The rules were published in the Federal Register on August 27, 2019
17 and became effective on September 26, 2019. *See* Regulations for Interagency Cooperation,
18 84 Fed. Reg. 44976 (Aug. 27, 2019); Regulations for Listing Species and Designating Critical
19 Habitat, 84 Fed. Reg. 45020 (Aug. 27, 2019); Regulations for Prohibitions to Threatened
20 Wildlife and Plants, 84 Fed. Reg. 44753 (Aug. 27, 2019) (collectively, the “2019 Revised ESA
21 Regulations”).

22 4. Defendants issued the challenged regulatory revisions to deregulate protections for
23 threatened and endangered species in several key respects. One of the rules repeals the long-
24 established FWS regulation implementing ESA Section 4(d), often referred to as the
25 “Blanket 4(d) Rule,” which automatically extended certain protections to threatened animals and
26 plants upon listing, 50 C.F.R. §§ 17.31, 17.71. Regulations for Prohibitions to Threatened
27 Wildlife and Plants, 84 Fed. Reg. 44753 (Aug. 27, 2019). Another rule makes several
28

1 fundamental changes to Section 4 review, severely restricting its scope and, for the first time,
2 subjugating conservation to economic considerations. Regulations for Listing Species and
3 Designating Critical Habitat, 84 Fed. Reg. 45020 (Aug. 27, 2019). And the remaining rule
4 similarly cabins Section 7 review to a degree that wholly thwarts its purpose. Regulations for
5 Interagency Cooperation, 84 Fed. Reg. 44976 (Aug. 27, 2019).

6 5. The Services claim that revising these longstanding and fundamental regulations
7 increases clarity and encourages transparency; on the contrary, the regulatory revisions are
8 contrary to the plain language of the ESA, lack any reasoned basis, and are arbitrary and
9 capricious under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 *et seq.*

10 6. The regulatory revisions also contradict the clear conservation mandate of the
11 ESA, which is “to provide a means whereby the ecosystems upon which endangered species and
12 threatened species depend may be conserved, [and] to provide a program for the conservation of
13 such endangered species and threatened species” 16 U.S.C. § 1531(b). Without the Blanket
14 4(d) Rule, for example, animals listed as “threatened” will not be extended protection upon
15 listing, but instead will have to wait for an indeterminate and historically lengthy amount of time
16 for the Services to issue species-specific protections—if the Services choose to act, at all.
17 Animals downgraded from endangered to threatened status will lose their protections against
18 “take” and will be subject to the same delay in regaining their protections, as well. This change
19 does nothing to promote clarity or transparency—it just makes it easier to “take” threatened
20 wildlife for longer periods of time, thereby undermining the very purpose of the ESA. The same
21 is true for the two accompanying regulations.

22 7. In enacting the regulatory revisions, the Services also failed to consider and
23 disclose the significant environmental impacts of the proposed revisions, thereby violating the
24 National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.* The final regulatory
25 revisions require NEPA review as they constitute major federal action that does not qualify for a
26 categorical exclusion.

1 mental well-being, and to relocate animals to sanctuaries where they can recover and flourish.
2 ALDF also regularly uses the standards for threatened and endangered animals set forth in the
3 ESA to inform civil cruelty and nuisance suits against captive animal facilities that fail to
4 adequately care for the threatened and endangered animals they exhibit. ALDF's legal advocacy
5 and ability to carry out its mission relies extensively upon the ESA to ensure imperiled species
6 receive the protections they need to thrive, and thus is impeded by the Services' action.

7 14. ALDF also advocates for threatened and endangered species in the wild,
8 promotes the humane treatment of wildlife, and campaigns for the preservation of wilderness
9 and wildlife habitat, including by persistently advocating for government adherence to wildlife
10 protection laws such as the ESA and NEPA. ALDF has successfully used legal action to protect
11 threatened and endangered species in California by forcing county governments to halt their
12 wildlife killing programs unless or until they study their environmental impacts. ALDF also
13 engages on the federal level, bringing lawsuits against the United States Department of
14 Agriculture's ("USDA") Wildlife Services to compel study of the impacts of its regional wildlife
15 killing programs; to protect and conserve wild lands, specifically from the effects of climate
16 change; and to force federal agencies to consider threatened and endangered species, as well as
17 the impacts of climate change, in their decision making. ALDF further advocates for threatened
18 and endangered species directly to government agencies. ALDF recently submitted comments to
19 the FWS opposing the delisting of the grey wolf, for example, and, in addition to submitting its
20 own comments, was part of the coalition that delivered over 800,000 comments to the Services
21 opposing the regulations at issue here. ALDF's separate comments opposing the regulations at
22 issue detailed the effects the proposed rules would have on threatened and endangered species in
23 captivity, an issue that is of the utmost concern to ALDF and its members. Declaration of Mark
24 Walden ("Walden Decl.") (Ex. A) ¶¶ 10-12.¹

25
26 ¹ Mr. Walden's declaration, along with four others, are attached as exhibits to this complaint and
27 are incorporated by reference in full. These declarations were originally filed with ALDF's
28 opposition to motion to dismiss and are being re-filed in their original form with this complaint.
The status of certain of the pending lawsuits mentioned in Mr. Walden's declaration has changed
in the interim.

1 15. ALDF and its members and supporters are concerned about protecting threatened
2 and endangered captive species from exploitation and extinction. ALDF and its members and
3 supporters derive recreational, aesthetic, and conservation benefits and enjoyment from the
4 proper treatment and conservation of threatened and endangered species and species that may be
5 listed as threatened or endangered. ALDF also has members and supporters who reside near and
6 visit facilities that exhibit members of threatened and endangered species and species that may
7 be listed as threatened or endangered species. ALDF and its members and supporters have been,
8 are being, and will continue to be irreparably harmed by defendants' disregard of their statutory
9 duties and by the unlawful injuries imposed on imperiled species and their critical habitat by the
10 defendants' actions.

11 16. For example, Ashley Fetters, a resident of Norwalk, Iowa, and member of ALDF,
12 relies on local zoos to provide wildlife viewing opportunities and to educate her daughter about
13 the natural world. Declaration of Ashley Fetters ("Fetters Decl.") (Ex. B) ¶ 3. She and her
14 daughter frequently visit the nearby Henry Doorley Zoo in Omaha, Nebraska, and the Blank
15 Park Zoo in Des Moines, Iowa to see threatened and endangered animals. *Id.* ¶ 4. At the Henry
16 Doorley Zoo, Fetters visits threatened and endangered animals (amur tigers, red pandas, African
17 elephants, and white rhinos, among others), as well as the giraffes, which are proposed
18 threatened. Similarly, at the Blank Park Zoo, Fetters visits the threatened and endangered
19 animals (African lions, Aldabra tortoises, amur tigers, red pandas, and Eastern Black rhinos) and
20 the giraffes. She plans to return to both of these zoos in 2020. She also travels to zoos and
21 sanctuaries in other states. *Id.* ¶ 5.

22 17. Fetters and her daughter have a particular affinity for savannah animals such as
23 elephants, lions, giraffes, and rhinos, all of which are either endangered, threatened, or proposed
24 threatened. *Id.* ¶ 6. It is very important to Fetters to know they are being conserved. *Id.* ¶ 7.
25 Some animals already have nowhere to go to continue their survival, and it terrifies her to think
26 of species that are displaced from the areas they're adapted to. *Id.* Because of these values, the
27 ESA and strong enforcement of it by the FWS and groups like ALDF are incredibly important to
28

1 her. *Id.* ¶ 8. Under the FWS’s new regulations, however, it will be more difficult for species like
2 the giraffe to be listed under the ESA, which makes it more difficult for ALDF and concerned
3 citizens like Fetters to act on behalf of animals that deserve the strongest legal protections. *Id.*
4 ¶ 9. Even the threatened and endangered species that Fetters visits in zoos are at risk of
5 prematurely losing protections due to the FWS’s changes to its ESA regulation, jeopardizing the
6 strong emotional, aesthetic, and personal interests Fetters has in these animals. *Id.* ¶¶ 10, 11. In
7 addition, the FWS’s new regulations also allow the agency to delist species that are not actually
8 recovering, eliminate the requirement that the scientific and commercial data “substantiate” a
9 species’ delisting, consider economic impacts of listing decisions—which Fetters finds
10 abhorrent—and impede the designation of critical habitat essential for species survival. *Id.* ¶ 10.
11 This puts species that Fetters cares about at risk of premature delisting.

12 18. Similar to Fetters, Lisa Garner is another ALDF member who is concerned about
13 the effects these new regulations will have on endangered, threatened, and proposed threatened
14 species located in zoos. Declaration of Lisa Garner (“Garner Decl.”) (Ex. C) ¶¶ 2-3.
15 Specifically, Garner has visited Zooworld, a roadside zoo in Panama City Beach, Florida, several
16 times, to view lemurs and mandrills, which are both endangered, as well as giraffes, which are
17 currently under consideration for listing by the FWS. *Id.* ¶ 4. She plans to visit this zoo again in
18 the future to monitor and document the condition of its animals. *Id.* Garner is especially
19 concerned about giraffes exhibited at the Zooworld. *Id.* ¶¶ 3, 8. Under the previous FWS
20 regulations, giraffes would enjoy automatic protections as soon as they are listed as threatened;
21 under the new regulations, they will not be protected until FWS issues species-specific
22 regulations, and even then, may not receive the full range of protections they would have
23 automatically received under the prior regulations. *Id.* ¶ 10. FWS has also specifically
24 identified climate change as one of the “natural or manmade factors” contributing to the giraffes’
25 decline. *Id.* Under FWS’s new regulations, the agency can decline to designate a habitat as
26 critical if the threats to the habitat are ones the agency cannot address. These changes make it
27 more difficult for species like the giraffe to be listed under the ESA, which makes it more
28

1 difficult for ALDF and concerned citizens like Garner to act on behalf of animals that deserve
2 the strongest legal protections. *Id.* Even listed animals like lemurs and wolves at Zooworld are
3 at risk of prematurely losing protections due to the FWS's changes to its ESA regulations. *Id.* ¶
4 11. A return to FWS's previous regulations would redress Garner's injury by providing animals
5 under consideration for listing now and in the future, and those already listed, with significantly
6 stronger protections. *See also* Declaration of Mary Delmoro ("Delmoro Decl.") (Ex. D) ¶¶ 4-14
7 (alleging similar injuries to her aesthetic interests in giraffes housed at zoo in Harpursville, New
8 York, which she monitors via live feed on a daily basis).

9 19. ALDF's members, staff, and supporters also frequent natural areas for the
10 purposes of observing threatened and endangered species and other recreational and professional
11 pursuits. Plaintiffs' members and staff enjoy observing, attempting to observe, photographing,
12 and studying these species, including signs of the species' presence in the areas. The
13 opportunity to possibly view these species or signs of species in these areas is of significant
14 interest and value to Plaintiffs' members and staff and increases the use and enjoyment of public
15 lands and ecosystems in the United States. Plaintiff's members also derive recreational,
16 aesthetic, and conservation benefits and enjoyment from the conservation of threatened and
17 endangered species and species that may be listed as threatened or endangered, as well as their
18 critical habitat; they have an interest in the health and humane treatment of wild animals.

19 20. For example, Leslie Patten, a member of ALDF residing in northwest Wyoming,
20 has been visiting Shoshone National Forest since the 1990s, a forest which has the most
21 wilderness land of any National Forest in the United States. Declaration of Leslie Patten
22 ("Patten Decl.") (Ex. E) ¶ 3. She also lives very close to Yellowstone National Park. *Id.* These
23 areas comprise habitats for many threatened and endangered species, including gray wolves,
24 grizzly bears, and Canada lynx, as well as species that are under consideration for listing or
25 delisting such as the North American wolverine. *Id.* ¶ 4. She also lives among critical habitat
26 for the Canada lynx and proposed critical habitats for the wolverine. *Id.* The Greater
27
28

1 Yellowstone Ecosystem is also home to pikas, which are particularly vulnerable to loss of habitat
2 related to climate change. *Id.*

3 21. Patten spends a considerable amount of time daily in nature. *Id.* at ¶ 5. She
4 spends this time outdoors specifically to feel closer to the natural world and to observe and enjoy
5 wildlife, including threatened and endangered species. *Id.* Patten is extremely concerned about,
6 and regularly witnesses, the effects of climate change on the Greater Yellowstone Ecosystem.
7 *Id.* ¶ 8. For example, ninety percent of Whitepark pine trees, which are the main fall food for
8 grizzly bears, are considered functionally dead due to the effects of climate change. Watching
9 her local forest die has caused her mental and physical health to suffer. *Id.* Specifically, Patten
10 is deeply concerned about the FWS's new regulations under the ESA. Under the new
11 regulations, the FWS can decline to designate a habitat as critical if the threats to the habitat are
12 ones the agency cannot address, like climate change; the FWS is limited in its ability to
13 designate habitat where a species does not currently live, which ignores animals like pikas who
14 have no place to retreat to, or grizzly bears in the Greater Yellowstone Ecosystem who are losing
15 their critical foods due to climate change; and the FWS is further limited in considering future
16 effects of climate change *Id.* ¶ 11. Each of these changes make it more difficult for species to
17 be listed under the ESA, which makes it more difficult for ALDF and concerned citizens like
18 Patten to act on behalf of animals that deserve the strongest legal protections. *Id.* These
19 vulnerable animals and the people like Patten who are deeply invested in their health and
20 happiness are being harmed by the FWS's decision to weaken the ESA's protections. *Id.* ¶ 13.

21 22. The 2019 Revised ESA Regulations directly and adversely impact the aesthetic,
22 conservation, and recreational interests of ALDF and its members in the continued vitality of
23 threatened and endangered species, species that may be listed as threatened or endangered
24 species, and their critical habitat. Among other things, the 2019 Revised ESA Regulations
25 unequivocally weaken ESA safeguards designed to conserve hundreds of endangered and
26 threatened species, which, at minimum, will result directly in an enhanced and substantial risk of
27 loss in biodiversity and degradation of fish and wildlife natural resources in areas that ALDF and
28

1 its members and supporters frequent. Further, the 2019 Revised ESA Regulations make it
 2 increasingly difficult to observe these species in the wild and to ensure they are protected when
 3 in captivity. Declines in species population are difficult to remedy and extinction of species is
 4 impossible to remedy. Should declines or extinction of species populations occur, ALDF and its
 5 members would be harmed irreparably and no relief would adequately return them to their
 6 original position. Vacatur of the 2019 Revised ESA Regulations and reinstatement of the prior
 7 regulations would eliminate this risk and redress ALDF's and its members' injury.

8 23. Finally, Plaintiffs' members, staff, and supporters have a procedural interest in
 9 ensuring that the Services comply with all applicable federal statutes and regulations, as well as
 10 procedural right to participate in the public processes such statutes and regulations require. ALDF
 11 is entitled to have its concerns addressed by the Services in their final rules, and to participate in
 12 a public NEPA process for the significant federal actions the Services undertook here. Plaintiff
 13 and its members, staff, and supporters have suffered a procedural injury by the Services' failure
 14 to address these concerns and to provide for a public NEPA process. Had Federal Defendants
 15 properly complied with NEPA, ALDF and its members and supporters would have participated in
 16 the NEPA process. *See, e.g.*, Patten Decl. ¶ 14; Walden Decl. ¶ 10. Federal Defendants' failure
 17 to do so has caused injury to ALDF and its members by depriving them of this procedural right.
 18 The relief requested in this litigation would redress this injury.²

19 24. Defendant David Bernhardt, U.S. Secretary of the Interior, is sued in his
 20 professional capacity. Mr. Bernhardt has responsibility for implementing and fulfilling the
 21 duties of the United States Department of the Interior, including the administration of the ESA
 22 with regard to threatened and endangered terrestrial and freshwater plant and animal species.
 23 Mr. Bernhardt signed the final revised ESA regulation at issue;

24
 25 ² To be clear, ALDF is alleging "associational standing" (*e.g.*, *W. Watersheds Project v.*
 26 *Kraayenbrink*, 632 F.3d 472, 482-83 (9th Cir. 2011)) based on harm to its individual members
 27 and supporters, in addition to its procedural injury in being deprived of a meaningful opportunity
 28 to participate in a public notice-and-comment procedure and NEPA process on behalf of its
 members (*see, e.g., infra* at ¶¶ 59, 88). ALDF is not alleging "direct" or "organizational
 standing" (*e.g., Smith v. Pacific Properties & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004)).

1 25. Defendant U.S. Fish and Wildlife Service is an agency of the U.S. Department of
2 the Interior, charged with administering the ESA with respect to threatened and endangered
3 terrestrial and freshwater plant and animal species;

4 26. Defendant Wilbur Ross, U.S. Secretary of Commerce, is sued in his professional
5 capacity. Mr. Ross has responsibility for implementing and fulfilling the duties of the
6 United States Department of Commerce, including the administration of the ESA with regard to
7 threatened and endangered marine species and anadromous fish species. Mr. Ross signed the
8 final revised ESA regulation at issue; and

9 27. Defendant National Marine Fisheries Service is an agency of the U.S. Department
10 of Commerce, responsible for administering the ESA with regard to threatened and endangered
11 marine species and anadromous fish species.

12 BACKGROUND

13 I. THE CONSERVATION, PROTECTION, AND RECOVERY OF BOTH WILD AND 14 CAPTIVE ENDANGERED AND THREATENED SPECIES IS A NATIONAL 15 PRIORITY UNDER THE ENDANGERED SPECIES ACT.

16 28. Congress passed the ESA in 1973 in recognition of a then-ongoing extinction
17 crisis and the belief that species in danger or threatened with extinction “are of esthetic,
18 ecological, educational, historical, recreational, and scientific value to the Nation and its people,”
19 and that, through various treaties and covenants, the United States had pledged to the
20 international community “to conserve to the extent practicable various species of fish or wildlife
21 and plants facing extinction.” 16 U.S.C. § 1531(a)(3)-(4).

22 29. Congress intended the ESA “to provide a program for the conservation of such
23 endangered species and threatened species” 16 U.S.C. § 1531(b). The ESA defined
24 “conservation” as “the use of all methods and procedures which are necessary to bring any
25 endangered species to the point at which the measures provided pursuant to this act are no longer
26 necessary.” 16 U.S.C. § 1532(3).

27 30. The ESA seeks to conserve, protect, and recover imperiled species by using the
28 “best scientific and commercial data available,” 16 U.S.C. § 1533(b), to determine, based on

1 enumerated statutory factors, the suitability of species for listing as threatened or endangered.
2 16 U.S.C. §§ 1533(a)(1)(A)-(E).

3 31. The ESA defines an “endangered species” as “any species which is in danger of
4 extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). The ESA
5 defines a “threatened species” as “any species which is likely to become an endangered species
6 within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C.
7 § 1532(20).

8 32. Section 7 of the ESA elevates the mandate of species protection over the primary
9 missions of federal agencies. In adopting this section, Congress effectively charged all federal
10 agencies with the affirmative duty to further the conservation of imperiled species. 16 U.S.C.
11 § 1536(a).

12 33. Section 7 of the ESA further requires every federal agency to consult with FWS
13 or NMFS to obtain review and clearance for activities that may affect listed species or their
14 habitat. If “any action authorized, funded, or carried out by” a federal agency may affect a listed
15 species or its designated critical habitat, that activity cannot go forward until consultation
16 ensures that it will not “jeopardize” the species or result in the “destruction or adverse
17 modification” of designated critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

18 34. Much like their wild brethren, endangered or threatened animals bred or kept in
19 captivity also benefit from the protections afforded by and the prohibitions enumerated in the
20 ESA. *See, e.g.*, Final Rule, 80 Fed. Reg. 7380, 7388 (Feb. 10, 2015) (“On its face the ESA does
21 not treat captives differently Section 9(a)(1)(A)-(G) of the ESA applies to endangered
22 species regardless of their captive status.”); 50 C.F.R. § 17.3 (defining the “take” definition’s
23 term “harass” in the context of captive animals).

24 35. The listing of a species as endangered under the ESA triggers prohibitions under
25 Section 9 of the Act, 16 U.S.C. § 1538, including the prohibition on the “take” of species, which
26 is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to
27 attempt to engage in any such conduct.” 16 U.S.C. § 1532(19); *see also* 50 C.F.R. § 17.3 (harass
28

1 “means an intentional or negligent act or omission which creates the likelihood of injury to
2 wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns
3 which include, but are not limited to, breeding, feeding, or sheltering[.]”).

4 36. Section 9 of the ESA also prohibits the “incidental take” of endangered species,
5 *i.e.*, a take that is not a direct goal of the proposed action. FWS or NMFS may issue an
6 “Incidental Take Statement” if, during Section 7 consultation, the agency concludes that the
7 incidental take will not jeopardize the species. The Incidental Take Statement outlines the
8 impacts of the incidental taking on the species, necessary mitigation measures, and any other
9 terms and conditions with which the action agency must comply (including reporting
10 requirements). 16 U.S.C. § 1536(b)(4)(C).

11 37. Section 10 of the ESA extends the regulation of incidental take to cover the
12 actions of private entities. FWS or NMFS may permit “any taking otherwise prohibited by
13 [Section 9(a)(1)(B)] if such taking is incidental to, and not the purpose of, the carrying out of an
14 otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B). If FWS or NMFS finds that the “taking
15 will not appreciably reduce the likelihood of the survival and recovery of the species[.]” the
16 agency may issue an Incidental Take Permit. 16 U.S.C. § 1539(a)(2)(B)(iv).

17 **II. THE CONSERVATION, PROTECTION, AND RECOVERY OF BOTH WILD AND**
18 **CAPTIVE ENDANGERED AND THREATENED SPECIES WERE FURTHERED BY**
19 **THE SERVICES’ BLANKET 4(D) RULE.**

20 38. Pursuant to the Congressional command that implementing agencies promulgate
21 regulations they deem “necessary and advisable to provide for the conservation of [threatened]
22 species,” 16 U.S.C. § 1533(d), FWS utilized the Blanket 4(d) Rule to prohibit the taking of
23 species listed as threatened under the ESA for the last 40 years. Until it was recently rescinded,
24 the protections of the Blanket 4(d) Rule remained in effect unless and until FWS finalized a
25 species-specific rule. *See* 50 C.F.R. § 17.31(a) (2018).

26 39. The Blanket 4(d) Rule has enabled the Services to focus their resources on listing
27 species without taking additional time and resources to develop simultaneous species-specific
28 regulations, which would further delay listing decisions.

1 40. The ESA’s protections can only go into effect once a species is listed. Delay in a
2 listing determination can cause irreparable harm to a species’ chances for survival and reduce the
3 species’ population and density. According to a 2016 study of the amount of time listed species
4 spent undergoing review between 1973 and 2014, the Services wait a median of 12.1 years to
5 provide proposed species with ESA protection. Puckett, E. E., Kesler, D. C., and Greenwald, D.
6 N., *Taxa, petitioning agency, and lawsuits affect time spent awaiting listing under the US*
7 *Endangered Species Act*, BIOL. CONSERV. 201, 220-229, 225 (2016).

8 41. The Services currently have a backlog of imperiled species that are awaiting a
9 listing decision. FWS’s Environmental Conservation Online System (“ECOS”) shows that there
10 are currently 61 ESA listing petitions pending with FWS that are either awaiting findings or have
11 been found to be “warranted” and “not precluded.” *See* 16 U.S.C. § 1533(b)(3). The oldest of
12 these pending petitions was filed in 2008. *Endangered Species Act Petitions Received by Fish*
13 *and Wildlife Service*, U.S. Fish & Wildlife Service Environmental Conservation Online System,
14 available at <https://bit.ly/2kjTCI2> (last visited Sept. 23, 2019). Despite this, only 19 species are
15 currently proposed for listing. *Species Proposed for Listing*, U.S. Fish & Wildlife Service
16 Environmental Conservation Online System, available at <https://bit.ly/2kQc7Ej> (last visited
17 Sept. 23, 2019). Since the start of 2017, FWS has only listed a total of 17 species as threatened
18 or endangered; specifically, 11 in 2017, five in 2018, and one so far in 2019. *U.S. Federal*
19 *Endangered and Threatened Species by Calendar Year*, U.S. Fish & Wildlife Service
20 Environmental Conservation Online System, available at <https://bit.ly/2ko9rgW> (last visited
21 Sept. 23, 2019).

22 42. NMFS similarly has 13 candidate species that it is currently reviewing to
23 determine whether listing is warranted under the ESA. The oldest of these candidate species is
24 the cusk, whose potential listing has been under review since 2007. *Candidate Species Under*
25 *the Endangered Species Act*, National Oceanic and Atmospheric Administration, available at
26 <https://bit.ly/2krhs4T> (last visited Sept. 23, 2019).

1 43. The delay in listing decisions and the existing backlog are a threat to imperiled
2 species awaiting the protections of being listed as endangered or threatened. The time it takes
3 for making a listing determination already falls outside the two-year timeframe Congress
4 mandated when it revised the ESA in 1982. 16 U.S.C. §§ 1533(b)(3), (6). In fact, the Services
5 have failed to act in the absence of litigation to compel decisions on listing petitions. *See, e.g.*,
6 United States Government Accountability Office, Environmental Litigation: Information on
7 Endangered Species Act Deadline Suits, Feb. 2017, available at
8 <https://www.gao.gov/assets/690/683058.pdf>.

9 44. Any agency action that increases the analysis to be made at the time of the listing
10 determination will further dilute the already limited and insufficient resources the Services have
11 available to make listing decisions, and will further thwart Congress’s conservational intent
12 when enacting the ESA.

13 45. This is especially so given the Services’ existing delay and/or failure in issuing
14 species-specific regulations. FWS has issued special rules for only half (116) of the 238 of the
15 animal species it has listed as threatened, NMFS has issued only 43 rules for 71 animal species,
16 and over 500 species are under consideration for protection. *See* Defenders of Wildlife White
17 Paper Series, Section 4(d) Rules: The Peril and the Promise (2017), at 5-6,
18 [https://defenders.org/sites/default/files/publications/section-4d-rules-the-peril-and-the-promise-](https://defenders.org/sites/default/files/publications/section-4d-rules-the-peril-and-the-promise-white-paper.pdf)
19 [white-paper.pdf](https://defenders.org/sites/default/files/publications/section-4d-rules-the-peril-and-the-promise-white-paper.pdf).

20 III. IN FURTHERANCE OF ITS CONSERVATION MANDATE, FWS PROMULGATED
21 THE BLANKET 4(d) RULE OVER 40 YEARS AGO TO PROTECT THREATENED
22 SPECIES FROM BECOMING ENDANGERED SPECIES.

23 46. Pursuant to Section 4(d) of the ESA, Congress required FWS “to provide for the
24 *conservation*” of threatened species through the issuance of regulations. 16 U.S.C. § 1533(d)
25 (emphasis added); *see also* 16 U.S.C. § 1531(c)(1) (“It is further declared to be the policy of
26 Congress that all Federal departments and agencies shall seek to conserve endangered and
27 threatened species and shall utilize their authorities in furtherance of the purposes of this
28 chapter.”).

1 47. In 1975, two years after the ESA was enacted, FWS exercised its authority under
2 Section 4(d) to issue a regulation extending the “take” prohibitions in Section 9 of the ESA
3 applicable to endangered species, 16 U.S.C. § 1538(a)(1), to all threatened species. 50 C.F.R.
4 § 17.31(a) (2018); Reclassification of the American Alligator and Other Amendments, 40 Fed.
5 Reg. 44411, 44425 (Sept. 26, 1975) (“Except as provided in Subpart A of this Part, or in a permit
6 issued under this Subpart, all of the provisions in § 17.21 shall apply to threatened wildlife.”);
7 *see* 50 C.F.R. § 17.21 (setting forth prohibited activities in respect of “endangered wildlife”).

8 48. This regulation, the Blanket 4(d) Rule, provided significant protections to
9 threatened species, furthering FWS’s conservation efforts, as it provided threatened species with
10 the same “take” protections applicable to endangered species, unless and until FWS modified
11 those protections through a species-specific rule. *See, e.g.*, Protection for Threatened Species of
12 Wildlife, 42 Fed. Reg. 46539 (Sept. 16, 1977) (stating that, under the Blanket 4(d) Rule, FWS
13 “determined that as a general rule, all of the prohibitions applying to endangered species would
14 apply to threatened species, unless otherwise provided for in a special rule.”). These protections
15 allowed FWS to work towards its conservation mandate by applying a well-defined set of default
16 protections to threatened species while FWS considered species-specific regulations.

17 49. FWS itself stated that the status quo created by the Blanket 4(d) Rule of complete
18 and presumptive protection, and FWS’s ability to tailor species-specific protections at a later
19 date if necessary, constituted “the cornerstone of the system for regulating threatened wildlife.”
20 40 Fed. Reg. 44414.

21 50. Indeed, FWS and the Secretary of the Interior *defended* the Blanket 4(d) Rule in a
22 lawsuit challenging the rule as contrary to the language in Section 4(d), *ultra vires*, and violative
23 of the ESA—and won. In 1993, the Court of Appeals for the D.C. Circuit held that the rule
24 constituted a “reasonable interpretation of [Section 4(d) of the ESA].” *Sweet Home Chapter of*
25 *Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 6 (D.C. Cir. 1993), *altered on other*
26 *grounds in reh’g*, 17 F.3d 1463 (D.C. Cir. 1994); *id.* at 7 (“[Section 4(d)] arguably grants the
27
28

1 FWS the discretion to extend maximum protection to all threatened species at once if, guided by
2 its expertise in the field of wildlife protection, it finds it expeditious to do so.”).

3 51. Since promulgating the Blanket 4(d) Rule in 1975, FWS has listed over
4 300 species as “threatened,” providing each of them with the same “take” protections applicable
5 to endangered species as a default. FWS has modified these protections with species-specific
6 rules for fewer than a quarter of these animals. Historically, FWS has “finalized an average of
7 2 species-specific 4(d) rules per year,” despite adding approximately four species to the
8 threatened list per year. Final Rule, Revision of the Regulations for Prohibitions to Threatened
9 Wildlife and Plants, *available at* <https://bit.ly/2lY29kh>, at 10 (Aug. 12, 2019).

10 IV. THE BLANKET 4(d) RULE PROVIDED CRITICAL PROTECTIONS TO
11 THREATENED CAPTIVE ANIMALS.

12 52. The prohibitions of the ESA apply to endangered or threatened animals bred and
13 kept in captivity as well as those found in the wild. *See, e.g.*, Listing Endangered or Threatened
14 Species, 79 Fed. Reg. 4313, 4317 (Jan. 24, 2017) (“On its face the ESA does not treat captives
15 differently Section 9(a)(1)(A)-(G) of the ESA applies to endangered species regardless of
16 their captive status.”); Listing Endangered or Threatened Species, 80 Fed. Reg. 7380, 7385
17 (Feb. 10, 2015) (“[T]he ESA does not allow for captive held animals to be assigned separate
18 legal status from their wild counterparts on the basis of their captive status”); Final
19 Interpretation, 79 Fed. Reg. 37578, 37597 (July 1, 2014) (“Captive members have the same legal
20 status as the species as a whole.”); *see also* 50 C.F.R. § 17.3 (defining prohibited act of
21 “harass[ment]” under ESA in context of captive animals).

22 53. Accordingly, the Blanket 4(d) Rule served to protect threatened captive animals
23 by providing them with the same protections against “take” under Section 9 of the ESA as
24 endangered animals.

25 54. Captive animals are subjected to abuse across the country in numerous settings,
26 including at roadside and other types of zoos, fur farms, and “canned hunting” ranches. For
27 example, in *Kuehl v. Sellner*, 161 F. Supp. 3d 678 (N.D. Iowa 2016), *aff’d*, 887 F.3d 845
28

1 (8th Cir. 2018), the court held that zoo owners violated the “take” prohibitions of the ESA due to
2 their mistreatment of threatened and endangered tigers and lemurs through, *inter alia*, inadequate
3 veterinary care, inadequate sanitation, social isolation, and lack of environmental enrichment.
4 *Id.* at 718. Pursuant to the ESA, the court ordered the zoo owners to transfer the animals to a
5 USDA-licensed facility capable of meeting the animals’ needs. *Id.*; *see also, e.g., Graham*
6 *v. San Antonio Zoological Soc’y*, 261 F. Supp. 3d 711, 751-52 (W.D. Tex. 2017) (holding there
7 was genuine issue of material fact as to whether ground surface in endangered elephant’s zoo
8 enclosure caused the elephant foot injuries).

9 55. The Blanket 4(d) Rule protections were critical in ensuring the protection of
10 threatened captive animals and in giving government agencies, as well as organizations such as
11 ALDF, means to protect such animals from mistreatment—or worse—through enforcement
12 actions. *See, e.g., Animal Legal Defense Fund v. Olympic Game Farm, Inc.*, No. 3:18-cv-06025,
13 Dkt. 1 (W.D. Wash. Dec. 18, 2018) (alleging inhumane treatment and confinement of
14 endangered gray wolves, lions, and tigers, and threatened brown bears and Canada lynx at
15 roadside zoo, and seeking injunctive relief under the ESA); *Animal Legal Defense Fund*
16 *v. Lucas*, No. 2:19-cv-40, Dkt. 37 (W.D. Penn. Mar. 20, 2019) (alleging inhumane and
17 unsanitary conditions for endangered ring-tailed lemur, black leopard, and gray wolf, and
18 threatened hyacinth macaw at so-called “wildlife zoo” and “petting zoo,” and seeking injunctive
19 relief under the ESA).

20 V. THE ELIMINATION OF THE BLANKET 4(d) RULE ABANDONS 40 YEARS OF
21 PROTECTIONS FOR THREATENED ANIMALS.

22 56. On January 30, 2017, President Donald J. Trump signed Executive Order 13771,
23 which states “that for every one new regulation issued, at least two prior regulations be identified
24 for elimination.” Executive Order 13711 § 1 (Jan. 30, 2017); *see also id.* § 2(a) (“Unless
25 prohibited by law, whenever an executive department or agency (agency) publicly proposes for
26 notice and comment or otherwise promulgates a new regulation, it shall identify at least two
27 existing regulations to be repealed.”). The stated purpose of this Executive Order was to
28

1 eliminate allegedly “unnecessary regulatory burdens.” Enforcing the Regulatory Reform
2 Agenda, 82 Fed. Reg. 12285 (Mar. 1, 2017).

3 57. On July 25, 2018, FWS proposed the three rules at issue here to carry out the
4 Executive Order. *See* Revision of the Regulations for Prohibitions to Threatened Wildlife and
5 Plants, 83 Fed. Reg. 35174, 35175 (July 25, 2018). In the proposed rule eliminating the
6 Blanket 4(d) Rule, FWS proposed to amend 50 C.F.R. § 17.31 to limit its application “only to
7 species listed as threatened species on or before the effective date of this rule.” *Id.* Stated
8 differently, FWS proposed to eliminate the presumptive protections against “take” for all newly
9 listed threatened species and those downgraded from endangered to threatened species. Under
10 the proposed rule, such animals “would have protective regulations *only if* the Service
11 promulgates a species-specific rule” at some time in the future. *Id.* (emphasis added). Thus, the
12 proposal flipped the regulatory framework on its head, exposing threatened animals—wild and
13 captive alike—to conduct that would be prohibited as to endangered animals unless and until
14 FWS both chose to and got around to creating a species-specific regulation.

15 58. In proposing to eliminate the Blanket 4(d) Rule prospectively, FWS
16 acknowledged that the prior rule constituted a “reasonable approach” to fulfilling its regulatory
17 duties, citing the D.C. Circuit’s opinion in *Sweet Home, supra*. 83 Fed. Reg. 35175.
18 Nevertheless, FWS proposed to reverse its prior position.

19 59. Embedded within the revised regulations, FWS solicited public comment on a
20 barely defined and unfocused swath of over two dozen regulations, not including subparts. *See*
21 83 Fed. Reg. 35194 (seeking comment on “any provisions in part 424 of the regulations”);
22 83 Fed. Reg. 35179 (seeking comment on “any provisions in part 402 of the regulations”). The
23 Services also indicated that the final rules “may include” additional, undefined revisions to “any
24 provisions in part 424 [and 402]”; though FWS failed to provide notice of such revisions as
25 required by the APA, it nonetheless assured the public that any such revisions would meet the
26 APA’s legal standard of being “a logical outgrowth of [these] proposed rule[s].” 83 Fed Reg. at
27 35179, 35194. These violations of APA notice-and-comment procedure under 5 U.S.C. § 553 by
28

1 FWS deprived ALDF, its members and supporters, and the public of a meaningful opportunity to
2 comment on several aspects of the final rules that were not included in, and were not logical
3 outgrowths of, the proposed rules. For example: (i) the “Listing Species and Designating
4 Critical Habitat” rule’s requirement that the Secretary determine there is a “reasonable certainty”
5 that an unoccupied area will contribute to the conservation of the species and that the area
6 currently contains one or more of those physical or biological features essential to the
7 conservation of the species in order to be designated as “critical habitat”; (ii) the Interagency
8 Cooperation Rule’s new definition of “activities that are reasonably certain to occur,” which
9 requires that such a conclusion be based on “clear and substantial information”; and (iii) the
10 Interagency Cooperation Rule’s expansion of the “environmental baseline” to include “[t]he
11 consequences to listed species or designated critical habitat from ongoing agency activities or
12 existing agency failures that are not within the agency’s discretion to modify.” Moreover,
13 despite ALDF’s submission of separate comments detailing the effects the rules would have on
14 threatened and endangered species in captivity – a cornerstone issue for ALDF – FWS did not
15 even mention this issue in the final rule or its preamble. Walden Decl. ¶ 12.

16 60. The Services further stated they likely would not undertake any environmental
17 assessment or draft any environmental impact statement under NEPA in connection with the
18 elimination of the Blanket 4(d) Rule, due to their conclusion that the proposed elimination
19 “would not ... have a significant effect on the human environment” and would be “categorically
20 excluded” from such requirements due to being merely “of an administrative, financial, legal,
21 technical or procedural nature.” 83 Fed. Reg. 35177.

22 61. The Services accepted comments on each of their proposed revisions to ESA
23 regulations, including elimination of the Blanket 4(d) Rule, through September 24, 2018. The
24 proposed revisions sparked tremendous concern and controversy: over 800,000 comments were
25 submitted to the Services opposing the revisions.

26 VI. FWS REPEALED THE BLANKET 4(d) RULE ON AUGUST 12, 2019.

27 62. On August 12, 2019, FWS issued a final rule amending 50 C.F.R. §§ 17.31 and
28

1 17.71, eliminating the Blanket 4(d) Rule as an “Executive Order 13771 deregulatory action.”
2 *See* Final Rule, Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants,
3 at 20, *available at* <https://bit.ly/21Y29kh>; *see also* <http://www.regulations.gov> (Docket ID. FWS-
4 HQ-ES-2018-0007). As a result, for the first time in over 40 years, FWS has exposed all captive
5 and wild animals (and plants) that may, now or in the future, be listed or reclassified as
6 “threatened” species to harm in the form of “take” prohibited by Section 9 of the ESA, creating a
7 new status quo utterly contrary to the ESA’s conservation mandate.

8 63. The final rule states: “We, the [FWS], revise our regulations related to threatened
9 species to remove the prior default extension of most of the prohibitions for activities involving
10 endangered species to threatened species.” *Id.* at 1. It continues: “Species listed or reclassified
11 as threatened species after the effective date of this rule would have protective regulations *only if*
12 the Service promulgates a species-specific rule.” *Id.* at 3 (emphasis added); *id.* at 8-9.

13 64. The final rule, however, is not accompanied by any requirement that FWS
14 promulgate any such species-specific rule, let alone any semblance of a timetable for doing so.
15 Rather, in the final rule, FWS maintains it has “discretion to revise or promulgate species-
16 specific rules *at any time* after the final listing or reclassification determination.” *Id.* at 3
17 (emphasis added). FWS also expressly refuses in the final rule to impose any timetable on itself
18 for finalizing any species-specific rule. *Id.* at 18 (“We considered including a regulatory
19 timeframe to reflect our intention to promulgate 4(d) rules at the time of listing, but ultimately
20 determined that creating a binding requirement was not needed.”). Thus, whereas for the last
21 40 years, a threatened species would enjoy the protections against “take” under Section 9 of the
22 ESA unless and until FWS finalized a species-specific rule, all newly listed species will now
23 enjoy no such protections unless and until FWS finalizes a species-specific rule. Critically, even
24 if the FWS finalizes a species-specific rule, it is under no obligation to extend *any* particular
25 protection to a threatened species in that rule, let alone the full range of protections the species
26 would have enjoyed under the Blanket 4(d) Rule. Furthermore, even if a species-specific rule
27 extends some protections to the threatened species, such protections would be of an uncertain
28

1 duration, given that the new rule gives the FWS discretion to revise such rules at any time. *Id.* at
2 3. The elimination of the Blanket 4(d) Rule therefore accelerates a threatened species' descent
3 into endangered status, and leaves the most vulnerable of captive and wild animals at further
4 risk, instead of promoting their conservation. The new rule therefore threatens irreparable injury
5 to ALDF and its members and supporters given their recreational, conservation, and aesthetic
6 interest in these animals.

7 65. FWS suggests it may draft and finalize species-specific 4(d) rules concurrently
8 with determining whether to list or reclassify an animal as “threatened,” introducing further lag
9 into an already backlogged system that would delay the time at which an animal could be
10 classified as “threatened” in the first place. *Id.* at 3. FWS, however, qualifies its purported
11 intention to follow through on this idea by stating, “we do not read the Act to require that we
12 promulgate a 4(d) rule whenever we listed a species as a threatened species,” ultimately
13 rendering any redeeming qualities of the proposal hollow. *Id.* at 16.

14 66. In the final rule, FWS also confirms that, despite several requests, it did not hold
15 any public hearings or extend the public comment period. *Id.* at 7.

16 67. FWS also confirms that it did not undertake any environmental assessment or
17 environmental impact statement in connection with the rule change due to its conclusion that the
18 change was “fundamentally administrative, technical, or procedural in nature.” *Id.* at 27
19 (invoking two categorical exclusions under 43 C.F.R. § 46.210(i)).

20 68. In justifying the elimination of the Blanket 4(d) Rule, FWS mentions reducing
21 permitting requirements nearly a dozen times in its first 15 pages. *See, e.g., id.* at 5 (“removing
22 redundant permitting requirements”), 11 (“reducing the need for section 10 permits”),
23 13 (“reduce unneeded permitting”), 14 (“do not require an incidental take permit”); 15 (“would
24 not require a Federal permit”). FWS’s congressional mandate under Section 4 of the ESA, of
25 course, is to conserve threatened and endangered species—not to cater to its leadership’s
26
27
28

1 constituents that stand to profit from adversely impacting animals and the environment without
2 government permits.³

3 69. FWS also provides pretextual justifications for eliminating the Blanket 4(d) Rule.
4 First, it states that eliminating the Blanket 4(d) Rule better aligns it with NMFS, which has never
5 had a comparable rule. *Id.* at 4. However, nowhere does FWS explain why NMFS is a model
6 agency in this regard and should be emulated. Indeed, despite designating 20 species of coral as
7 threatened in 2014, NMFS has not issued a 4(d) rule to protect any of them from harm.
8 Moreover, FWS omits that NMFS manages far fewer threatened species than FWS—67 species
9 as opposed to 328 species—which materially distinguishes NMFS from FWS.

10 70. Second, FWS cites its supposed “considerable experience in developing species-
11 specific rules over the years,” and suggests that it can speed up the process of finalizing species-
12 specific rules—not by allocating additional funding or staffing to the process—but by
13 “review[ing] existing species-specific 4(d) rules that could be used as a model or applied to the
14 species in question.” *Id.* at 5, 12. This assertion is not credible. The ability to look to prior
15 species-specific 4(d) rules is not a novel invention. Nor is it an option that has been unavailable
16 to prior FWS administrations, which have managed to finalize *only two* species-specific rules
17 per year on average, despite adding approximately four species to the threatened list per year.
18 *See id.* at 10; *see also id.* at 13 (“The Service has finalized 22 species-specific 4(d) rules in the
19 last decade (2009-2018) ... [and] 13 species-specific rules in the 12 years prior (1997-2008).”).
20 Furthermore, the notion that existing species-specific 4(d) rules will serve as useful precedent
21 going forward assumes without any factual basis that newly listed or reclassified threatened
22 species will be sufficiently similar to the few threatened species that already have species-

23
24 ³ *See, e.g.,* Lisa Friedman, *U.S. Significantly Weakens Endangered Species Act*, THE NEW YORK
25 TIMES, available at [https://www.nytimes.com/2019/08/12/climate/endangered-species-act-
26 changes.html](https://www.nytimes.com/2019/08/12/climate/endangered-species-act-changes.html) (Aug. 12, 2019) (“Republicans have long sought to narrow the scope of the [ESA],
27 saying that it burdens landowners, hampers industry and hinders economic growth. [Defendant
28 Interior Secretary David] Bernhardt, *a former oil and gas lobbyist*, wrote in an op-ed last
summer that the act places an ‘unnecessary regulatory burden’ on companies. ... The Trump
administration’s revisions to the [ESA] regulations that guide the implementation of the [ESA],
... mean opponents of the [ESA] are ... poised to claim their biggest victory in decades.”
(emphasis added)).

1 specific 4(d) rules. More fundamentally, however, a naked assertion that FWS can probably
2 churn out species-specific rules more quickly than its predecessors is not a sufficient reason to
3 eliminate a 40-year-old rule that plainly furthered FWS's conservational mandate by protecting
4 threatened species from becoming endangered species. Nor is it a reason to assert that entities
5 such as ALDF lack standing to challenge the new rule. *See Central Delta Water Agency v. U.S.*,
6 306 F.3d 938, 950 (9th Cir. 2002) ("It would be inequitable in the extreme for us to permit one
7 party to create a significantly increased risk of harm to another, and then avoid the aggrieved
8 party from trying to prevent the potential harm because the party that created the risk promises
9 that it will ensure that the harm is avoided, yet offers no specific or concrete plan of action for
10 doing so").

11 71. Indeed, FWS's action is even less justifiable given its context; FWS must provide
12 more than a logical explanation when reversing a prior position. Because the consistency of an
13 agency's interpretation of a statute is relevant to the determination of whether its interpretation is
14 permissible, FWS's position here is entitled to considerably less deference. *Natural Resources*
15 *Defense Council v. Env'tl. Protection Agency*, 526 F.3d 591, 602 (9th Cir. 2008). For its
16 regulations to stand, FWS must show not only that new rule itself is reasonable, but also that
17 there is a reasonable rationale to support its departure from prior practice—something it has
18 failed to do. *Seldovia Native Assoc., Inc. v. Lujan*, 904 F.2d 1335, 1345 (9th Cir. 1990).

19 72. More than just reversing long-established agency practice, the regulatory
20 revisions promulgated by the Services directly contradict the conservation goals of the ESA by
21 further jeopardizing imperiled species. Under the new rule, FWS will either (1) continue acting
22 on listing petitions at its current rate without issuing species-specific regulations, leaving listed
23 species just as unprotected as if they had not been listed; or (2) delay its listing decisions until it
24 has also created species-specific rules to promulgate simultaneously with the listing, where such
25 species-specific rules may provide no protections at all or fewer protections than under the prior
26 Blanket 4(d) Rule. Under either scenario, imperiled species are at an increased risk of take, and
27 in some cases, extinction. This contradicts the conservation principles mandated by the ESA and
28

1 directly injures the recreational, conservation, and aesthetic interests of ALDF and its members
2 and supporters.

3 VII. THE RULES GOVERNING LISTING AND CRITICAL HABITAT AND
4 INTERAGENCY COOPERATION SIMILARLY REVERSE THE SERVICES'
LONG-STANDING PRACTICE WITH REGARD TO CLIMATE CHANGE.

5 73. The “Listing Species and Designating Critical Habitat” rule suffers the same
6 critical conflicts with the language and purpose of the ESA. The ESA requires that listing
7 decisions be made “*solely* on the basis of the best scientific and commercial data available.”
8 16 U.S.C. § 1533(b)(1)(A). And under the Services’ original regulations, decisions about
9 whether a species should be listed as endangered or threatened were made “solely on the basis of
10 the best available scientific and commercial information regarding a species’ status, without
11 reference to possible economic or other impacts of such determination.” 50 C.F.R. § 424.11(b).
12 Put differently, listing determinations were driven by scientific analysis. The revised rule
13 removes the phrase “without reference to possible economic or other impacts of such
14 determination.” Now the government can consider whether the decision to list a species as
15 endangered will hurt a company’s bottom line—which is not permitted by, and directly
16 contravenes, the plain language, structure, and purpose of the ESA.

17 74. Similarly, the Services’ original regulations provided that “recovery” of the
18 species should be considered in determining whether a species should continue to be listed. Yet
19 recovery is *not* a criteria for consideration in the new regulations, meaning a species could be
20 delisted even if it is not recovering. This risk is of grave concern to ALDF and its members.
21 Patten Decl. ¶ 12; Fetters Decl. ¶ 10; Garner Decl. ¶ 11. The new rule also eliminates the
22 requirement that the scientific and commercial data “substantiate” a species’ delisting. This puts
23 species at risk of premature delisting.

24 75. Further, it is now more difficult to designate an area as “critical habitat,” which is
25 crucial to protect a threatened or endangered species. The revised rules state the government
26 may decline to designate a habitat as critical if the threats to the habitat are ones that the agency
27 cannot address, like the climate crisis. As was made clear to the Services during the comment
28

1 period, this wholly ignores that the climate crisis is the biggest long-term threat facing animals—
2 and that habitat loss, fueled by human development and the climate crisis, is the primary cause
3 of species extinction. *See, e.g.*, Patten Decl. ¶ 11; Fetters Decl. ¶ 9; Garner Decl. ¶ 10; Delmoro
4 Decl. ¶ 13.

5 76. The new rule also limits the designation of habitats that have features a species
6 needs to thrive if the species does not *currently* live there. However, as was pointed out to the
7 Services during the comment period, many animals will need to expand or shift their ranges in
8 order to survive as their original habitats are destroyed or fundamentally altered by the climate
9 crisis. *Id.* For example, the plight of the Key deer, a subspecies of the North American white-
10 tailed deer, underscores the importance of protecting habitats threatened by climate change
11 beyond where a species currently lives. Key deer (currently classified as endangered, though the
12 government recently stated it intends to delist the species) live on only a few dozen islands in the
13 Florida Keys. They face numerous threats, including disease and human encroachment. But
14 rising sea levels and hurricanes—which are becoming increasingly destructive due to the climate
15 crisis—are two of their biggest threats. As sea levels continue to rise, their habitat will shrink.
16 Their extinction is almost certain unless both their remaining habitat and new habitats that they
17 don’t currently occupy are protected.

18 77. The rule further severely restricts the Services’ ability to consider the effects of
19 climate change by limiting the meaning of “foreseeable future.” H.R. Rep. No. 96-697, at 12
20 (1979) (Conf. Rep.), reprinted in 1979 U.S.C.C.A.N. 2572, 2576. When deciding whether a
21 species is threatened, the government considers whether the animal is likely to become
22 endangered within the “foreseeable future.” The new rule limits “foreseeable future” to “only so
23 far into the future as the Services can reasonably determine that both the future threats and the
24 species’ responses to those threats are likely.” H.R. Rep. No. 96-697, at 12 (1979) (Conf. Rep.),
25 reprinted in 1979 U.S.C.C.A.N. 2572, 2576. This allows the Services to ignore the longer-term
26 impacts of the climate crisis when making decisions, especially when predicting events that may
27 not occur until years or decades into the future.

1 78. For example, the pika (a small furry animal related to rabbits) lives in cool and
2 moist mountainous areas. Pikas need snowpack in the winter and mild summers to survive.
3 Frustratingly, the FWS has declined to list the pika twice in the last ten years despite scientists'
4 warnings that pikas will likely be extinct within the next 100 years due to warming temperatures.
5 The new rule makes it even harder to list species like the pika moving forward.

6 79. The new "Interagency Cooperation Rule" fares no better. Section 7(a)(2) of the
7 ESA requires every federal agency to consult with the Services to "insure" that the agency's
8 actions are not likely "to jeopardize the continued existence" of any listed species or "result in
9 the destruction or adverse modification" of critical habitat. The Services' original rules
10 implementing this requirement were congruent with the language of the statute. They broadly
11 defined agency action to include "all activities or programs of any kind authorized, funded or
12 carried out ... by federal agencies," including the granting of permits and "actions directly *or*
13 *indirectly* causing modifications to the land, water or air."

14 80. The new rule again undoes this regulatory scheme in several respects. For
15 example, it (1) limits the circumstances under which an agency is deemed to destroy or
16 adversely modify critical habitat by requiring such action to affect the habitat "as a whole" and
17 ignoring harm from "global processes," *i.e.*, climate change; (2) limits the nature and scope of
18 the analysis of the effects of agency action by revising the definitions of "effects of the action"
19 and "environmental baseline" and narrowing causation standards; (3) limits the instances in
20 which changed circumstances affecting listed species or critical habitat require re-initiation of
21 consultation; (4) limits agencies' duties to insure mitigation of the adverse effects of their
22 proposals and delegating to agencies the ability to make certain biological determinations;
23 (5) allows broad-based "programmatic" and "expedited" consultations lacking site-specific, in-
24 depth analysis of proposed agency action; and (6) imposes hasty deadlines on informal
25 consultations.

26 81. During the comment period on these proposed rules, ALDF and its coalition
27 partners alerted the Services to the above issues with the Services' proposal to enact these
28

1 changes. Despite this, and without meaningfully addressing public comments, the Services
2 codified these changes in final rules on August 27, 2019.

3 VIII. THE SERVICES FAILED TO COMPLY WITH NEPA CONSULTATION
4 REQUIREMENTS.

5 82. NEPA requires federal agencies to analyze the environmental impacts of a
6 particular action before the proposed action may proceed. 42 U.S.C. § 4332(2)(C). Federal
7 agencies must notify the public of proposed actions and allow the public to comment on the fully
8 disclosed environmental impacts of the proposed project. Thus, NEPA is action-forcing in that it
9 requires “agencies to consider all environmental consequences of choosing one course of action
10 over another *before making a final decision.*” *Nat’l Park and Conservation Ass’n v. Stanton*,
11 54 F. Supp. 2d 7, 24 (D.D.C. 1999) (emphasis added); *Marsh v. Oregon Natural Resources*
12 *Council*, 490 U.S. 360, 371 (1989) (“NEPA ensures that the agency will not act on incomplete
13 information, only to regret its decision after it is too late to correct”). This ensures that the
14 public is made aware of all environmental effects of an agency’s actions and thus allows the
15 public to participate in the process of preparing environmental reviews. 42 U.S.C. §§ 4321-
16 4332; 40 C.F.R. §§ 1502.1, 1503.1.

17 83. An Environmental Impact Statement (“EIS”) is required under NEPA for all
18 “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C.
19 § 4332(2)(C). “The primary purpose of an environmental impact statement is to serve as an
20 action-forcing device to ensure that the policies and goals defined in [NEPA] are infused into the
21 ongoing programs and actions of the Federal Government.” 40 C.F.R. § 1502.1. An EIS must
22 “provide full and fair discussion of significant environmental impacts and [must] inform
23 decisionmakers and the public of the reasonable alternatives which would avoid or minimize
24 adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

25 84. The trigger for NEPA compliance and use of the NEPA process to “prevent or
26 eliminate damage” to the environment is a “federal action.” 42 U.S.C. § 4332(2)(C). “Major
27 Federal Actions” include, among other things, “adoption of formal plans, such as official
28

1 documents prepared or approved by federal agencies which guide or prescribe alternative uses of
2 federal resources, upon which future agency actions will be based,” 40 C.F.R. § 1508.18(b)(2);
3 and “actions with effects that may be major and which are potentially subject to Federal control
4 and responsibility” and “include new and continuing activities, including projects and programs
5 entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies,”
6 40 C.F.R. § 1508.18. The “human environment” to be analyzed “shall be interpreted
7 comprehensively to include the natural and physical environment and the relationship of people
8 with that environment.... When an environmental impact statement is prepared and economic or
9 social and natural or physical environmental effects are interrelated, then the environmental
10 impact statement will discuss all of these effects on the human environment.” 40 C.F.R.
11 § 1508.14.

12 85. Accordingly, an EIS must analyze: “(i) the environmental impact of the proposed
13 action, (ii) any adverse environmental effects which cannot be avoided should the proposal be
14 implemented, (iii) alternatives to the proposed action (including no action), (iv) the relationship
15 between local short-term uses of man’s environment and the maintenance and enhancement of
16 long-term productivity, and (v) any irreversible and irretrievable commitments of resources
17 which would be involved in the proposed action should it be implemented.” 42 U.S.C.
18 § 4332(2)(C).

19 86. When an EIS is not prepared, or the agency is uncertain whether or not the
20 significance threshold has been met, an Environmental Assessment (“EA”) is the NEPA process
21 that must be used. 40 C.F.R. § 1508.27. This inquiry must include an analysis “in several
22 contexts, such as a whole (human, national), the affected region, the affected interests and the
23 locality.” 40 C.F.R. § 1508.27(a). In addition, the agency must analyze the severity of the
24 action, such as whether impacts “may be both beneficial and adverse,” “the degree to which the
25 proposed action affects public health or safety,” “unique characteristics of the geographic area,”
26 and “the degree to which the possible effects on the human environment are highly uncertain or
27 involve unique or unknown risks.” 40 C.F.R. §§ 1508.27(b)(1)-(5).

1 87. Here, the Services wholly failed to provide either an EIS or an EA in connection
 2 with their revised regulations. Rather, the Services invoked two categorical exclusions under
 3 43 C.F.R. § 46.210(i). In essence, the Services argued that because the revisions were legal,
 4 technical, or procedural in nature, and because the revised regulations' potential impacts were
 5 too broad and speculative for a meaningful analysis, the revised regulations were exempt from
 6 NEPA consultation requirements. These revisions, however, are anything but "legal, technical,
 7 or procedural in nature." As addressed above, the revocation and/or reversal of key protections
 8 and practices for listed species leaves these species in great peril and without any meaningful
 9 protections. The revised regulations will have a direct and immediate impact on all future
 10 species designated as threatened or endangered, as well as the habitats in which they do or will
 11 reside.

12 88. The Services failure to comply with NEPA consultation requirements improperly
 13 foreclosed on ALDF and its members' ability to meaningfully participate in the environmental
 14 review preparation process. Walden Decl. ¶ 12.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of the Administrative Procedure Act: Issuance of Regulations that are Arbitrary, Capricious, and Not in Accordance With Law

19 89. Plaintiff repeats and realleges each and every allegation contained above as if fully
 20 set forth herein.

21 90. Pursuant to 5 U.S.C. § 706(2)(A), a reviewing court shall hold unlawful and set
 22 aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of
 23 discretion, or not in accordance with law. This includes actions that are "contrary to governing
 24 law." *Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 682 (9th Cir. 2007)

25 91. Each of the three rules is contrary to the explicit requirements and conservation
 26 mandates of the ESA, *see, e.g.*, 16 U.S.C. §§ 1531(b) & (c), 1533(b)(1)(A), 1536(a)(1), which
 27
 28

1 governs the Services' regulatory actions. Each of the rules further imperils—rather than protects
2 and conserves—vulnerable species.

3 92. Each of the three rules comprising the Services' regulatory revisions also
4 constitute arbitrary and capricious agency action insofar as the Services: (1) relied on factors
5 which Congress has not intended them to consider, including economic interests that are not
6 within the Services' purview under the ESA; (2) entirely failed to consider important aspects of
7 the problem, including the substantial concerns raised in the numerous comments to the Services
8 on its proposal; and (3) offered an explanation for its decision that runs counter to the evidence
9 before the agency, and indeed finds no reasonable or rational connection to the facts presented in
10 the rulemaking record. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins.*
11 *Co.*, 463 U.S. 29, 43 (1983).

12 93. The Regulations for Prohibitions to Threatened Wildlife and Plants indefinitely
13 deprive proposed or newly-designated threatened species from the ESA's protections against
14 take that were otherwise automatically afforded to these species for the last 40 years.

15 94. The Regulations for Listing Species and Designating Critical Habitat unlawfully
16 and arbitrarily: (1) delete the restriction on referencing economic impacts in making listing
17 determinations; (2) limit the circumstances under which species can be listed as threatened based
18 on the likelihood that they will become endangered in the “foreseeable future” by codifying an
19 unreasonably narrow definition of “foreseeable future”; (3) eliminate the requirement for data
20 that “substantiate[s]” delisting determinations and eliminate species “recovery” as a
21 consideration in delisting determinations; (4) expand the Services' ability to decline to designate
22 habitat as “critical habitat” by expanding the “not prudent” exemption, automatically exempting
23 some habitats from designation, and ignoring indirect threats; and (5) limit the circumstances for
24 designating unoccupied habitat as “critical habitat.”

25 95. The Regulations for Interagency Cooperation unlawfully and arbitrarily: (1) limit
26 the circumstances under which an agency is deemed to destroy or adversely modify critical
27 habitat by requiring such action to affect the habitat “as a whole” and ignoring harm from
28

1 “global processes,” *i.e.*, climate change; (2) limit the nature and scope of the analysis of the
2 effects of agency action by revising the definitions of “effects of the action” and “environmental
3 baseline” and narrowing causation standards; (3) limit the instances in which changed
4 circumstances affecting listed species or critical habitat require re-initiation of consultation;
5 (4) limit agencies’ duties to insure mitigation of the adverse effects of their proposals and
6 delegating to agencies the ability to make certain biological determinations; (5) allow broad-
7 based “programmatic” and “expedited” consultations lacking site-specific, in-depth analysis of
8 proposed agency action; and (6) impose hasty deadlines on informal consultations.

9 96. In finalizing these actions, the Services failed to consider and justify their actions
10 in light of FWS’s history of delay or failure to issue species-specific rules; the established
11 significance of the threat that climate change poses to threatened and endangered species; the
12 efficacy of the Services’ previous regulations; and numerous other issues raised to the Services
13 during the comment period on the proposed rules. FWS further wholly failed to respond to
14 ALDF’s concerns about the effects of repealing the Blanket 4(d) Rule on captive animals.

15 97. The Services also failed to supply reasoned explanations for their actions,
16 especially insofar as they reverse long-standing agency positions.

17 98. Finally, the Services’ rulemaking process violated APA requirements by failing to
18 provide notice of further potential revisions, beyond a simple assertion that any such revisions
19 would meet the APA’s legal standard of being “a logical outgrowth of [these] proposed rule[s].”
20 Such failures deprive ALDF, its members, and the public a meaningful opportunity to comment
21 on several aspects of the final rules in violation of 5 U.S.C. § 553.

22 **SECOND CLAIM FOR RELIEF**

23 **Violation of the National Environmental Policy Act** 24 **and the Administrative Procedure Act:** 25 **Failure to Prepare an Adequate Environmental Impact Statement**

26 99. Plaintiff repeats and realleges each and every allegation contained above as if
27 fully set forth herein.

1 100. Congress enacted the NEPA to “promote efforts which will prevent or eliminate
2 damage to the environment.” 42 U.S.C. § 4331. The NEPA ensures that federal agencies
3 properly consider the environmental impacts of, and the alternatives to, their activities.
4 42 U.S.C. § 4332. Today, NEPA is the Nation’s “basic national charter for the protection of the
5 environment.” 40 C.F.R. § 1500.1(a).

6 101. NEPA and its implementing regulations, including well-settled NEPA caselaw,
7 require federal agencies to take a “hard look” at environmental impacts of proposed projects,
8 measures to mitigate these environmental impacts, the purpose and need for the proposed action,
9 alternatives to a proposal, including a “no action alternative,” and the environmental and social
10 impacts of a reasonable range of alternatives, including no action. *Marsh v. Or. Natural Res.*
11 *Council*, 490 U.S. 360, 374 (1989). NEPA further requires agencies to use high quality, accurate
12 scientific information and to ensure the scientific integrity of their analysis. 40 C.F.R.
13 §§ 1500.1(b), 1502.24. Accordingly, they must take a hard look at the direct, indirect, and
14 cumulative effects of their actions on the environment and disclose those effects for informed
15 public comment. *See* 40 C.F.R. §§ 1508.7, 1508.8, 1508.25. An adequate EIS must analyze the
16 proposed agency action in different contexts. *See* 40 C.F.R. § 1508.27. Specifically, “context”
17 means that “the significance of an action must be analyzed in several contexts such as society as
18 a whole (human, national), the affected region, the affected interests, and the locality Both
19 short- and long-term effects are relevant.” 40 C.F.R. § 1508.27(a).

20 102. An EIS must analyze the intensity, or the “severity” of the impacts of the
21 proposed agency action. 40 C.F.R. § 1508.27(b). This requires an agency to consider “[t]he
22 degree to which the effects on the quality of the human environment are likely to be highly
23 controversial.” 40 C.F.R. § 1508.27(b)(4). An agency must also discuss “[t]he degree to which
24 the possible effects on the human environment are highly uncertain or involve unique or
25 unknown risks,” 40 C.F.R. § 1508.27(b)(5), and “[w]hether the action is related to other actions
26 with individually insignificant but cumulatively significant impacts.” 40 C.F.R. § 1508.27(b)(7).
27 Analysis of the intensity of the proposed action must also discuss the extent to which the
28

1 proposed agency action “may cause loss or destruction of significant scientific, cultural or
2 historical resources,” 40 C.F.R. § 1508.27(b)(8), and “[t]he degree to which the action may
3 adversely affect an endangered or threatened species or its habitat that has been determined to be
4 critical under the Endangered Species Act of 1973.” 40 C.F.R. § 1508.27(b)(9).

5 103. NEPA also requires agencies to disclose and analyze measures to mitigate the
6 impacts of proposed actions. 40 C.F.R. §§ 1502.14(f), 1502.16(h). Mitigation must “be
7 discussed in sufficient detail to ensure that environmental consequences have been fairly
8 evaluated.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

9 104. Finally, NEPA requires that an EIS contain a thorough discussion of the
10 “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii), (E). The discussion of
11 alternatives is “the heart” of the NEPA process and is intended to provide a “clear basis for
12 choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14; *see also*
13 42 U.S.C. § 4332(2)(C)(iii), (E). The agency must “[r]igorously explore and objectively
14 evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a). As such, “[a]n agency may not
15 define the objectives of its action in terms so unreasonably narrow that only one alternative from
16 among the environmentally benign ones in the agency’s power would accomplish the goals of
17 the agency’s action, and the EIS would become a foreordained formality.” *Citizens Against*
18 *Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir.1991) (citation omitted).

19 105. The Council on Environmental Quality (“CEQ”) provides that each federal
20 agency shall identify in its NEPA procedures those classes of actions that normally do not
21 require either an EIS or an EAS. 40 C.F.R. § 1507.3(b)(2)(ii). These “categorical exclusions”
22 are actions that do not individually or cumulatively have a significant effect on the human
23 environment. If an agency action falls within one of the defined categorical exclusions, then no
24 EIS or EA is required, unless one or more exceptions apply, which are also defined by the
25 agency’s NEPA procedures. FWS defines categorical exclusions as “policies, directives,
26 regulations, and guidelines: that are an administrative, financial, legal, technical, or procedural
27 nature; or whose environmental effects are too broad, speculative, or conjectural to lend
28

1 themselves to meaningful analysis and will later be subject to the NEPA process, either
2 collectively or case-by-case.” 43 C.F.R. § 46.210(i). Similarly, NMFS defines categorical
3 exclusions in NOAA Administrative Order 216-6A and Companion Manual, Policy and
4 Procedures for Compliance with the National Environmental Policy Act and Related Authorities
5 (Jan. 13, 2017), Appendix E.

6 106. In promulgating the revised regulations, the Services failed to undertake either an
7 EIS or an EA, in direct violation of NEPA. In fact, the Services did not issue a draft
8 environmental assessment or draft environmental impact statement for the proposed rules. The
9 Services also did not propose any alternatives to their proposed actions. Rather, they
10 erroneously argued that the regulatory revisions were categorically excluded from NEPA. Both
11 FWS and NMFS have stated that the regulatory revisions are categorically excluded from NEPA
12 review because the revisions’ environmental impacts are “fundamentally administrative, legal,
13 technical, or procedural in nature” that “would not individually or cumulatively have a
14 significant effect on the human environment.”

15 107. This is incorrect. The Services’ regulatory revisions substantively alter the
16 protections afforded to vulnerable species under the law, and have individually and cumulatively
17 significant effects on the human environment. Both individually and taken as a whole, the rules
18 have the purpose and effect of leaving threatened and endangered species vulnerable to take
19 under the ESA—namely by reducing their available habitat, leaving them susceptible to climate
20 change, removing blanket protections, and severely restricting the scope of agency review.

21 108. Even if the revisions could be covered by a categorical exclusion, extraordinary
22 circumstances require the preparation of an EIS or an EA. The revised regulations will
23 adversely affect threatened species and their habitats pursuant to 40 C.F.R. § 1508.27(b)(9). The
24 effects of the revised ESA regulations on the quality of the human environment are clearly
25 “highly controversial” within the meaning of 40 C.F.R. § 1508.27(b)(4), as indicated by the
26 public outcry and volume of public comments received in response to the proposed rules. The
27 possible effects on the human environment involve “unique [and] unknown risks” within the
28

1 meaning of 40 C.F.R. § 1508.27(b)(5). The revisions “may establish a precedent for future
2 actions with significant effects” within the meaning of 40 C.F.R. § 1508.27(b)(6). Finally, the
3 revisions threaten a violation of federal law imposed for the protection of the environment,
4 namely the ESA, within the meaning of 40 C.F.R. § 1508.27(b)(10).

5 109. As a result, the Services’ failure to conduct a lawful NEPA process based on the
6 significant impacts of the revised regulations violated NEPA and its implementing regulations,
7 was arbitrary and capricious, an abuse of discretion, and a failure to act in accordance with the
8 law, and, therefore, violated the NEPA, the CEQ regulations, and the FWS and NMFS
9 guidelines implementing NEPA.

10 **REQUEST FOR RELIEF**

11 WHEREFORE, Plaintiffs request this Court to find for Plaintiffs and to enter a judgment
12 and order:

- 13 a. Declare that FWS and NMFS acted arbitrarily, capriciously, and contrary to the
14 ESA, in violation of the APA;
- 15 b. Hold unlawful and vacate the 2019 Revised ESA Regulations;
- 16 c. Enjoin the FWS from applying or otherwise relying upon the 2019 Revised ESA
17 Regulations;
- 18 d. Reinstate the predecessors to the 2019 Revised ESA Regulations;
- 19 e. Award Plaintiff its reasonable fees, costs, and expenses, including attorneys’ fees;
20 and
- 21 f. Grant Plaintiff such further and additional relief as the Court may deem just and
22 proper.
- 23
24
25
26
27
28

1 Dated: June 8, 2020

ORRICK, HERRINGTON & SUTCLIFFE LLP

2
3 By: s/ Clement Roberts

4 CLEMENT ROBERTS (CSBA # 209203)
5 DANIEL S. GUERRA (CSBA # 267559)
6 KOUROSH JAHANSOUZ (CSBA #
7 292559)

8 ORRICK, HERRINGTON & SUTCLIFFE
9 LLP

10 405 Howard Street

11 San Francisco, CA 94105

12 Telephone: (415) 773-5700

13 Facsimile: (415) 773-5759

14 croberts@orrick.com

15 dguerra@orrick.com

16 kjahansouz@orrick.com

17 EMMANUEL FUA (CSBA # 284563)

18 ORRICK, HERRINGTON & SUTCLIFFE

19 LLP

20 51 West 52nd Street

21 New York, NY 10019

22 Telephone: (212) 506-5000

23 Facsimile: (212) 506-5151

24 efua@orrick.com

25 *Attorneys for Plaintiff*

26 *ANIMAL LEGAL DEFENSE FUND*

Exhibit A

1 CLEMENT ROBERTS (CSBA # 209203)
2 DANIEL S. GUERRA (CSBA # 267559)
3 KOUROSH JAHANSOUZ (CSBA # 292559)
4 ORRICK, HERRINGTON & SUTCLIFFE LLP
5 405 Howard Street
6 San Francisco, CA 94105
7 Telephone: (415) 773-5700
8 Facsimile: (415) 773-5759
9 croberts@orrick.com
10 dguerra@orrick.com
11 kjahansouz@orrick.com

12 *Attorneys for Plaintiff*

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 OAKLAND DIVISION

16 ANIMAL LEGAL DEFENSE FUND,

17 Plaintiff,

18 v.

19 DAVID BERNHARDT, U.S. Secretary of the
20 Interior; U.S. FISH AND WILDLIFE
21 SERVICE; WILBUR ROSS, U.S. Secretary of
22 Commerce; and NATIONAL MARINE
23 FISHERIES SERVICE,

24 Defendants.

Case No. 4:19-cv-06812-JST

Related Cases: No. 4:19-cv-06013-JST
No. 4:19-cv-06812-JST

**DECLARATION OF MARK WALDEN
IN SUPPORT OF PLAINTIFF'S
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

1 I, Mark Walden, make this Declaration pursuant to 28 U.S.C. § 1746:

2 1. The facts set forth in this Declaration are based on my personal knowledge. If
3 called as a witness, I could and would testify to these facts. As to those matters which reflect an
4 opinion, they reflect my personal opinion and judgment on the matter.

5 2. I am the Chief Programs Officer at the Animal Legal Defense Fund (ALDF). I
6 have served in this capacity since 2016. In this role, I am responsible for coordinating ALDF's
7 activities across programs, including ALDF's civil Litigation Program. I also coordinate among
8 ALDF's programs and executive leadership, ALDF's communications department, and donor
9 and member outreach.

10 3. ALDF is a national nonprofit animal protection organization founded in 1979 that
11 uses education, public outreach, legislation, and litigation to protect the lives and advance the
12 interests of animals, including those protected or considered for protection under the Endangered
13 Species Act (ESA). ALDF is supported by hundreds of dedicated attorneys and more than
14 230,000 members and supporters nationwide, many of whom who share ALDF's interest in ESA
15 protected species.

16 4. One of ALDF's cornerstone issues is protecting members of threatened and
17 endangered species from illegally inadequate housing, treatment, and conditions at commercial
18 facilities such as fur farms and roadside zoos. Using the ESA, ALDF regularly engages in
19 significant advocacy and public education efforts to raise awareness about the conditions in
20 which threatened and endangered species are held in captivity, to improve their physical and
21 mental well-being, and to relocate animals to sanctuaries where they can recover and flourish.

22 5. ALDF also regularly uses the standards for threatened and endangered animals set
23 forth in the ESA to inform civil cruelty and nuisance suits against captive animal facilities that
24 fail to adequately care for the threatened and endangered animals they exhibit. ALDF's legal
25 advocacy and ability to carry out its mission relies extensively upon the ESA to ensure imperiled
26 species receive the protections they need to thrive. These efforts are directly impacted and
27 harmed by the rules at issue in this litigation.

28

1 6. ALDF’s work against captive animal facilities, or “roadside zoos,” includes
2 several cases that resulted in published federal decisions including:

- 3 • *Kuehl v. Sellner*, 161 F.Supp.3d 678 (N.D. Iowa 2016) *aff’d* by 887 F.3d 845 (8th
4 Cir. 2018). This was the first lawsuit to successfully apply the ESA to captive
5 wild animals in a litigated victory. ALDF—on behalf of itself and several Iowa
6 members—sued the zoo’s owners regarding their treatment of endangered tigers
7 and ring-tailed lemurs. In 2016, the United States District Court for the Northern
8 District of Iowa found the ESA applicable to captive animals, and that Cricket
9 Hollow Zoo violated that law. The court ordered that the four remaining tigers
10 and three remaining lemurs be removed from the zoo.
- 11 • *Graham v. San Antonio Zoological Society*, No. 5:15-cv-01054-XR, 2017 WL
12 2533531, at *18–25 (W.D. Tex. June 8, 2017). This lawsuit alleged the zoo was
13 violating the ESA by harming and harassing Lucky, a female Asian elephant that
14 was housed all alone in an inadequate habitat. The United States District Court
15 for the Western District of Texas held the ESA applied to Lucky and ultimately
16 the case was dismissed after the zoo voluntarily addressed the conditions giving
17 rise to the lawsuit.

18 7. ALDF also recently settled a lawsuit involving threatened gray wolves in
19 Minnesota. *Animal Legal Defense Fund v. Fur-Ever Wild*, No. 0:2017-cv-04496 (D. Minn.).
20 Before the case settled, ALDF obtained a favorable ruling granting in part a motion for summary
21 judgment.

22 8. ALDF also has pending lawsuits asserting claims under the ESA, including:
23 *Animal Legal Defense Fund v. Kimberly A Lucas dba Farmers’ Inn*, No. 19-cv-0040 (W.D. Pa.);
24 *Conley v. Houston Aquarium, Inc.*, No. 4:17-cv-2877 (S.D. Tex.); and *Animal Legal Defense*
25 *Fund v. Olympic Game Farm, Inc.*, 3:18-cv-06025-RBL (W.D. Wash.). ALDF also has issued a
26 Notice of Intent to Sue letter under the ESA to a facility in Wisconsin called Special Memories
27 Zoo.

1 9. In addition to these past, pending, and future cases, ALDF frequently is contacted
2 by members and supporters expressing concern about conditions at “roadside zoo” facilities
3 around the country. This includes species that are listed as threatened or likely will be listed in
4 the future, such as those described in the accompanying declarations. ALDF’s lawyers spend
5 countless hours investigating the facilities that members and supporters flag as potential
6 litigation targets.

7 10. ALDF and its members and supporters also advocate for threatened and
8 endangered species conservation, promote the humane treatment of animals in the wild, and
9 campaign for the preservation of wilderness and wildlife habitat, including by persistently
10 advocating for government adherence to wildlife protection laws such as the ESA and National
11 Environmental Policy Act (NEPA). ALDF has successfully used legal action to protect
12 threatened and endangered species in California by forcing county governments to halt their
13 wildlife killing programs unless or until they study their environmental impacts. ALDF also
14 engages on the federal level, bringing lawsuits against the United States Department of
15 Agriculture’s (“USDA”) Wildlife Services to compel study of the impacts of its regional wildlife
16 killing programs; to protect and conserve wild lands, specifically from the effects of climate
17 change; and to force federal agencies to consider threatened and endangered species, as well as
18 the impacts of climate change, in their decision making. ALDF further advocates for threatened
19 and endangered species directly to government agencies. ALDF recently submitted comments to
20 the FWS opposing the delisting of the grey wolf, for example, and, in addition to submitting its
21 own comments, was part of the coalition that delivered over 800,000 comments to the Services
22 opposing the regulations at issue here. Had the Defendants in this case properly complied with
23 NEPA, ALDF would have participated in that process on behalf of itself and its members.
24 Defendants’ failure to do so has caused injury to ALDF and its members by depriving us of this
25 procedural right.

26 11. ALDF and its members are concerned about protecting threatened and
27 endangered captive species from exploitation and extinction. ALDF and its members derive
28

1 recreational, aesthetic, and conservation benefits and enjoyment from the proper treatment and
2 conservation of threatened and endangered species and species that may be listed as threatened
3 or endangered. As explained in the accompanying declarations, ALDF also has members and
4 supporters who reside near and visit facilities that exhibit members of threatened and endangered
5 species and species that may be listed as threatened or endangered species, as well as wild lands
6 where they reside in their natural habitats. ALDF and its members have been, are being, and will
7 continue to be irreparably harmed by defendants' disregard of their statutory duties and by the
8 unlawful injuries imposed on imperiled species and their critical habitat by the defendants'
9 actions.

10 12. ALDF has also suffered a procedural injury by virtue of the FWS's failure to
11 respond to comments that ALDF submitted during the rulemaking at issue here. In addition to
12 joining in coalition comments, ALDF also submitted separate comments detailing the effects the
13 rules would have on threatened and endangered species in captivity, which is of the utmost
14 concern to ALDF. The FWS did not even mention this issue in the final rule or its preamble, and
15 failed to adequately respond to the coalition comments, as well.

16
17 Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true and correct.

18
19 Executed this 3rd day of January, 2020.

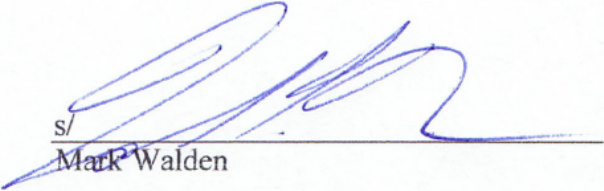
20
21
22 
23 s/ Mark Walden

Exhibit B

1 CLEMENT ROBERTS (CSBA # 209203)
2 DANIEL S. GUERRA (CSBA # 267559)
3 KOUROSH JAHANSOUZ (CSBA # 292559)
4 ORRICK, HERRINGTON & SUTCLIFFE LLP
5 405 Howard Street
6 San Francisco, CA 94105
7 Telephone: (415) 773-5700
8 Facsimile: (415) 773-5759
9 croberts@orrick.com
10 dguerra@orrick.com
11 kjahansouz@orrick.com

12 *Attorneys for Plaintiff*

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 OAKLAND DIVISION

16 ANIMAL LEGAL DEFENSE FUND,

17 Plaintiff,

18 v.

19 DAVID BERNHARDT, U.S. Secretary of the
20 Interior; U.S. FISH AND WILDLIFE
21 SERVICE; WILBUR ROSS, U.S. Secretary of
22 Commerce; and NATIONAL MARINE
23 FISHERIES SERVICE,

24 Defendants.

Case No. 4:19-cv-06812-JST

Related Cases: No. 4:19-cv-06013-JST
No. 4:19-cv-06812-JST

**DECLARATION OF ASHLEY
FETTERS IN SUPPORT OF
PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

1 I, Ashley Fetters, make this Declaration pursuant to 28 U.S.C. § 1746:

2 1. The facts set forth in this Declaration are based on my personal knowledge. If
3 called as a witness, I could and would testify to these facts. As to those matters which reflect an
4 opinion, they reflect my personal opinion and judgment on the matter.

5 2. I became a member of the Animal Legal Defense Fund (ALDF) because of their
6 efforts to advance the legal rights of animals in zoos, factory farms, and the wild. I especially
7 support their work in Iowa to overturn “ag gag” laws and rescue animals from roadside zoos
8 where they are treated horribly.

9 3. I live in Norwalk, Iowa. Because wild spaces are not too abundant in our local
10 area, I rely on local zoos to provide wildlife viewing opportunities and to educate my daughter
11 about the natural world. I visit these types of well-resourced, accredited facilities specifically to
12 see threatened and endangered animals being cared for and thriving.

13 4. Two of the zoos I frequent are the Henry Doorley Zoo in Omaha, Nebraska, and
14 the Blank Park Zoo in Des Moines, Iowa. At Henry Doorley Zoo I visit the threatened and
15 endangered animals (amur tigers, red pandas, African elephants, and white rhinos, among
16 others), as well as the giraffes, which are proposed threatened. Similarly at the Blank Park Zoo I
17 visit the threatened and endangered animals (African lions, Aldabra tortoises, amur tigers, red
18 pandas, and Eastern Black rhinos) and the giraffes. I plan to return to both of these zoos in 2020.

19 5. I also travel to zoos and sanctuaries in other states. For example, I’ve twice
20 visited the Peace River Wildlife Center in Punta Gorda, Florida, which rescues and rehabilitates
21 injured, orphaned, or displaced wildlife. I have also visited the Saint Louis Zoo in Missouri,
22 which is considered a world leader in saving endangered species and their habitats. I plan to visit
23 the San Diego Zoo in June 2020, where I will seek out bonobos, lemurs, African elephants, and
24 rhinos, as well as the giraffes.

25 6. My daughter and I have a particular affinity for savannah animals such as
26 elephants, lions, giraffes, and rhinos. I have always gravitated toward them, and in fact my
27 interest in giraffes, especially, has been a source of family jokes since childhood. I have now
28

1 passed my love for them along to my daughter. These particular savannah animals, who are all
2 endangered, threatened, or proposed threatened, are very special to me. I find them to be so
3 majestic, and I care deeply about making sure that they are protected from anyone who would do
4 them harm.

5 7. It's very important to me to know they are being conserved. I believe that every
6 single species is here for a reason, and thinking that species could go extinct in my lifetime is
7 devastating and heartbreaking. Some animals already have nowhere to go to continue their
8 survival, and it terrifies me to think of a species that are displaced from the areas they're adapted
9 to. It feels like we are all running out of habitat, and it's astonishing that more people don't care.
10 We already encroach on their environment and habitat with development, and now we are
11 destroying more wild places through climate change. Since we are the ones who are destroying
12 it, it's only right that we are the ones who have to stand up and protect them.

13 8. Because of these values, the Endangered Species Act (ESA) and strong
14 enforcement of it by the Fish and Wildlife Service (FWS) and groups like ALDF is incredibly
15 important to me.

16 9. I am aware that the FWS is currently considering listing giraffes under the
17 Endangered Species Act. Under the FWS's previous regulations, giraffes would enjoy automatic
18 protections as soon as they are listed as threatened; under the new regulations, they will not be
19 protected until FWS issues species-specific regulations. FWS has also specifically identified
20 climate change as one of the "natural or manmade factors" contributing to the giraffes' decline.
21 Under FWS's new regulations, the agency can decline to designate a habitat as critical if the
22 threats to the habitat are ones the agency cannot address, like climate change; it is limited in its
23 ability to designate habitat where a species does not currently live, which ignores that animals
24 are being displaced to other areas due to climate change; and it is further limited in considering
25 future effects of climate change. Each of these changes make it more difficult for species like the
26 giraffe to be listed under the ESA, which makes it more difficult for ALDF and concerned
27 citizens like me to act on behalf of animals that deserve the strongest legal protections.

28

1 10. Even the threatened and endangered animals that I visit in zoos are at risk of
2 prematurely losing protections due to the FWS’s changes to its ESA regulations. In addition to
3 the limitation on consideration of climate change impacts, the FWS’s new regulations also allow
4 the agency to delist species that are not actually recovering. The new regulations also eliminate
5 the requirement that the scientific and commercial data “substantiate” a species’ delisting. This
6 puts the species that I care about at risk of premature delisting. Finally, the new regulations
7 allow the agency to consider economic impacts of listing decisions, which clearly undermines
8 the very strong protections outlined in the ESA. I find it abhorrent that the FWS would allow
9 economics to dictate whether a species is protected and conserved.

10 11. If the FWS were to return to its previous regulations, my injuries by virtue of my
11 strong emotional, aesthetic, and personal interest in threatened and endangered species
12 conservation would be redressed because these species would receive the full protection to
13 which they are entitled under the ESA.

14
15
16 Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true and correct.

17
18 Dated this 4th day of January, 2020.

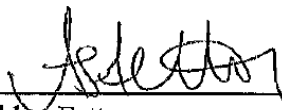
19
20 
21 _____
22 Ashley Fetters
23
24
25
26
27
28

Exhibit C

1 CLEMENT ROBERTS (CSBA # 209203)
2 DANIEL S. GUERRA (CSBA # 267559)
3 KOUROSH JAHANSOUZ (CSBA # 292559)
4 ORRICK, HERRINGTON & SUTCLIFFE LLP
5 405 Howard Street
6 San Francisco, CA 94105
7 Telephone: (415) 773-5700
8 Facsimile: (415) 773-5759
9 croberts@orrick.com
10 dguerra@orrick.com
11 kjahansouz@orrick.com

12 *Attorneys for Plaintiff*

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 OAKLAND DIVISION

16 ANIMAL LEGAL DEFENSE FUND,

17 Plaintiff,

18 v.

19 DAVID BERNHARDT, U.S. Secretary of the
20 Interior; U.S. FISH AND WILDLIFE
21 SERVICE; WILBUR ROSS, U.S. Secretary of
22 Commerce; and NATIONAL MARINE
23 FISHERIES SERVICE,

24 Defendants.

Case No. 4:19-cv-06812-JST

Related Cases: No. 4:19-cv-06013-JST
No. 4:19-cv-06812-JST

**DECLARATION OF LISA GARNER IN
SUPPORT OF PLAINTIFF'S
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

1 I, Lisa Garner, make this Declaration pursuant to 28 U.S.C. § 1746:

2 1. The facts set forth in this Declaration are based on my personal knowledge. If
3 called as a witness, I could and would testify to these facts. As to those matters which reflect an
4 opinion, they reflect my personal opinion and judgment on the matter.

5 2. I support the Animal Legal Defense Fund (ALDF) because of their advocacy on
6 behalf of animals in roadside zoos.

7 3. I am particularly concerned about the animals at Zooworld, a roadside zoo in
8 Panama City Beach, Florida. I have visited the zoo several times, and I continue to monitor the
9 zoo through social media. I plan to continue monitoring the zoo and would visit again in the
10 future to document to the conditions of the animals there who I care about.

11 4. The zoo exhibits lemurs and mandrills, which are endangered, as well as giraffes,
12 which are currently under consideration for listing by the Fish and Wildlife Service (FWS). It
13 advertises opportunities on its website to “get up close and personal” with giraffes, sloths, and
14 lemurs, among others, and invites visitors to “snuggle[] with an endangered species” in the
15 lemur exhibit.

16 5. The zoo is located on a major highway that subjects the animals to constant noise,
17 movement, and exhaust fumes. Cars on the road are clearly visible to the animals while they’re
18 inside their exhibits, which are separated from the road by simple chain link fences.

19 6. Many of the exhibits lack adequate space, enrichment, and proper shade and
20 shelter. On my visits I have documented animals displaying clear signs of psychological distress
21 and boredom, such as pacing and listlessness. On my last visit the heartbreakingly small gray
22 wolf enclosure was muddy and full of trash; I took a video of the wolf laying in the cold mud.
23 Again, the enclosure was lined with one simple chain link fence that did not appear to be
24 reinforced at the bottom or otherwise escape-proof.

25 7. Since my first visit I have been active in educating the public about conditions at
26 the zoo and how the animals are suffering. I have spent hours organizing with other concerned
27 citizens, protesting the facility, and educating people via social media. I created a page on
28

1 Facebook for visitors to upload their photos and videos documenting the conditions at the zoo. I
2 also reached out to ALDF about this facility because I know they have had success in suing and
3 rescuing animals from zoos like this in the past.

4 8. I am especially concerned about the giraffes exhibited at the facility. I visited
5 them on both of my trips to the zoo and continue to monitor social media for any updates about
6 or new photos or videos of them. Their enclosure is incredibly small, is situated directly on the
7 highway, and doesn't offer any shade or any private area for the giraffes to remove themselves
8 from public view. They can be clearly seen chewing on wood and wires in their exhibit, which is
9 a sign of psychological distress and boredom. In 2013, a 5-month-old giraffe named Elliot got
10 stuck in an open space between a slat above the door in his barn and suffered a lethal injury to
11 his spinal cord while he struggled to free himself. That broke my heart. No animal should have
12 to suffer and die like that—especially at a zoo that purports to care for them. When animals are
13 listed under the ESA, the zoo can be held accountable for their deaths.

14 9. My concerns extend to other animals, too. In 2013, an 18-month-old lion cub had
15 to be euthanized when zoo personnel dropped him while transporting him in knee-deep mud.
16 Other more recent U.S. Department of Agriculture inspection reports have documented hazards
17 in the giraffe and lemur enclosures, as well as physical injuries to the lion. I have personally
18 documented at least sixteen different inadequate enclosures at the zoo. It really breaks my heart
19 to see animals suffering in this way.

20 10. I am aware that the Fish and Wildlife Service (FWS) is currently considering
21 listing giraffes under the Endangered Species Act. Under the FWS's previous regulations,
22 giraffes would enjoy automatic protections as soon as they are listed as threatened; under the
23 new regulations, they will not be protected until FWS issues species-specific regulations. FWS
24 has also specifically identified climate change as one of the "natural or manmade factors"
25 contributing to the giraffes' decline. Under FWS's new regulations, the agency can decline to
26 designate a habitat as critical if the threats to the habitat are ones the agency cannot address, like
27 climate change; it is limited in its ability to designate habitat where a species does not currently
28

1 live, which ignores that animals are being displaced to other areas due to climate change; and it
2 is further limited in considering future effects of climate change. Each of these changes make it
3 more difficult for species like the giraffe to be listed under the ESA, which makes it more
4 difficult for ALDF and concerned citizens like me to act on behalf of animals that deserve the
5 strongest legal protections.

6 11. Even listed animals like the lemurs and wolves at Zooworld are at risk of
7 prematurely losing protections due to the FWS's changes to its ESA regulations. The FWS's
8 original regulations provided that "recovery" of the species should be considered in determining
9 whether a species should continue to be listed, but recovery is not a criteria for consideration in
10 the new regulations, meaning a species could be delisted even if it is not recovering. The new
11 regulations also eliminate the requirement that the scientific and commercial data "substantiate"
12 a species' delisting. This puts the species that I care about at risk of premature delisting.

13 12. The ESA is truly the strongest tool we have to protect these vulnerable animals,
14 and my interests in their health and happiness is being harmed by the FWS's decision to weaken
15 it. A return to FWS's previous regulations would redress my injury by providing animals under
16 consideration for listing now and in the future, and those already listed, with significantly
17 stronger protections.

18
19 Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true and correct.

20 Executed this 6th day of January, 2020.

21
22 

23
24

Lisa Garner

Exhibit D

1 CLEMENT ROBERTS (CSBA # 209203)
 DANIEL S. GUERRA (CSBA # 267559)
 2 KOUROSH JAHANSOUZ (CSBA # 292559)
 ORRICK, HERRINGTON & SUTCLIFFE LLP
 3 405 Howard Street
 San Francisco, CA 94105
 4 Telephone: (415) 773-5700
 Facsimile: (415) 773-5759
 5 croberts@orrick.com
 dguerra@orrick.com
 6 kjahansouz@orrick.com

7 *Attorneys for Plaintiff*

9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 OAKLAND DIVISION

12 ANIMAL LEGAL DEFENSE FUND,

13 Plaintiff,

14 v.

15 DAVID BERNHARDT, U.S. Secretary of the
 Interior; U.S. FISH AND WILDLIFE
 16 SERVICE; WILBUR ROSS, U.S. Secretary of
 Commerce; and NATIONAL MARINE
 17 FISHERIES SERVICE,

18 Defendants.

Case No. 4:19-cv-06812-JST

Related Cases: No. 4:19-cv-06013-JST
 No. 4:19-cv-06812-JST

**DECLARATION OF MARY
 DELMORO IN SUPPORT OF
 PLAINTIFF'S OPPOSITION TO
 DEFENDANTS' MOTION TO DISMISS**

1 I, Mary Delmoro, make this Declaration pursuant to 28 U.S.C. § 1746:

2 1. The facts set forth in this Declaration are based on my personal knowledge. If
3 called as a witness, I could and would testify to these facts. As to those matters which reflect an
4 opinion, they reflect my personal opinion and judgment on the matter.

5 2. I am currently retired, but have worked with animals my entire life. I have a
6 degree in Wildlife Management with a minor in Biology, and I've worked in labs, as a wildlife
7 artist, and have been offered zookeeping positions at zoos accredited by the Association of Zoos
8 and Aquariums. I have over 50 years' experience raising and caring for large hoofstock,
9 specifically.

10 3. I support the Animal Legal Defense Fund (ALDF) because of their advocacy on
11 behalf of animals in roadside zoos.

12 4. There is one zoo in particular that I am very concerned about, in Harpursville,
13 New York. This facility was made famous by April the Giraffe, who was broadcast live on
14 YouTube while giving birth to her son, Tajiri. April is seventeen years old and has been
15 exhibited at the zoo since 2015, along with her seven-year-old breeding partner, Oliver. April
16 gave birth to Tajiri in April 2017 and another bull (male giraffe) named Azizi in March 2019. A
17 fifth giraffe, fourteen-year-old Johari, has also lived at the zoo since January 2019.

18 5. The zoo offers a live stream of the giraffes through its website and on YouTube.
19 Oliver and Johari reside together in one barn, and April and her two bulls reside together in a
20 second barn. Each barn has its own camera and video feed that broadcasts 24 hours a day.

21 6. I first became aware of April in 2017 when I watched her give birth to Tajiri. I
22 checked in on her through the online feed periodically over the last few years, but I started
23 watching steadily since Azizi's birth in early 2019. Since then, I've watched April and the bulls
24 for an hour or two each day, on and off; I check the feed in the morning to see how they are
25 doing, and then observe on and off throughout the day. I keep the feed on in the background as I
26 go about my day so that I can check in on them periodically.

1 7. I am very concerned for the health of the giraffes. Since the zoo stopped breeding
2 April it appears that they have stopped caring for her. She has had some health scares, including
3 two bad bouts of colic in the weeks after the birth of her second calf. Her overall body condition
4 also started to decline, which I have witnessed steadily over the years I've been watching her. I
5 can see through the live feed that her backbone and top of her hipbone and tailbone are visible
6 and prominent. Her neck is sagging from a lack of muscle at its base. Her stride is stilted, her
7 gait is unnatural, and her hooves are abysmal; her feet are obviously compromised. I can see the
8 signs of body condition decline and understand what's happening because of my background,
9 but it doesn't take a professional to see her decline.

10 8. Oliver is also limping horribly. He was ill then lame for two months. After about
11 three weeks of observing this I emailed with their vet about my concerns, and he said Oliver is
12 totally impossible to approach to examine or treat because he's not familiar with the vet, and that
13 the best he can do is put him on painkillers. A few weeks ago, the last time I saw him outside on
14 their cam, he was still lame on his right front.

15 9. The live feed of the giraffes used to show both the inside and outside of the barns,
16 but it now only shows the outside. One evening when they were broadcasting the inside of
17 Oliver and Johari's barn, I observed the zookeepers hosing out the stall (i.e. removing all
18 bedding and leaving only exposed, wet concrete) and then shutting the lights and leaving for the
19 night. This means Oliver and Johari spent the entire night standing in a wet, empty, dark stall.
20 The owner of the facility has admitted in the past that practices like this (i.e. not providing
21 bedding in the stalls) are cost-saving measures. He has also admitted that using the wrong
22 bedding in the stalls has caused the giraffes to have hoof problems.

1 10. The conditions of the giraffes and the practices I observe through the live feed
2 concern and upset me a great deal. After years of observing them on a daily basis, I care very
3 deeply for each of the giraffes at this facility. I get enjoyment out of seeing and knowing they are
4 happy and healthy, which is why I was so interested in tuning in to April's births and early days
5 with her bulls. I plan to continue watching the giraffes at this facility because I care about them
6 and so that I can advocate on their behalf.

7 11. I have filed multiple complaints with the U.S. Department of Agriculture's
8 Animal and Plant Health Inspection Service, which is charged with regulating animal exhibitors
9 under the Animal Welfare Act. I've also contacted the local humane society, but didn't get a
10 response. I finally contacted ALDF about my concerns because I know they have had success
11 challenging facilities like this and rescuing animals from them through litigation. I am deeply
12 committed to helping and protecting these animals any way that I can.

13 12. I hate that roadside zoos can neglect animals this way while remaining
14 accountable to virtually no one. The Animal Welfare Act is very limited in its protections and
15 lacks a mechanism for the public to enforce its standards. That is why the Endangered Species
16 Act (ESA) is so essential to protecting animals in roadside zoos. It not only provides greater
17 protections than the Animal Welfare Act, but it allows citizens to enforce it.

18 13. I am aware that the Fish and Wildlife Service (FWS) is currently considering
19 listing giraffes under the Endangered Species Act. Under the FWS's previous regulations,
20 giraffes would enjoy automatic protections as soon as they are listed as threatened; under the
21 new regulations, they will not be protected until FWS issues species-specific regulations. FWS
22 has also specifically identified climate change as one of the "natural or manmade factors"
23 contributing to the giraffes' decline. Under FWS's new regulations, the agency can decline to
24 designate a habitat as critical if the threats to the habitat are ones the agency cannot address, like
25 climate change; it is limited in its ability to designate habitat where a species does not currently
26 live, which ignores that animals are being displaced to other areas due to climate change; and it
27 is further limited in considering future effects of climate change.

28

Exhibit E

1 CLEMENT ROBERTS (CSBA # 209203)
2 DANIEL S. GUERRA (CSBA # 267559)
3 KOUROSH JAHANSOUZ (CSBA # 292559)
4 ORRICK, HERRINGTON & SUTCLIFFE LLP
5 405 Howard Street
6 San Francisco, CA 94105
7 Telephone: (415) 773-5700
8 Facsimile: (415) 773-5759
9 croberts@orrick.com
10 dguerra@orrick.com
11 kjahansouz@orrick.com

12 *Attorneys for Plaintiff*

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 OAKLAND DIVISION

16 ANIMAL LEGAL DEFENSE FUND,

17 Plaintiff,

18 v.

19 DAVID BERNHARDT, U.S. Secretary of the
20 Interior; U.S. FISH AND WILDLIFE
21 SERVICE; WILBUR ROSS, U.S. Secretary of
22 Commerce; and NATIONAL MARINE
23 FISHERIES SERVICE,

24 Defendants.

Case No. 4:19-cv-06812-JST

Related Cases: No. 4:19-cv-06013-JST
No. 4:19-cv-06812-JST

**DECLARATION OF LESLIE PATTEN
IN SUPPORT OF PLAINTIFF'S
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

1 I, Leslie Patten, make this Declaration pursuant to 28 U.S.C. § 1746:

2 1. The facts set forth in this Declaration are based on my personal knowledge. If
3 called as a witness, I could and would testify to these facts. As to those matters which reflect an
4 opinion, they reflect my personal opinion and judgment on the matter.

5 2. I support the Animal Legal Defense Fund (ALDF) because of their advocacy on
6 behalf of wild animals and the natural lands they inhabit.

7 3. I live an hour northwest of Cody in northwestern Wyoming. I have been visiting
8 the area and backpacking here since the 1990s, and in 2008 I moved here from the San Francisco
9 Bay Area to be closer to nature. My property is surrounded by the Shoshone National Forest,
10 which has the most wilderness land of any National Forest in the United States. I also live very
11 close to Yellowstone National Park, and within the Greater Yellowstone Ecosystem. I feel very
12 lucky to live here; this area is unique for wildlife viewing and the benefits of nature. Wildlife is
13 markedly more abundant here than other natural places I've visited. The Greater Yellowstone
14 Ecosystem is well known as a sanctuary for the largest concentration of wildlife in the lower 48
15 states. It encompasses state lands, two national parks, portions of five national forests, three
16 national wildlife refuges, Bureau of Land Management holdings, and private and tribal lands. It
17 is amazing to be able to live among wildlife like I do, and I know people travel from all over the
18 world to experience it.

19 4. My local area comprises habitat for many threatened and endangered species,
20 including gray wolves, grizzly bears, and Canada lynx, as well as species that are under
21 consideration for listing or delisting such as the North American Wolverine. I live among critical
22 habitat for the Canada lynx and proposed critical habitat for the wolverine. The Greater
23 Yellowstone Ecosystem is also home to pikas, which are particularly vulnerable to loss of habitat
24 related to climate change. The ability of these animals to continue thriving and surviving is
25 directly dependent on the existence and quality of their habitat.

26 5. I spend time in nature daily. I go hiking, backpacking, cross-country skiing,
27 snowshoeing, fishing—just about everything. I typically get outdoors to recreate at least five
28

1 times a week. I also love photography and maintain trail cameras to capture photographs of
2 cougars, bears, mountain lions, and other large carnivores for my own personal and professional
3 use. I spend this time outdoors specifically to feel closer to the natural world and to observe and
4 enjoy wildlife, including threatened and endangered species. I am certain I will continue to
5 spend time, recreate in, and enjoy the Shoshone National Forest and the other parks, refuges, and
6 forests within the Greater Yellowstone Ecosystem on a regular, if not daily, basis.

7 6. In 2018 I published a book called *Ghost Walker: Tracking a Mountain Lion's*
8 *Soul Through Science and Story*. It includes my trail photography and tells personal stories of
9 how I've tracked mountain lions in the areas around my home. It also includes interviews with
10 biologists, professional trackers, houndsmen, and conservationists, in an effort to examine the
11 impact of hunting mountain lions, what happens when wolves and grizzly bears are added to the
12 mix of top predators, and how mountain lions navigate urban-wildlife interfaces.

13 7. I am also a very active member of my local community and the broader
14 conservation community. I stay up-to-date with local conservation issues and attend federal and
15 state meetings in my area related to, among others, wolf and mountain lion season setting,
16 Shoshone National Forest management plans, and grizzly bear management. I serve on the
17 boards of several local and national environmental organizations and attend conferences related
18 to wildlife topics.

19 8. I am extremely concerned about, and regularly witness, the effects of climate
20 change on the Greater Yellowstone Ecosystem. I have watched the forest in and around my
21 home explode in wildfire over the past decade, and I feel distraught over their impacts to my
22 home, the wilderness surrounding it, and the wild animals with whom I feel a deep emotional
23 connection. I cannot return to some of my favorite trails, as they are obstructed from hundreds of
24 downed trees due to bark beetle and budworm infestations. Despite the fact in some areas the
25 forest service has logged these infestation, the slash left on the ground makes cross-country hikes
26 and skiing impossible. Directly behind my house, the forest service has been doing fire
27 prevention but has not money or crew to burn the piles or slash, leaving it impossible to walk
28

1 through. Ninety percent of the Whitebark pine trees, found in high altitudes in the Greater
2 Yellowstone Ecosystem, are considered functionally dead due to beetle kill. These are the main
3 fall food for grizzly bears. Watching my local forest die has caused my mental and physical
4 health to suffer.

5 9. I worry not only for me, but for the animals who call the Greater Yellowstone
6 Ecosystem their home. I worry that before long they will not be any truly wild spaces left for
7 them to roam and be at peace without human interference. It's very important for large
8 carnivores and undulates to have continuous space to travel. As their habitat continues to shrink
9 from housing developments, disruptive human activities, and climate change, it's more
10 important than ever to protect as much of their habitat as possible.

11 10. After a lifetime of hiking and visiting wilderness, and now living full-time next to
12 one of the wildest places in the United States, I deeply value wild refuges where I, and animals,
13 can wander without seeing another person for days. It's hard to put into words what it means to
14 me to see and experience nature the way that I do, because it's so essential. Seeing threatened
15 and endangered animals in the natural world helps me relax; it helps me connect with the greater,
16 larger world in a spiritual sense; and gets me out of my own head and anthropomorphic view.
17 It's incredibly important to me to continue having opportunities to observe and enjoy threatened
18 and endangered species in their habitats. Habitat protection is key for preserving them and my
19 experience of them into the future.

20 11. I am concerned about and directly impacted by the Fish and Wildlife Services'
21 (FWS) new regulations under the Endangered Species Act. Under FWS's new regulations, the
22 agency can decline to designate a habitat as critical if the threats to the habitat are ones the
23 agency cannot address, like climate change; it is limited in its ability to designate habitat where a
24 species does not currently live, which ignores animals like pikas who have no place to retreat to,
25 or grizzly bears in the Greater Yellowstone Ecosystem who are losing their critical foods due to
26 climate change; and it is further limited in considering future effects of climate change. Each of
27 these changes make it more difficult for species to be listed under the ESA, which makes it more
28

1 difficult for ALDF and concerned citizens like me to act on behalf of animals that deserve the
2 strongest legal protections.

3 12. Even the listed animals in the Greater Yellowstone Ecosystem are now at risk of
4 prematurely losing protections due to the FWS's changes to its ESA regulations. The FWS's
5 original regulations provided that "recovery" of the species should be considered in determining
6 whether a species should continue to be listed, but recovery is not a criteria for consideration in
7 the new regulations, meaning a species could be delisted even if it is not recovering. The new
8 regulations also eliminate the requirement that the scientific and commercial data "substantiate"
9 a species' delisting. This puts the species that I care about at risk of premature delisting.

10 13. These vulnerable animals and the people like me who are deeply invested in their
11 health and happiness are being harmed by the FWS's decision to weaken the ESA's protections.
12 A return to FWS's previous regulations would redress my injury by providing animals under
13 consideration for listing now and in the future, and those already listed, with the strongest
14 possible protections.

15 14. I have also suffered a procedural injury by being deprived of an opportunity to
16 share these concerns with the FWS in the context of environmental review under the National
17 Environmental Policy Act. If the FWS had fully considered the environmental impacts of its
18 regulatory changes, I would have submitted comments explaining the impacts of these rules on
19 myself and the animals among whom I live.

20
21 Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true and correct.

22
23 Executed this 6th day of January, 2020.

24
25 /s/ Leslie Patten
26 Leslie Patten
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Attestation re Electronic Signatures

I, Clement Roberts, attest pursuant to Northern District Civil Local Rule 5-1(i)(3) that all other signatories to this document, on whose behalf this filing is submitted, concur in the filing's content and have authorized this filing. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: January 7, 2020

By: */s/ Clement Roberts*
CLEMENT ROBERTS