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February 11, 2021

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

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

Dear President Biden,

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

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

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

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

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

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

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

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

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

Signed,

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

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Enclosures

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

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

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

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

CC:

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

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

I. The DOI Should Rescind the 2008 Bernhardt Memorandum.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In 2019, the Trump Administration amended regulations pertaining to Section 7 consultations. Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019) (codified at 50 C.F.R. § 402). The new regulations amended the definition of “effects of the action” that the action agency and Services must consider when engaging in Section 7 consultation, *see* 50 C.F.R. § 402.14(a)), by adding a restrictive “but for” requirement: “A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur.” 50 C.F.R. § 402.02(d). The 2019 amendments to the regulations also added § 402.17, which defines “activities that are reasonably certain to occur” and “consequences caused by the proposed action,” both of which are terms used to determine the scope of effects that must be considered during consultation to “insure” that agency actions are not likely to jeopardize any listed species. 50 C.F.R. § 402.17.⁶

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

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

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

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

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

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

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

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

V. Conclusion

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