September 23, 2020

ATTORNEY GENERAL RAOUL OPPOSES NEW NATIONAL ENVIRONMENTAL POLICY ACT ROLLBACK THAT THREATENS ENDANGERED SPECIES

Chicago — Attorney General Kwame Raoul, as part of a multistate coalition, announced his intent to sue the federal government over a rollback of federal environmental protections for endangered species under the National Environmental Policy Act.

On July 16, the Council on Environmental Quality (CEQ) issued a rule that would substantially undermine the National Environmental Policy Act (NEPA), a federal statute adopted in 1970 that requires federal agencies to identify and reduce potential environmental harm resulting from federal actions, including approvals for major infrastructure and energy projects. On Aug. 28, Raoul and a coalition of attorneys general filed a lawsuit challenging the rule. Among the issues raised, Raoul and the coalition argued that the CEQ had curtailed public participation in the NEPA process.

Today's 60-day notice of intent to sue will allow the coalition to amend their complaint filed in August to address the federal government's failure to consider the rule's impact on endangered and threatened species, in violation of the Endangered Species Act.

"The continued attempts to roll back federal environmental protection regulations will have long-term consequences for our environment, our states' ecosystems, economies and public health," Raoul said. "I will file this lawsuit because the public deserves know the impact infrastructure and energy projects will have on the environment before they begin."

The 60-day notice of intent to sue argues that the rule allows many federal projects to evade environmental review under NEPA. Without that review, greater harm to fish and wildlife likely will occur; yet, the CEQ did not consult with the federal wildlife agencies as required by the Endangered Species Act.

Moreover, the rule instructs agencies not to consider "cumulative impacts" or the environmental impacts of a proposed action combined with the anticipated impacts of other existing or future projects. Multiple intrusions into a single site or habitat can be devastating for the existing ecosystem. If agencies do not consider and disclose these impacts, they inevitably will disregard them in approving major federal projects throughout the country. In short, less frequent and less comprehensive NEPA review under the rule will cause greater harm to protected species.

Joining Raoul in sending the intent to sue are the attorneys general of California, Colorado, Connecticut, Delaware, the District of Columbia, Guam, Maine, Massachusetts, Maryland, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington and Wisconsin; as well as New York City and Harris County, Texas.

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September 22, 2020

Via Electronic and Certified U.S. Mail: Return Receipt Requested

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RE: 60-Day Notice of Intent to Sue the Council on Environmental Quality ("CEQ") Under the Endangered Species Act regarding its *Update to Regulations Implementing the Procedural Provisions of the National Environmental Policy Act ("NEPA")*

Dear Chairwoman Neumayr, *et al.*:

This letter provides notice that the CEQ has violated the Endangered Species Act ("ESA") in issuing its July 16, 2020 final rule entitled *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,* 85 Fed. Reg. 43,304 (July 16, 2020) (hereinafter "Final Rule"). Prior to promulgating the Final Rule, CEQ failed to consult

under section 7 of the ESA with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (together, "Services") regarding the Final Rule's likely impact to federally listed endangered and threatened species in the United States. We request that CEQ immediately comply with its consultation obligations under the section 7 of the ESA to ensure that the Final Rule will not "jeopardize the continued existence of any endangered or threatened species or result in the adverse modification" of critical habitat of any listed species.[1]

If CEQ fails to initiate consultation within 60 days, the undersigned entities, including the States of California, Washington, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New York, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Wisconsin, Massachusetts, Pennsylvania, the Territory of Guam, the District of Columbia, the City of New York, and Harris County, Texas intend to file suit against CEQ, by amending our existing Complaint in *State of California et al v. Council on Environmental Quality*, 3:20-cv-06057-RS (N.D. Cal) to seek a court order requiring CEQ to fulfill its statutory consultation obligations under the ESA.[2]

I. BACKGROUND

A. The Endangered Species Act

The ESA was enacted by Congress in 1973 out of deep concern for the preservation of America's imperiled plants and wildlife.[3] The Act aims "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species."[4] As the U.S. Supreme Court has stated, Congress intended "to halt and reverse the trend toward species extinction, whatever the cost."[5] Thus, "the language, history, and structure of the [ESA]" indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities."[6]

There are presently 1,471 animal species and 946 plant species listed as threatened or endangered, respectively, in the United States.[7] The listing of a species under the ESA is a last resort to conserve endangered and threatened species and the ecosystems on which they depend. The Services manage listed species and their designated critical habitats.

As relevant here, section 7 of the ESA reflects "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered

[1] 16 U.S.C. § 1536(a)(2).

[2] *Id*. § 1540(g)(2)(A)(i).

[3] *Id.* § 1531 *et seq*.

[4] *Id*. § 1531(b).

[5] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

[6] *Id.* at 174-75.

[7] *See* 50 C.F.R. § 17.11 (animals), § 17.12 (plants).

species," elevating concern for species protection "over the 'primary missions' of federal agencies.'"[8] Section 7 requires all federal agencies to "insure" that any action they propose to authorize, fund, or carry out "is not likely to jeopardize the continued existence" of any endangered or threatened species or "likely to result in the destruction or adverse modification of" any designated critical habitat.[9] Federal agency action subject to consultation is broadly defined and includes "the promulgation of regulations" as well as "actions which directly or indirectly cause[sic] modifications to the land, water, or air."[10]

Under section 7, federal agencies, including CEQ, must engage in a consultation process with the appropriate Service before taking action that "may affect" listed species.[11] Typically, the Services will prepare a "biological opinion" evaluating the impacts of an agency's intended action. If the Services determine that the action is likely to result in jeopardy or adverse modification of critical habitat, the Services will impose "reasonable and prudent alternatives" to avoid this result, and also will impose "reasonable and prudent measures" to minimize and mitigate the impacts of the proposed federal agency action.[12]

Finally, section 7(d) of the ESA prohibits any "irretrievable commitment of resources" pending the completion of consultation.[13] The purpose of section 7(d) is to maintain the environmental status quo pending the completion of consultation. Section 7(d)'s prohibition remains in effect throughout the consultation period and until the federal agency has satisfied its obligation under section 7(a)(2) to ensure that the action will not result in jeopardy to the species or adverse modification of its critical habitat.[14]

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[8] *Hill*, 437 U.S. at 185.

[9] 16 U.S.C. § 1536(a)(2).

[10] 50 C.F.R. § 402.02; *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054-55 (9th Cir. 1994.)

[11] 50 C.F.R. § 402.14(a).

[12] 50 C.F.R. § 402.14; *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007).

[13] 16 U.S.C. § 1536(d).

[14] *See, e.g., Pacific Rivers Council*, 30 F.3d 1050, 1056-57 (9th Cir. 1994); *Defs. of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 113 (D.D.C. 2011).

B. NEPA Helps Protect Listed Species in Federal Planning

NEPA was enacted in 1970 declaring a "national policy" to encourage "productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man."[15] Consistent with this overarching policy, Congress directed federal agencies to implement NEPA "to the fullest extent possible" and to conduct a detailed environmental review for "major Federal actions significantly affecting the quality of the human environment" that analyzes an action's environmental impacts, alternatives to the proposed action, the relationship between short-term uses and long-term productivity, and any irreversible and irretrievable commitment of resources.[16]

In 1978, CEQ promulgated regulations that have guided federal, state, and local agencies' compliance with NEPA for more than 40 years.[17] These 1978 implementing regulations helped to ensure that federal agencies fully comply with NEPA's requirement that agencies take a "hard look" at the environmental impacts of their actions and provide an opportunity for meaningful public participation in the agency decision-making process.[18]

NEPA review ensures that federal agencies consider potential impacts to fish and wildlife, including federally listed species, when planning and undertaking projects. NEPA review may show the presence of a federally listed species in a project area or might reveal potential impacts on species that agencies might otherwise overlook. With this information in hand, federal agencies can alter the proposed action or implement mitigation measures to avoid or decrease adverse impacts to listed species. In addition, courts have held that the scope of NEPA's cumulative impacts analysis under the 1978 regulations is broader than that required under the ESA itself.[19] Thus, by eliminating cumulative impacts analysis from NEPA, CEQ's Final Rule is immediately likely to impact listed species. Environmental review under NEPA helps to ensure agency actions are "not likely to jeopardize the continued existence" of any endangered or threatened species.[20]

C. The 2020 Final Rule Threatens Harm to Listed Species

CEQ's Final Rule, which became effective on September 14, 2020, radically re-writes many fundamental provisions of the 1978 NEPA regulations. In particular, the Final Rule severely limits which federal actions require NEPA compliance; narrows the scope of federal agencies' obligation to consider environmental impacts; threatens to render NEPA's public participation process a meaningless paperwork exercise; and unlawfully seeks to restrict judicial

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[15] 42 U.S.C. § 4321.

[16] 42 U.S.C. § 4332(2)(C).

[17] *See* 40 C.F.R. Part 1500 (1978).

[18] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

[19] *Fund for Animals v. Hall*, 448 F. Supp.2d 127, 136 (D.D.C. 2006).

[20] 16 U.S.C. § 1536(a)(2).

review of agency actions that violate NEPA. The Final Rule weakens federal agency NEPA review as described below and eliminates the concomitant benefits to listed species entirely.

The Final Rule narrows the universe of federal actions subject to environmental review under NEPA which will harm listed species. First, the Final Rule establishes a "threshold inquiry" carving out six situations from any environmental review whatsoever.[21] Second, the Final Rule authorizes federal agencies to determine that other statutes or directives conflict with NEPA and thus excuses agencies from NEPA review.[22] Third, the Final Rule expands the use of categorial exclusions by removing consideration of cumulative impacts and allowing use of categorical exclusions in situations that previously were considered extraordinary circumstances (i.e., circumstances where normally an action excluded from more rigorous review would have required a closer look).[23] And, importantly, the Final Rule removes the presence of endangered and threatened species from the list of extraordinary circumstances which would conclusively bar use of a categorial exclusion.[24] With fewer projects undergoing environmental review because of the changes in the Final Rule, it is inevitable that federal agencies will overlook and fail to mitigate harm to listed species.

For projects that are not entirely exempt from review, the Final Rule also severely limits the scope of environmental impacts agencies must consider. For example, the Final Rule instructs agencies not to consider "cumulative impacts"—that is, the environmental impacts of a proposed action combined with the anticipated impacts of other existing or future projects.[25] Cumulative impacts can be particularly devastating for listed species. For example, while one intrusion into a species' habitat might cause minimal harm, multiple incursions into the same region may contract the species' range or extirpate it from a geographic area entirely thus adversely modifying critical habitat.

Likewise, the Final Rule allows agencies to ignore the impacts of greenhouse gas emissions and climate change, which are, by definition, cumulative. Impacts related to climate change threaten many species throughout the United States both directly and through adverse modification of critical habitat.[26] If agencies are permitted to avoid consideration of cumulative

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[21] 85 Fed. Reg. at 43,359 (to be codified at § 1501.1)

[22] 85 Fed. Reg. at 43, 359, 43,373-74 (to be codified at §§ 1501.1(a)(2), (a)(3), 1507.3(d)(2).

[23] 85 Fed. Reg. at 43,360 (to be codified at § 1501.4).

[24] *Compare* 40 C.F.R. § 1508.1(d) (2020), with *id.* § 1508.4 (1978).

[25] 85 Fed. Reg. at 43,360 (to be codified at 40 C.F.R. § 1501.3(b).)

[26] *See, e.g.*, Céline Bellard, *et al*., *Impacts of Climate Change on the Future of Biodiversity*, 15 ECOLOGY LETTERS 365, 375 (2012) (most climate change impact models "indicate alarming consequences for biodiversity, with the worst-case scenarios leading to extinction rates that would qualify as the sixth mass extinction in the history of the earth"), *available at* https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1461-0248.2011.01736.x; Paul Leadley *et al*., *Biodiversity Scenarios: Projections of 21st Century Change in Biodiversity and Associated Ecosystem Services*, CONVENTION ON BIOLOGICAL DIVERSITY TECHNICAL

impacts, agencies will inevitably fail to address, mitigate, or avoid such impacts in approving major federal projects throughout the country.

In California, there are currently over 300 species listed as endangered or threatened under the ESA that reside wholly or partially within the State and its waters—more than any other mainland state. Examples include the southern sea otter (*Enhydra lutris nereis*) found along California's central coastline, the desert tortoise (*Gopherus agassizii*) and its critical habitat in the Mojave Desert, the marbled murrelet (*Brachyramphus marmoratus*) in north coast redwood forests, as well as two different runs of Chinook salmon (*Oncorhynchus tshawytscha*) and their spawning, rearing, and migration habitat in the Bay-Delta and Central Valley rivers and streams. These and other species are affected by federal projects throughout California. For example, Chinook salmon are threatened by the U.S. Bureau of Reclamation's proposal to raise the level of the Shasta Reservoir in northern California.

Washington State has 49 federally listed species. These listed species include chinook (*Oncorhynchus tshawytscha*), chum (*Oncorhynchus keta*), and sockeye (*Oncorhynchus nerka*) salmon, steelhead (*Oncorhynchus mykiss*), Southern Resident killer whales (*Orcinus orca*) and the pygmy rabbit (*Brachylagus idahoensis*), the smallest rabbit in North America.

There are dozens of federally endangered or threatened species that reside in whole or in part within the State of New York and its waters. Examples include four sea turtles that can be found in New York waters—the loggerhead (*Caretta caretta*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*) and Kemp's Ridley (Lepidochelys kempii). New York hosts ten National Wildlife Refuges, home to federally protected species like the Piping Plover (*Charadrius melodus*), and dozens of other federal sites. Other species of concern include the endangered shortnose sturgeon (*Acipenser brevirostrum*), Atlantic sturgeon (*Acipenser oxyrinchus)*, and the Northern long-eared bat (*Myotis septentrionalis*). Strong ESA protections both within its state borders and throughout each species' range are fundamental to New York's interests.

Guam has numerous species and habitats that are threatened or endangered. These species and habitats include the Mariana Fruit Bat (*Pteropus mariannus*), Hayun Lagu (*Serianthes nelsonii*), the largest native tree in the Mariana Islands, and the Guam Rail or the Ko'ko' bird (*Gallirallus owstoni*), which is native to Guam and found nowhere else in the world.

At least seventeen federally listed and protected endangered or threatened species are known to occur in Massachusetts, including, for example, the threatened piping plover (*Charadrius melodus*) and northern long-eared bat (*Myotis septentrionalis*), and the endangered shortnose sturgeon (*Acipenser brevirostrum)* and leatherback sea turtle (*Dermochelys coriacea*).

SERIES NO. 50 (2010); see also U.S. Dep't of the Interior, *9 Animals That are Feeling the Impacts of Climate Change* (Nov. 16, 2015)(climate change threatens endangered and threatened species, including loggerhead and other sea turtles, polar bears, and piping plovers), *available at* https://www.doi.gov/blog/9-animals-are-feeling-impacts-climate-change.

Endangered species in Minnesota include the Rusty-Patched Bumble Bee, *(bombus affinis*), the Topeka Shiner (*nontropis topeka*),the Higgins Eye Pearlymussel (*lampsilis higgininsi*), and the Winged Mapleleaf Mussel (*quadrula fragosa*). Of special concern are the Canada lynx (*lynx canadensis*) and the Western Prairie Fringed Orchid (*plantanthera praeclara*).

New Jersey has at least 14 federally listed species, including the threatened piping plover (*Charadrius melodus*), red knot (*Calidris canutus rufa*), and the recently designated New Jersey state reptile, the bog turtle (*Clemmys muhlenbergii*).

Pennsylvania has 19 federally listed and protected endangered or threatened species are known to occur in Pennsylvania, including the endangered rusty patched bumble bee (*Bombus affinis)* and Piping plover (*Charadrius melodus*) and the threatened northern long-eared bat (*Myotis septentrionalis*).

In short, as described above, the Final Rule threatens severe and irreversible impacts to numerous endangered and threatened species throughout the United States, including species within the territories of the undersigned states and territories.

II. CEQ Failed to Comply with its Mandatory Duty to Consult with the Services on the Final Rule's Impact to Listed Species

CEQ's revision of NEPA's implementing regulations is a discretionary action that required consultation under the ESA.[27] Despite the Final Rule's significant changes to NEPA's regulations, CEQ did not consult with the Services regarding the Final Rule's potential and, indeed, likely impacts to endangered and threatened species.[28] Instead, CEQ bypassed section 7's formal consultation process and concluded, without providing any meaningful analysis or supporting evidence, that the Final Rule will have "no effect" on listed species and critical habitat.[29]

CEQ's reasoning for not consulting under section 7 of the ESA is arbitrary and capricious and violates the ESA. In its Final Rule, CEQ asserts that it "determined that updating its regulations implementing the procedural provisions of NEPA has 'no effect' on listed species and critical habitat. Therefore, ESA section 7 consultation is not required."[30] CEQ stated it reviewed the rulemaking "to determine if it 'may affect' listed species or their designated critical habitat" and concluded that "[n]one of the changes to the 1978 regulations are anticipated to have environmental impacts, including potential effects to listed species and critical habitat."[31] In its response to comments, CEQ contends that consultation is not required because the Final Rule is "procedural in nature, and does not make any final determination regarding the level of

[27] 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

[28] 85 Fed. Reg. at 43,354-55.

[29] *Id.* at 43,354-55.

[30] *Id.* at 43,354.

[31] *Id.* at 43,354-55.

NEPA analysis required for particular actions."[32] These cursory explanations are wholly insufficient to avoid section 7 consultation.

First, "[t]he threshold for triggering the Endangered Species Act is relatively low: consultation is required whenever a federal action '*may affect* listed species or critical habitat.'"[33] As discussed, the Final Rule threatens significant harm to endangered and threatened species throughout the United States, and thus easily passes the low threshold required for triggering consultation. CEQ's contrary finding is unsupported and contradicted by CEQ itself. For one thing, CEQ asserts that reducing delay in the NEPA process will "expedite[] a plethora of logging, mining, transportation, and other projects."[34] CEQ fails to explain how expediting the approval process for federal projects which include ground-disturbing activities will have no effect whatsoever on listed species or critical habitat.

Second, CEQ's assertion that it need not consult with the Services because the Final Rule does not authorize any activity at the present time also violates the ESA. ESA consultation is required for programmatic agency actions that, like the Final Rule, authorize activity that harms listed species.[35] For example, the Ninth Circuit has held that ESA consultation was required before the U.S. Forest Service could repeal the National Roadless Rule, which generally prohibits roadbuilding and logging in "inventoried roadless areas" in the national forests but does not by itself authorize or prohibit any specific on-the-ground activity.[36]

Although the Final Rule significantly weakens NEPA's implementing regulations, CEQ did not identify, quantify, or consider the adverse impacts of this change on a programmatic level; nor did it consider the impacts to any specific threatened or endangered species prior to finalizing the rulemaking.[37] Instead, it arbitrarily asserts that there would be no impacts, categorically, to the approximately 1,800 listed species in the United States and hundreds of millions of acres of critical habitat, despite the diverse threats that each one faces. CEQ does not have the expertise or the statutory authority to determine that there will be no impacts to listed

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[32] *Id.* at 43,354.

[33] *California ex rel. Lockyer v. U.S. Dep't of Agric.*,575 F.3d 999, 1018 (9th Cir. 2009) (emphasis in original)(quoting 16 U.S.C. § 1536(a)(2).)

[34] 85 Fed. Reg. at 43,352 (claiming "there are no adverse environmental impacts" from the final rule.)

[35] *See Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1055 (9th Cir. 1994); *see also W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496-97 (9th Cir. 2011) (ESA consultation required before Bureau of Land Management could revise regulations governing the agency's grazing program nationwide); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059, 1097 (N.D. Cal. 2007) (consultation required before Forest Service could revise regulations governing development of forest management plans for the National Forests).

[36] *California ex rel. Lockyer*, 575 F.3d at 1019.

[37] 85 Fed. Reg. 43,354-55.

species from the Final Rule without seeking input from the Services. It is for precisely this reason that the consultation requirement exists.

By finalizing the Final Rule without first complying with the ESA's substantive and procedural requirements, CEQ has failed to ensure that its actions will not jeopardize the numerous listed species in the United States or adversely modify their critical habitat. This failure undermines the plain language and fundamental purposes of the ESA and violates the Act.[38]

If CEQ does not withdraw the Final Rule and begin consultation within 60 days, please be advised that we intend to commence litigation to compel CEQ to perform these duties. This letter provides the notice of intent to sue under section 11(g) of the ESA, to the extent such notice is required, and that parties other than the undersigned may join this litigation with respect to the claims covered by this notice.[39]

[38] 16 U.S.C. § 1531(b).

[39] *Id.* § 1540(g)(2)(A)(i).

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