

May 19, 2025

Via Federal eRulemaking Portal

Public Comments Processing
Attn: FWS-HQ-ES-2025-0034
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

**Re: Rescinding the Definition of “Harm” Under the Endangered Species Act;
FWS-HQ-ES-2025-0034**

On behalf of ten organizations, we write to comment on the proposal by the U.S. Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) (collectively “the Services”) to rescind the regulatory definition of “harm” under the Endangered Species Act (“ESA” or “the Act”). *See* Rescinding the Definition of “Harm” Under the Endangered Species Act, 90 Fed. Reg. 16,102 (proposed Apr. 17, 2025) (to be codified at 50 C.F.R. pts. 17, 222).¹

The signatories to this letter include the National Wildlife Federation, Arizona Wildlife Federation, Florida Wildlife Federation, Georgia Wildlife Federation, New Mexico Wildlife Federation, North Carolina Wildlife Federation, South Carolina Wildlife Federation, Association of Northwest Steelheaders, Conservation Council for Hawaii, and North American Grouse Partnership. All are organizations committed to the conservation of wildlife and, importantly, wildlife habitat, around the country. All are organizations committed to the conservation of wildlife and, importantly, wildlife habitat, around the country. As explained herein, the current proposal to rescind the decades-old definition of “harm” in federal regulations based on the Services’ sudden new, far narrower interpretation of the term runs counter to the Act’s fundamental purposes to protect and restore listed species and the ecosystems upon which they depend, and to the undersigned organizations’ commitment to preserving and restoring species and ecosystems throughout the southeastern United States and other regions of the country.

Conservation organizations have long recognized that restoration, management, and protection of habitat is essential to restoring and maintaining the rich diversity of wildlife in the United States. The National Wildlife Federation was established in 1936 and has worked with its state affiliate organizations to support science-based wildlife management, regulation of hunting and fishing, and protection and restoration of habitat to restore and maintain fish and wildlife. The Association of Northwest Steelheaders was founded in 1960 and is a sport fishing advocacy organization of anglers in the Pacific Northwest dedicated to enhancing and protecting fisheries and their habitats for today and tomorrow. The North American Grouse Partnership was established in 1999 and works to protect declining grouse species and their habitats by ensuring

¹ Because the Services treat the FWS regulatory definition and the NMFS regulatory definition of “harm” as being “materially identical,” 90 Fed. Reg. at 16,103, they are referred to throughout this letter as being a single operative interpretation of the meaning of “harm” under the statute.

that science-based public policies and on-the-ground land management decisions lead to positive outcomes for grouse.

For over 50 years, through twenty-five congressional terms and ten presidential administrations, prohibited take of endangered fish and wildlife under the ESA has included significant modification or degradation of habitat where it actually kills or injures the species. The ESA's protections for imperiled species and their habitat have long conserved and prevented the decline of both listed and unlisted species. Habitat restoration for game species benefits endangered species, and habitat protection and restoration for endangered species benefits game species. For example, protection and restoration of wetland habitats on the Gulf coast and in the prairie region benefits ducks and endangered whooping cranes, Mississippi sandhill cranes, and many other wetland-dependent species. Restoration of longleaf pine forests and savannas in the South creates habitat for bobwhite quail and threatened red-cockaded woodpeckers, along with hundreds of other plants and animals, many endangered or threatened. Restoration of streams for threatened native trout in the West benefits other threatened and endangered fish and amphibians and creates backcountry fishing opportunities for many. The Services' proposal to rescind and reinterpret the longstanding definition of "harm" would jeopardize these protections.

As a preliminary matter, the Services' proposal is unnecessary and not called for by the Supreme Court's recent holding in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024), a case that pertains only to standards of judicial review. At any rate, the Services' current definition of "harm" already represents the single best meaning of the term. Any suggestion to the contrary is belied by the Supreme Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) and the myriad interpretive tools relied on therein. Habitat loss is the single most important factor behind both the listing and recovery of protected species. To attempt to remove habitat degradation and destruction from regulation by rescinding the definition of harm and relying on a new interpretation of the term would gut the purpose of the ESA "to provide a means whereby *the ecosystems* upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b) (emphasis added).

Furthermore, the Services' proposal is procedurally flawed in violation of the Administrative Procedure Act ("APA"), the National Environmental Policy Act ("NEPA"), and the ESA's consultation requirements. The proposed rescission and change in interpretation of "harm" would have significant consequences by reversing 50 years of long-standing interpretation upon which numerous industries and organizations have relied. Yet the Services have failed to provide any legitimate justification for this reversal and failed to comply with notice and comment rulemaking requirements in violation of the APA. Moreover, the proposal will have far reaching impacts on the environment and listed species. Two-thirds of federally listed species rely on habitat on non-federal lands; approximately half of listed species have at least 80% of their habitat on non-federal lands, and 76 listed vertebrates and invertebrates occur solely on non-federal lands. Meanwhile, the Services identify habitat loss or modification as a factor in the listing and/or recovery of 330, or 92%, of 358 species or subspecies of United States vertebrate animals currently listed as endangered or threatened. If private actors no longer need incidental take permits for activities that significantly modify habitat, irreversible harm to species will proceed without any evaluation of whether these harms "appreciably reduce the likelihood of the [species'] survival and recovery." 16 U.S.C. § 1539(a)(2)(B)(iv). Thus, the proposed rescission and change in interpretation must be reviewed as a major federal action in an

environmental impact statement under NEPA and must undergo Section 7 consultation under the ESA.

I. Background

In shaping legislation to address species extinction, Congress started from the finding that destruction and degradation of natural habitats are the primary drivers of extinction and biodiversity loss across the United States. *See TVA v. Hill*, 437 U.S. 153, 178–79 (1978) (citing legislative history, including H.R. Rep. No. 93-412 (1973) and S. Rep. No. 93-307 (1973)). Despite substantial efforts to prevent extinction, however, biodiversity loss remains a significant and rapidly increasing problem. Habitat degradation and loss are still the leading causes of extinction, a problem that will only get worse with climate change.² If we are to remain committed to the goals of the ESA in the face of these challenges, protecting habitat to provide for the survival and recovery of listed species is of paramount importance.

In light of this overarching purpose of the ESA, the Services have consistently interpreted and implemented Section 9, governing the “take” of listed species, to prohibit significant habitat modification and degradation that actually kills or injures endangered or threatened fish and wildlife since the Act was first passed in 1973. Under the Act, take “means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). While the Act does not define the term “harm,” just eighteen months after the Act was passed, FWS proposed and then promulgated the original definition of “harm” in 1975. *See* Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,413 (Sept. 26, 1975) (codified at 50 C.F.R. pt. 17). In promulgating this definition, FWS explained that it was consistent with the Act’s emphasis on “the habitat needs of listed species”: “Congress specifically acknowledged these needs by stating . . . [t]he purposes of this Act are to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved[.]” *Id.* (quoting 16 U.S.C. § 1531(b)). The 1975 regulation included the core elements that remain today: harm was defined as “an act or omission which actually injures or kills wildlife, including acts which . . . significantly disrupt essential behavioral patterns,” such as “breeding, feeding or sheltering,” and “significant environmental modification or degradation which has such effects.” 50 C.F.R. § 17.3 (1975).

FWS made a minor clarification of the definition in 1981 to confirm that the requirement of actual death or injury applied to habitat modification. Endangered and Threatened Wildlife and Plants; Final Redefinition of “Harm,” 46 Fed. Reg. 54,748 (Nov. 4, 1981) (codified at 50 C.F.R. pt. 17). In making this clarification, FWS retained an explicit reference to harm from habitat modification and degradation, emphasizing that “Congress made its intent to protect species and their habitat very clear” and “intended to create a definition of take which included all of the various ways of killing or injuring protected wildlife.” *Id.* at 54,749. In this manner, the 1981 modification reinforced the original intent of FWS’ 1975 rulemaking: to recognize harm as

² *See, e.g.,* David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States: Assessing the Relative Importance of Habitat Destruction, Alien Species, Pollution, Overexploitation, and Disease*, 48 BIOSCIENCE 607, 609, 613–14 (Aug. 1998), Attachment 02.

encompassing habitat modification and degradation and to limit the prohibition on harm to only those “actions causing actual death or injury.” 40 Fed. Reg. at 44,413.

FWS’ harm definition has remained unchanged since 1981 and was upheld by the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* in 1995. 515 U.S. at 695. The substantially similar NMFS definition of harm was adopted in 1999. Endangered and Threatened Wildlife and Plants; Definition of “Harm,” 64 Fed. Reg. 60,727, 60,727 (Nov. 8, 1999) (codified at 50 C.F.R. pt. 222). NMFS emphasized that the definition was “not a change in existing law” but rather merely sought to affirm that NMFS’s “interpretation of harm is consistent with that of FWS.” *Id.* NMFS further emphasized that, based on “the text contained in the ‘Purposes’ subsection” as well as “the structure and legislative history of the ESA,” the definition effectuated a “Congressional intent to protect the habitats of listed species.” *Id.*

II. There Is No Need to Revisit the Regulatory Definition of “Harm” in Light of *Loper Bright*.

As a threshold matter, the Services appear to contend that they should revisit the regulatory definition of the term “harm” in light of the Supreme Court’s recent decision in *Loper Bright*. *See* 90 Fed. Reg. at 16,103–04. This is not so. *Loper Bright* does not call for new rulemakings, but rather addresses the standard of review courts must use to evaluate agency interpretations of law.

For 40 years, federal courts were instructed to defer—in varying ways—to agency interpretation of statutory language. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). On June 28, 2024, the Supreme Court overruled *Chevron* in *Loper Bright*. *Loper Bright*, 603 U.S. at 412. The Court, abolishing the two-step *Chevron* deference analysis, reaffirmed that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Id.* at 385 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). In *Loper Bright*, the Court held that, rather than deferring to agency interpretation, the courts should determine the single “best” meaning of statutory language. *Id.* at 400.

But *Loper Bright* does not require rescinding the current definition of harm. To the contrary, *Loper Bright* instructs that prior cases that merely relied on the governing standard at the time (*Chevron* deference) need not be revisited. *Id.* at 412. The Supreme Court has long recognized that “overturning a long-settled precedent . . . require[s] ‘special justification,’ not just an argument that the precedent was wrongly decided.” *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). In the words of the *Loper Bright* Court, “[m]ere reliance on *Chevron* cannot constitute a special justification for overruling such a holding.” *Loper Bright*, 603 U.S. at 412 (citation and internal quotations omitted). In its guidance to lower courts, the Court explained that it was not “call[ing] into question prior cases that relied on the *Chevron* framework.” *Id.* The *Loper Bright* Court further explained that “[t]he holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite [the Court’s] change in interpretive methodology.” *Id.* (citing *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008)); *see also Halliburton*, 573 U.S. at 266.

Here, the Services do not, and cannot, provide any “special justification” for attempting to overturn the long-settled holding of *Sweet Home*. *Halliburton*, 573 U.S. at 266. In *Sweet Home*, the Supreme Court upheld the regulatory definition of “harm” and conducted a searching analysis that affirmed that definition as the correct statutory interpretation of the ESA’s “take” prohibition. *See Sweet Home*, 515 U.S. at 690–714. The Court’s holding was broad, noting that “based on the text, structure, and legislative history of the ESA, . . . the Secretary reasonably construed the intent of Congress when he defined ‘harm’ to include ‘significant habitat modification or degradation that actually kills or injures wildlife.’” *Id.* at 708. The mere fact that this conclusion was reached under *Chevron*, the prevailing standard at the time, is of no moment. As explained in Section III below, any attempt to reinterpret the current definition of “harm” is futile as the current definition constitutes the single best meaning of the ESA.

III. The Current Definition of Harm Is the “Single Best Meaning” of That Term Under *Loper Bright*.

As explained above, nothing in *Loper Bright* requires the Services to revisit the regulatory definition of harm. Despite this lack of necessity, it appears that the Services’ intent is to improperly reinterpret the term “harm,” without notice and comment rulemaking, *see* Section IV *below*, to apply only to an “affirmative act[] . . . directed immediately and intentionally against a particular animal.” 90 Fed. Reg. at 16,103 (quoting *Sweet Home*, 515 U.S. at 719–20 (Scalia, J. dissenting)).

A. The Supreme Court in *Sweet Home* Conducted a *Loper Bright* Analysis when It Upheld the Current Definition of Harm.

The Supreme Court in *Sweet Home* determined that the current definition of harm was what Congress intended “harm” to mean when it enacted the ESA. As discussed below, rather than simply concluding the current definition found in the federal regulations was reasonable, the *Sweet Home* Court conducted a thorough investigation, utilizing traditional tools of statutory interpretation, to determine Congress’ intent in enacting the Act. Moreover, the *Sweet Home* Court went further and explained that limiting harm to direct and deliberate actions is actually *contrary* to the text and purpose of the Act. The Court’s careful and thorough reasoning remains sound under *Loper Bright*.

The *Sweet Home* Court concluded that the text of the Act supported including habitat modification and degradation in the definition of harm for three reasons. First, the Court explained that the ordinary understanding of “harm” supported the Services’ current regulatory definition of the term. *Sweet Home*, 515 U.S. at 697. Harm means to “cause hurt or damage to: injure.” *Id.* This certainly includes habitat modification that *actually kills or injures* wildlife. *Id.* Nothing in the dictionary definition of “harm,” the Court reasoned, included a requirement that it be limited to direct or willful action. *Id.* Moreover, the Court noted that to limit “harm” to such direct or willful actions would result in a statutory surplusage given that direct harm is already encompassed by the other terms used to define “take.” *Id.* at 697–98.

Second, the Court went on to conclude that the express purposes of the ESA support an interpretation that includes habitat modification within the definition of harm. The Court recognized in *TVA v. Hill*, and again in *Sweet Home*, that the Act is “the most comprehensive

legislation for the preservation of endangered species ever enacted by any nation.” *Sweet Home*, 515 U.S. at 698 (quoting *Hill*, 437 U.S. at 180). The Act was passed to “halt and reverse the trend toward species extinction.” *Id.* at 699 (quoting *Hill*, 437 U.S. at 184). Moreover, among the central purposes of the Act was “provid[ing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” *Id.* at 698 (quoting 16 U.S.C. § 1531(b)). And the Act applied to all land in the United States and to the Nation’s territorial seas. *Id.* Reading “harm” to encompass habitat modification and degradation that actually kill or injure listed species, the Court reasoned, is thus consistent with Congress’ intent in enacting the ESA. *Id.* at 699.

Third, the Court considered the 1982 amendment to the ESA. At the time of this amendment, harm was defined, as it is now, to include habitat destruction and degradation. Congress did nothing to change this definition. Instead, Congress authorized the Secretary to issue permits for take that is *otherwise prohibited*, but which is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” *Id.* at 700 (quoting 16 U.S.C. § 1539(a)(1)(B)). The Court noted that this amendment would make little sense if Congress intended “harm” under the ESA to only include direct, deliberate takings. *Id.* at 700–01. Indeed, this prohibition suggests just the opposite—that Congress understood Section 9’s take prohibition to prohibit indirect, as well as deliberate takings. *Id.* But under the Services’ apparent new understanding of “harm”—limiting it to direct, deliberate actions against individual listed species—the incidental take permit procedure would have little to no purpose. *Id.* “No one could seriously request an ‘incidental’ take permit to avert § 9 liability for direct, deliberate action against a member of a[] [listed] species.” *Id.*

As for statutory context, the Court reasoned that Congress intended “harm” to “serve a particular function in the ESA, consistent with, but distinct from, the functions of the other verbs used to define ‘take.’” *Id.* at 702. The current definition of “harm” does just that by including indirectly injuring listed species through habitat modification—that gives the term “a character of its own *not* to be submerged by its association.” *Id.* (emphasis added).

Turning to legislative history, the Court noted that the Committee Reports “*make clear* that Congress intended ‘take’ to apply broadly to cover indirect as well as purposeful actions.” *Id.* at 704 (emphasis added). Notwithstanding the Services’ unsubstantiated claim that the term “take” has a centuries-old meaning, 90 Fed. Reg. at 16,103, “[t]he Senate Report *stressed* that “‘take’ is defined . . . *in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.*” *Sweet Home*, 515 U.S. at 704 (emphasis added) (quoting S. Rep. No. 93-307, at 7 (1973)). This established Congress’ intent to broaden the term take. Similarly, the House Report noted that “‘the *broadest possible* terms’ were used to define restrictions on takings.” *Id.* (emphasis added) (quoting H.R. Rep. No. 93-412, at 15 (1973)). The Report went as far as to explain that the definition of “take” would allow “the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.” *Id.* at 705 (quoting H.R. Rep. No. 93-412, at 11 (1973)).

Last, the Court explained that the legislative history underlying the 1982 amendment giving the Secretary authority to grant incidental take permits also supported a broad reading of “harm.” *Id.* at 707. For that amendment, the House Report stated that “by use of the word

‘incidental’ the Committee intends to cover situations in which it is known that a taking will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity.” *Id.* (quoting H.R. Rep. No. 97-567, at 31 (1982)). “Indeed, Congress had habitat modification directly in mind: Both the Senate and the House Conference Report identified as the model . . . a case in California where a development project threatened incidental harm to a species . . . *by modification of its habitat.*” *Id.* (emphasis added) (citing S. Rep. No. 97-418, at 10 (1982); H.R. Conf. Rep. No. 97-835, at 30–32 (1982)).

To be sure, the Court’s final conclusion in *Sweet Home* was that the interpretation was “reasonable” under *Chevron*, *id.* at 708, but that was merely because the operative standard of review at the time was *Chevron*. But the *Sweet Home* Court’s thorough review of the Act’s text, structure, and legislative history *is the precise analysis* required by *Loper Bright* to determine the best meaning of the statute. *See Loper Bright*, 603 U.S. at 408–09 (emphasizing that a statute’s “best meaning” is discerned when a court “deploy[s] its full interpretive toolkit”). Stated differently, the *Sweet Home* Court’s analysis is equivalent to the *Loper Bright* analysis required for determining the best meaning of a statute. Moreover, even if the Services disagree with this statement—that the *Sweet Home* Court determined the current definition is the best meaning—it is clear enough that the Court determined that the traditional tools of statutory interpretation *do not* support limiting “harm” to deliberate actions of hunters and trappers, which appears to be the intent of the Services here. *See* 90 Fed. Reg. at 16,103; *Sweet Home*, 515 U.S. at 697–702, 705.

The Services’ intent thus appears to be to reverse settled Supreme Court precedent, which was neither re-opened nor called into question by *Loper Bright*. Indeed, the existing definition is precisely the kind of stable interpretation, refined over 50 years of application by the agencies and the courts, for which respect is “especially warranted.” *Loper Bright*, 603 U.S. at 386, 402 (counseling in favor of respect for agency interpretations that were “issued roughly contemporaneously with enactment of the statute and remained consistent over time” and “rest[] on factual premises within [the agency’s] expertise”).

B. Decades of Applying the Current Definition of Harm and the Importance of Habitat to Listed Species Underscores That the Current Definition Is the Best Reading of the ESA.

In addition to ignoring the history of the Act and its explicit focus on habitat, the Services’ proposal to change their interpretation of “harm” to omit injury and death resulting from habitat modification and their reliance on the *Sweet Home* dissent ignores decades of application, the structure of the ESA, and on-the-ground facts regarding the critical importance of habitat as a factor in species decline and recovery.

For example, the three decades of application following *Sweet Home* have reinforced the strength of its holding and undermined the dissent’s catastrophizing. The Services and the courts have repeatedly read and applied the harm definition to include the limitations emphasized in the *Sweet Home* concurrence. *See, e.g., Cascadia Wildlands v. Scott Timber Co.*, 105 F.4th 1144, 1156 (9th Cir. 2024). Such application has confirmed that the two main features the *Sweet Home* dissent argued would violate the ESA—a failure to require death or injury to individual members of a species and a failure to require proximate causation—are *not* in fact part of the regulatory definition. *Compare Sweet Home*, 515 U.S. at 715–16 (Scalia, J., dissenting), *with, e.g.,*

Cascadia Wildlands, 105 F.4th at 1156 (applying “harm” to require injury to individual members of a species), and *Aransas Project v. Shaw*, 775 F.3d 641, 656–58 (5th Cir. 2014) (applying “harm” to require proximate causation).³ Thus, the existing harm definition not only represented the best reading of the ESA when *Sweet Home* was decided, but its validity has also been borne out in the thirty years of application since.

Moreover, as discussed above, the focus on habitat permeates the statute: the first stated purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). “Conserve” and “conservation” are defined to include “habitat acquisition and maintenance.” 16 U.S.C. § 1532(3). The first factor for listing a species as endangered or threatened in Section 4 of the Act is “the present or threatened destruction, modification, or curtailment of its habitat or range.” 16 U.S.C. § 1533(a)(1)(A). In enacting and amending the ESA, Congress recognized protecting and restoring habitat is essential to achieving the goals of the Act. The first congressional finding in enacting the ESA in 1973 notes that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation.” 16 U.S.C. § 1531(a)(1).

Numerous sections of the Act reinforce this goal. Section 4 of the Act directs the Services concurrently with listing a species as endangered or threatened to “designate any habitat of such species which is then considered to be critical habitat.” 16 U.S.C. § 1533(a)(3)(A)(i). Section 7 of the Act requires all federal agencies to ensure any agency action “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat of such species. 16 U.S.C. § 1536(a)(2). Section 9 of the Act prohibits the “take” of fish and wildlife species, which includes “harm.” 16 U.S.C. §§ 1538(a)(1); 1532(19). Consistent with congressional intent and the structure and language of the statute, “harm” was defined nearly contemporaneously with enactment of the Act to “include significant habitat modification or degradation where it actually kills or injures wildlife.” 50 C.F.R. § 17.3; *see* 40 Fed. Reg. at 44,413. Finally, Congress amended the Act in 1982 by in part adding Section 10, which establishes processes to issue incidental take permits mitigated by habitat conservation plans (“HCPs”). 16 U.S.C. § 1539(a).

The fact that the Act prioritizes habitat is no surprise. It mirrors the real world, where “there is no disagreement in the ecological literature about one fundamental relationship: sufficient loss of habitat will lead to species extinction.”⁴ Indeed, habitat destruction and degradation are the leading causes of species imperilment and extinction, both in the United

³ Additionally, the harm definition’s limitations have ensured that, contrary to the dissent’s catastrophizing, the definition has not in fact “impose[d] unfairness to the point of financial ruin” or “conscripted” swaths of private land “to national zoological use,” *Sweet Home*, 515 U.S. at 714; rather, it has engendered a balanced framework that regularly allows private actors to proceed with their activities pursuant to mitigation measures, *see* U.S. FWS, *Habitat Conservation Plans*, <https://www.fws.gov/service/habitat-conservation-plans>, Attachment 03.

⁴ NAT’L RSCH. COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT 72 (1995), Attachment 04.

States and around the world.⁵ The current global extinction rate is tens to hundreds of times higher than the background rate of extinction.⁶

Several assessments have identified loss, degradation, or modification of habitat as the primary cause of species decline leading to endangered, threatened, or imperiled status. Wilcove, et al., in 2000 found “[h]abitat destruction and degradation, not surprisingly, emerge as the most pervasive threat to U.S. biodiversity, contributing to the endangerment of 85% of the species . . . analyzed.”⁷ This assessment examined threats to 1,880 species of imperiled or endangered plants and animals in the United States.⁸ Relevant to harm from prohibited take of fish or wildlife, it found habitat loss or degradation affected 89% of mammals, 90% of birds, 97% of reptiles, 87% of amphibians, 94% of fish, 97% of mussels, 52% of crayfish, and 97% of butterflies.⁹ Haines, et al., in 2021 examined the listing of 1,730 native species and reaffirmed that habitat modification remains the leading cause of species being listed as endangered or threatened.¹⁰ Finally, Leu, et al. in 2017 examined the temporal trends in threats leading to the listing of species as endangered or threatened between 1975 and 2017.¹¹ This assessment “found that habitat loss continues to be a top threat through time causing species to require federal protection” and “[t]he number of native species in the United States impacted by habitat loss at time of listing continues to increase.”¹² In sum, all reported assessments identify loss, degradation, or modification of habitat as the leading cause of species becoming endangered or threatened in the United States.

In listing a species as endangered or threatened, conducting status reviews, or developing recovery plans, the Services have often determined that loss, modification, or degradation of habitat is a causative factor, and often the primary factor, in the animal’s endangered status or is a significant threat to its recovery. We have reviewed Service documents for 358 vertebrate animal

⁵See, e.g., Stuart L. Pimm et al., *The Biodiversity of Species and Their Rates of Extinction, Distribution, and Protection*, 344 SCI. 1246752-1, 1246752-5 (2014), Attachment 05; Aaron S. Hogue & Kathryn Breon, *The Greatest Threats to Species*, CONSERVATION SCI. & PRAC., Feb. 2022, at 1, 4, Attachment 06; David S. Wilcove et al., *Leading Threats to Biodiversity: What’s Imperiling U.S. Species*, in PRECIOUS HERITAGE: THE STATUS OF BIODIVERSITY IN THE UNITED STATES 240, 242 (Bruce Stein et al. eds., 2000), Attachment 07.

⁶ INTERGOVERNMENTAL SCI.-POL’Y PLATFORM ON BIODIVERSITY & ECOSYSTEM SERVS., SUMMARY FOR POLICYMAKERS OF THE IPBES GLOBAL ASSESSMENT REPORT ON BIODIVERSITY AND ECOSYSTEM SERVICES 12 (Sandra Díaz et al. eds., 2019), Attachment 08.

⁷ David S. Wilcove et al., *Leading Threats to Biodiversity: What’s Imperiling U.S. Species*, in PRECIOUS HERITAGE: THE STATUS OF BIODIVERSITY IN THE UNITED STATES 240, 242–43 (Bruce Stein et al. eds., 2000), Attachment 07.

⁸ *Id.* at 243.

⁹ *Id.* at 243.

¹⁰ Aaron M. Haines et al., *Benchmark for the ESA: Having a Backbone Is Good for Recovery*, 2 FRONTIERS IN CONSERVATION SCI. 1, 3, 7 fig.3 (2021), Attachment 09.

¹¹ Matthias Leu et al., *Temporal Analysis of Threats Causing Species Endangerment in the United States*, CONSERVATION SCI. & PRAC., Apr. 2019, at 1, Attachment 10.

¹² *Id.* at 6, 7.

species or subspecies¹³ currently listed as endangered or threatened in the United States to determine whether the relevant Service has identified habitat loss, degradation, or modification as a factor in listing the species or in its recovery. Attachment 1 presents the results of that review. As noted earlier, the Services identify habitat loss or modification as a factor in the listing and/or recovery of 330, or 92%, of 358 species or subspecies of United States vertebrate animals currently listed as endangered or threatened. This includes 32, or 94%, of amphibians; 34, or 100%, of reptiles; 129, or 94%, of fishes; 77, or 96%, of birds; and 58, or 81%, of mammals.¹⁴

In sum, to conclude that prohibited harm to fish and wildlife does not include significant modification or degradation of habitat where it actually kills or injures the species ignores Supreme Court precedent upholding the current definition and rejecting the Services' new interpretation; ignores Congressional purpose and intent in enacting the ESA; ignores the language of the statute, the structure of the statute, and the amendment of the statute; and ignores, to a significant extent, common sense. For these reasons, the current proposed rescission of the harm definition and policy change violates the intent and purposes of the statute.

IV. The Services' Proposal to Reverse Their Longstanding Interpretation of "Harm" Violates the Requirements of the APA.

In addition to being unnecessary and contrary to the best reading of the ESA, the Services' proposal also violates the legal requirements for agency decisionmaking. The APA, 5 U.S.C. §§ 551 *et seq.*, "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). "One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). Thus, the APA directs reviewing courts to "hold unlawful and set aside" agency actions that are "without observance of procedure required by law" or are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).¹⁵

When agencies "change their existing policies," they must, at minimum, acknowledge the policy change and "provide a reasoned explanation for the change." *Encino Motorcars*, 579 U.S. at 221. And in circumstances such as this, when the agency's "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account," the agency must go a step further and "provide a more detailed justification than what would suffice for a new policy

¹³ Species listed as multiple distinct population segments are treated as one species and species listed based on similarity of appearance are not included.

¹⁴ SELC Review of Listed Vertebrates Threatened by Habitat Loss (2025), Attachment 01.

¹⁵ An agency action is arbitrary and capricious and unlawful under the APA where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

created on a blank slate.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Failure to do so is arbitrary and capricious. *Id.*

Here, the Services’ proposal to reverse their longstanding interpretation of the term “harm” would both constitute an arbitrary and capricious change in policy and flout the procedural requirements of the APA.

A. The Services’ Proposal to Reverse Course on Their 50-Year Understanding of “Harm” Is Arbitrary and Capricious.

In their Federal Register notice, the Services evince their intent to reverse course on the interpretation of “harm” that each agency has consistently applied since the inception of the ESA more than 50 years ago.¹⁶ Suddenly, the Services now claim that this same longstanding definition, which was affirmed by the Supreme Court in *Sweet Home*, 515 U.S. at 707–08, is “legally incorrect.” 90 Fed. Reg. at 16,104.

Specifically, the Services claim that interpreting “harm” to “prohibit actions that impair the *habitat* of protected species” does not “reflect the best reading of the statute.” *Id.* at 16,103 (emphasis added). Elaborating on this, the Services cite to the dissenting opinion in *Sweet Home* for the proposition that a better interpretation of “harm,” in their view, would “be construed to require an ‘affirmative act[] . . . directed immediately and intentionally against a particular animal—not [an] act[] or omission[] that indirectly and accidentally cause[s] injury to a population of animals.’” *Id.* (citing *Sweet Home*, 515 U.S. at 719–20 (Scalia, J., dissenting)). Setting aside the many legal issues with this interpretation discussed elsewhere in this comment letter,¹⁷ the Services’ proposal to suddenly reverse their understanding of “harm” after 50 years of consistently implementing the term to include significant habitat modification or degradation that actually kills or injures wildlife, and more than 30 years after the Supreme Court affirmed that interpretation of the statute in *Sweet Home*, is arbitrary and capricious under the APA for several reasons.

First, as previously discussed, *see* Section II, the Services’ reliance on *Loper Bright* as justification for why the agencies are now allegedly justified in adopting a new reading of this provision of the ESA is disingenuous. 90 Fed. Reg. at 16,103–04. As *Loper Bright* made clear, statutory interpretation is the domain of the courts, *Loper Bright*, 603 U.S. at 412, and the U.S. Supreme Court has already ruled on the meaning of “harm” as understood by the Services and Congress for the last half-century. *Sweet Home*, 515 U.S. at 708. The Services are not legal experts, and they have proffered no rationale for why they now suddenly disagree with the Supreme Court’s thorough legal analysis in *Sweet Home* beyond broadly summarizing arguments

¹⁶ The FWS definition of “harm” as encompassing “significant . . . modification or degradation” of habitat “which actually injures or kills wildlife” was first codified in 1975. 40 Fed. Reg. at 44,416. While NMFS did not propose to codify its definition until 1998, it explicitly stated at the time that it had already been applying this understanding of “harm” prior to that codification. Endangered and Threatened Wildlife and Plants; Definition of “Harm,” 63 Fed. Reg. 24,148, 24,149–50 (proposed May 1, 1998) (to be codified at 50 C.F.R. pt. 222); *see also* 64 Fed. Reg. 60,727 (Nov. 8, 1999) (final NMFS rule).

¹⁷ *See supra* Section III.

raised by the dissent in *Sweet Home*, all of which were addressed and rejected by the majority and concurring opinions.¹⁸

Furthermore, the Services have not identified any practical reasons to support a sudden change in interpretation to exclude habitat modification and destruction from “harm,” nor have they even acknowledged the implications that such a dramatic change in position would have on their administration of the ESA. As discussed above in Section III, for example, the desire to better regulate and mitigate harm to species arising from development-related habitat destruction on private lands formed the backbone of the Section 10 incidental take permitting program that Congress adopted in its amendments to the ESA in 1982. *See, e.g.*, H.R. Conf. Rep. No. 97-835, at 30–32 (1982). Yet here the Services have completely failed to acknowledge how changing their interpretation of “harm” to exclude habitat degradation would conflict with the Section 10 incidental take permitting scheme and disrupt the implementation of Section 10 HCPs that are required under the statute. 16 U.S.C. § 1539(a)(2).

Likewise, the Services have not shown any consideration of how this change in their longstanding interpretation of “harm” would interact with any other components of the ESA, including incidental take statements (“ITSs”) issued for federal projects as part of the Section 7 consultation process. *See* 16 U.S.C. § 1536(b)(4). These oversights are particularly egregious in light of the fact that 50 years of implementation of Sections 7 and 10 have led to the growth of an entire conservation-banking industry and attendant financial markets over the last several decades. Additionally, the Services fail to consider the many public benefits conferred by lands enrolled in HCPs, safe harbor agreements, and candidate conservation agreements with assurances—all of which are based around mitigating and avoiding “take” from habitat destruction and degradation—and fail to consider how their proposed interpretive change would interact with these programs and hamstring entities like state wildlife agencies that may rely on these habitat conservation mechanisms and associated programs like HCP land acquisition grants to achieve their conservation obligations.

The Services appear to either be unaware of the potential far-reaching impacts of their proposed change in interpretation, or to be intentionally obfuscating and disregarding the effects that such a dramatic shift in statutory interpretation could have on ESA implementation. Either way, the public is being deprived of the opportunity to meaningfully comment on the true scope of the action being proposed by the Services here, in violation of the APA.

Because the Services’ proposed policy reversal goes against half a century of consistent understanding and implementation of the ESA, and because those decades of implementation have “engendered serious reliance interests that must be taken into account,” the Services are obligated under the APA to “provide a more detailed justification than what would suffice for a new policy created on a blank slate.” *Fox*, 556 U.S. at 515. The Services have failed in that obligation, and they have failed to provide a “reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy,” *id.* at 515-16, or even to candidly acknowledge their change in position and “at least . . . ‘show that there are good reasons for the new policy.’” *Encino Motorcars*, 579 U.S. at 221 (citing *Fox*, 556 U.S. at 515). The

¹⁸ The agencies’ verbatim recitation of portions of the dissenting opinion does not substitute for actual analysis here.

Services' invitation for comment on "reliance interests" does not absolve them from these failings; at best it portends the Services' intention to attempt to paper over these defects at the final rule stage without seriously considering the concerns that commenters may raise.

Rather than being a carefully considered agency decision rooted in any sort of expertise, the Services' proposal thus reveals itself to be the arbitrary product of shifting political whims—precisely the type of vacillation that *Loper* was intended to discourage.

B. The Services' Proposal Would Violate the APA's Notice and Comment Rulemaking Requirements.

As discussed above, the Services propose to rescind the definition of "harm" from their regulations implementing the ESA because, for the first time in more than 50 years, they no longer believe that the meaning of "harm" under the ESA should be read to "prohibit actions that impair the habitat of protected species." *See* 90 Fed. Reg. at 16,103. Instead, under the Services' new understanding expressed in the Federal Register notice, the ESA's prohibition on "harm" would only apply to an "affirmative act[] . . . directed immediately and intentionally against a particular animal." *Id.*

The Services now claim that in the absence of a rule defining "harm," their decision to interpret and implement the ESA in this completely novel way would merely "rest on the statutory definition of 'take.'" *Id.* at 16,103.¹⁹ This stated rationale is circular and unavailing. Under the APA, an agency may not elect to leave the public in the dark, and replace longstanding regulatory certainty with new murky agency discretion, in an effort to shield the agency's own actions from judicial review.

Precedent reflects this. The U.S. Supreme Court has recognized that an agency cannot "skirt notice-and-comment" requirements under the APA by "issu[ing] an interpretive rule, rather than a legislative rule." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 105 (2015). Here, the Services' actions are even worse—they expect the public to ascertain their policy change from the general preamble discussion of the federal register notice at issue here. And federal courts of appeal have determined that a purportedly interpretive rule in fact adds substance (i.e. has legal effect or establishes a binding norm) making it a legislative rule that requires notice and comment rulemaking if it meets any one of the following four factors: (1) "in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties," (2) "the agency has published the rule in the Code of Federal Regulations," (3) "the agency has explicitly invoked its general legislative authority," or (4) "the rule effectively amends a prior legislative rule." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *see also Sweet v. Sheahan*, 235 F.3d 80, 91 (2d Cir. 2000) (applying *American Mining* factors); *Hemp Indus. Ass'n v. Drug Enf't Admin.*, 333 F.3d 1082, 1087 (9th Cir. 2003) (adopting factors 1, 3, and 4 of the *American Mining* test).

¹⁹ The ESA defines the verb "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

All of those factors apply here to counsel that the Services must treat their change in interpretation of the meaning of “harm” as a legislative rule, with a new definition codified in the Code of Federal Regulations, that undergoes notice and comment rulemaking. The Services’ effort to skirt this rulemaking requirement is impermissible under the APA. *See, e.g., Elec. Priv. Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 5–8 (D.C. Cir. 2011) (rejecting agency’s effort to categorize its action as an interpretive rule or a policy statement and remanding to the agency to conduct notice and comment rulemaking).

V. Rescinding and Reinterpreting the Definition of “Harm” Is a Major Federal Action That Requires NEPA Review.

The Services assert that no NEPA review of this proposal is necessary – in fact, they contend that this proposed rescission and policy change to interpret harm to exclude habitat destruction qualifies for a categorical exclusion from NEPA review. This assertion is wrong and belied by the statute, NEPA regulations, and caselaw.

A. The Services Cannot Rely on a Categorical Exclusion.

Despite the environmental consequences of the proposed rescission and accompanying policy change, the Services contend that they need not prepare *any* environmental document under NEPA. In an attempt to justify this conclusion, the Services state that: 1) they “believe [the rescission and policy change are] compelled by the best reading of the statutory text” and therefore a nondiscretionary action, and 2) in the alternative, the rescission and policy change are subject to a categorical exclusion for actions that have “no significant individual or cumulative effect on the quality of the human environment.” 90 Fed. Reg. at 16,104. The Services’ reversal of their 50-year-old interpretation of harm is neither mandatory nor insignificant, and the Services must conduct a thorough NEPA review of this proposal.

First, the Services cannot absolve themselves of the duty to evaluate environmental effects by labeling their action “nondiscretionary.” 42 U.S.C. § 4336(a)(4). Nondiscretionary actions are those agencies are legally obligated to carry out. NEPA does not require the preparation of environmental documents for such actions because agencies are compelled to execute them, regardless of what any environmental document might reveal. 42 U.S.C. § 4336(a)(4); *see also Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (holding that agency was not required to conduct NEPA analysis where it had “no ability” to adopt a different course of action and “lack[ed] the power to act on whatever information” an EIS might reveal).

The rescission and policy change do not fall within this NEPA exception because this action is not “compelled.” 90 Fed. Reg. at 16,104. Indeed, *Sweet Home* rejected arguments that Congress had intended the Services’ current proposed interpretation. *Sweet Home*, 515 U.S. at 703. The ESA cannot “compel” the proposed reinterpretation when the Supreme Court has already rejected this meaning. To the extent the Services attempt to bolster their claim with an appeal to *Loper Bright*, *see* 90 Fed. Reg. at 16103–04, this argument fails. As explained above, *see supra* Section II, *Loper Bright* did “not call into question prior cases that relied on the *Chevron* framework.” *Loper Bright*, 603 U.S. at 412.

Turning to the Services’ alternative claim, the rescission and policy change are not covered by any categorical exclusions. Categorical exclusions are defined as “a category or kind

of action that has no significant individual or cumulative effect on the quality of the human environment.” 43 C.F.R. § 46.205; *see* NAT’L OCEANIC & ATMOSPHERIC ADMIN., POLICY AND PROCEDURES FOR COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT AND RELATED AUTHORITIES 4 (2017) (“CM”) (categorical exclusions are “a category of actions that an agency has determined does not individually or cumulatively have a significant effect on the quality of the human environment”); DEP’T OF THE INTERIOR, DEPARTMENTAL MANUAL PT. 516 CH. 8.5 (2020); 42 U.S.C. § 4336e(1). Categorical exclusions have always been “limited to situations where there is an insignificant or minor effect on the environment.” *Sierra Club v. Bosworth*, 510 F.3d 1016, 1027 (9th Cir. 2007) (citation omitted). It is ludicrous for the Services to suggest that abandoning 50-year-old protections from habitat modification for hundreds of endangered and threatened species across millions of acres of habitat would have anything less than significant environmental impacts.

The particular categorical exclusions cited by the Services are not applicable here. They cover “[p]olicies, directives, regulations, and guidelines” that are either “of an administrative, financial, legal, technical, or procedural nature” or have “environmental effects [that] are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” 90 Fed. Reg. at 16,104; 43 C.F.R. § 46.210(i); *see also* CM app. E-14, G7 (containing a substantially similar categorical exclusion for NMFS). The first prong is clearly designed to cover ministerial actions, not a far-reaching, substantive change in agency policy. *See Pub. Emps. for Env’t Resp. v. Nat’l Park Serv.*, 605 F.Supp.3d 28, 57 (D.D.C. 2022) (finding agency’s claim that this categorical exclusion covered its substantive policy change “strain[ed] credibility”).²⁰ The second prong is equally inapplicable because the impacts of the Services’ regulatory change will not be subject to any later NEPA analysis.

Although the Services attempt to bolster their argument by citing two prior ESA rulemakings that invoked these categorical exclusions, *see* 90 Fed. Reg. at 16,104, this comparison is misplaced because the factual circumstances of those rulemakings meaningfully differed from the proposed rescission and policy change at issue here.²¹ For example, both rulemakings claimed to be limited to the context of evaluating unoccupied habitat for critical habitat designation and, accordingly, asserted that the definition at issue “would be unnecessary” to apply “in the vast majority of cases.” Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 47,333, 47,335 (Aug. 5, 2020) (codified at 50 C.F.R. pt. 424); *see also* Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 87 Fed. Reg. 37,757, 37,759 (June 24, 2022). By contrast, the Services’ proposed new interpretation of harm would expose hundreds of species to death and injury from habitat modification. Indeed, the current proposal is more similar to when FWS

²⁰ Indeed, FWS’ own NEPA guidance specifically identifies a “[c]hange in Service policy having a major positive or negative environmental effect” as a factor counseling in *favor* of the preparation of a full environmental impact statement. U.S. FWS, SERVICE MANUAL: ENVIRONMENTAL QUALITY PT. 550 FW 3.3(B)(2)(b) (1996).

²¹ Additionally, the mere fact that the Services invoked categorical exclusions in these two other rulemakings does not mean such use of categorical exclusions was appropriate.

proposed to limit “take” under the Migratory Bird Treaty Act to purposeful killing of birds—and there, FWS prepared a full environmental impact statement. Migratory Bird Permits; Regulations Governing Take of Migratory Birds; Environmental Impact Statement, 85 Fed. Reg. 5,913, 5,913–14 (Feb. 3, 2020).

Furthermore, under the applicable NEPA regulations, “[a]ny action that is normally categorically excluded *must* be evaluated to determine whether it meets any of the extraordinary circumstances” such that it “may have a significant environmental effect and require additional analysis and action.” 43 C.F.R. § 46.205(c) (emphasis added); *see* CM 4 (“A CE may only be applied to a proposed action when . . . there are no extraordinary circumstances that may require further analysis in an EA or EIS.”). These extraordinary circumstances specifically include actions that “may . . . [h]ave significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species.” 43 C.F.R. § 46.215; *see* CM 5 (identifying “adverse effects on species or habitats protected by the ESA . . . that are not negligible or discountable” as an extraordinary circumstance); *see also* 43 C.F.R. § 46.215(a)–(l) (list of Department of Interior extraordinary circumstances, including “significant impacts on . . . ecologically significant or critical areas” and “unique . . . environmental risks”); CM 4–5 (list of NMFS extraordinary circumstances, including “adverse effects on an area with unique environmental characteristics,” “environmental effects that are . . . unique” and “the potential for significant cumulative impacts”). Under the Services’ own NEPA policies, the significant impacts discussed herein preclude the application of the cited categorical exclusions to this action.

For all of these reasons, the Services may not employ categorical exclusions here. The Services’ attempt to invoke these categorical exclusions without any effort to explain their applicability further evidences the arbitrary nature of their action. *See California v. Norton*, 311 F.3d 1162, 1177–78 (9th Cir. 2002) (holding that an agency “must provide a reasoned explanation for its reliance on the categorical exclusion” where the record indicates “that exceptions to the categorical exclusion may apply”); *see also Alaska Ctr. for the Env’t v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999) (citation omitted) (“An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment.”). The Services must prepare a full environmental document analyzing the environmental impacts of their proposed action. 42 U.S.C. §§ 4332(2)(C); 4336.

B. NEPA Requires the Services to Prepare a Full Environmental Impact Statement.

Under NEPA, the rescission of the regulatory definition of “harm” and policy change to exclude habitat degradation and destruction from ESA regulation is a “major Federal action[] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Thus, the Services must conduct NEPA review of this action.²²

²² The extent of federal control is undisputed: the Services themselves “are proposing” and “undertaking” the rescission and policy change. 90 Fed. Reg. at 16,102. Accordingly, the rescission and policy change

The rescission and policy change would impose significant environmental consequences. As discussed above, the Notice of Proposed Rulemaking expresses a clear intent to apply the interpretation that the Supreme Court rejected in *Sweet Home*. The Services would no longer recognize “significant habitat modification or degradation where it actually kills or injures wildlife” as a take in violation of Section 9 of the ESA. The interpretation thereby seeks to deprive endangered and threatened species of the protection that Section 9 has provided against death and injury caused by habitat destruction, the leading driver of extinction, for over 50 years.²³ The rescission of the definition of harm and reinterpretation of that term would have significant and wide-ranging implications for the management of listed species and their habitats around the country.

First, the proposed reinterpretation would adversely impact the HCP framework that has been implemented by the Services for decades. As noted earlier, two-thirds of federally listed species rely on habitat on non-federal lands, and approximately half of listed species have 80% or more of their habitat on non-federal lands.²⁴ For over forty years, FWS has used HCPs to protect endangered and threatened species on these non-federal lands. Non-federal actors develop HCPs as part of their applications for incidental take permits, which exempt otherwise-lawful activities that indirectly “take” a listed wildlife species from the ESA’s prohibition on take. 16 U.S.C. § 1539(a). This system allows non-federal actors to proceed with activities that indirectly kill or injure endangered and threatened wildlife without violating Section 9’s prohibition on take, provided that they “minimize and mitigate the impacts” of the indirect harms of their activities to endangered and threatened species and that their actions do “not appreciably reduce the likelihood of the [species’] survival and recovery.” 16 U.S.C. § 1539(a). In addition to the listed species targeted by these plans, numerous unlisted species also benefit from the habitat conservation and restoration efforts.

However, under the Services’ proposed reinterpretation of harm, activities that indirectly kill or injure endangered and threatened wildlife by significantly modifying their habitat would no longer violate Section 9 of the ESA. As a result, such activities may no longer warrant incidental take permits. Thus, these activities would proceed without the mitigation measures that have historically been put in place, with significant consequences for listed species and unlisted species alike.²⁵

are “subject to substantial Federal control and responsibility” and constitute a “major Federal action” for purposes of NEPA. 42 U.S.C. § 4336e(10)(A).

²³ David S. Wilcove et al., *Leading Threats to Biodiversity: What’s Imperiling U.S. Species*, in PRECIOUS HERITAGE: THE STATUS OF BIODIVERSITY IN THE UNITED STATES 240, 242 (Bruce Stein et al. eds., 2000), Attachment 07; Talia E. Niederman et al., *US Imperiled Species and the Five Drivers of Biodiversity Loss*, 0 BIOSCIENCE 1, 3 (Jan. 2025), Attachment 11; U.S. FWS, *Why Save Endangered Species*, <https://www.fws.gov/story/why-save-species>, Attachment 12.

²⁴ U.S. FWS, *Habitat Conservation Plans*, <https://www.fws.gov/service/habitat-conservation-plans>, Attachment 03; U.S. FWS, *Our Endangered Species Program and How It Works with Landowners* (July 2009), Attachment 13.

²⁵ FWS’ database of habitat conservation plans illustrates the magnitude of this impact. Habitat Conservation Plans currently number over 1,400 and span more than 46 million acres of land. *See* U.S.

Allowing such unmitigated harms poses a particularly high risk to species whose remaining habitat occurs entirely on non-federal lands. According to a report from the U.S. Government Accountability Office, 76 listed vertebrates and invertebrates occur solely on non-federal lands.²⁶ If private actors no longer need incidental take permits for activities that significantly modify habitat, the corresponding harms to species could proceed without any evaluation of whether these harms “appreciably reduce the likelihood of the [species’] survival and recovery.” 16 U.S.C. § 1539(a). For species that occur solely on non-federal lands, the Services’ approach could permit industries to wipe out the entirety of their habitat, virtually eliminating their chance at long-term survival and recovery, without undergoing any ESA analysis.

In addition to depriving species of further protection from HCPs, the Services’ proposed reinterpretation would also decrease the effectiveness of ITSs. ITSs are issued pursuant to Section 7 consultation and provide an exception from Section 9 liability for a specified amount of incidental take. *See* 16 U.S.C. §§ 1536(b)(4), (o)(2). They also impose requirements to monitor the extent of incidental take that occurs and minimize its impacts. *See id.* § 1536(b)(4); 50 C.F.R. § 402.14(i). Once the action has begun, the ITS’s specified amount of incidental take functions as “a ‘trigger’ that, when reached, results in an unacceptable level of incidental take” and “require[es] the parties to re-initiate consultation.” *Ariz. Cattle Growers’ Ass’n v. U.S. FWS*, 273 F.3d 1229, 1249 (9th Cir. 2001). In this manner, ITSs provide a critical check on a project’s impacts, ensuring that they do not cause more harm than expected to endangered and threatened species. The Services’ proposed reinterpretation would disrupt this system by eliminating consideration of death and injury due to significant habitat degradation and destruction from an ITS.

Furthermore, the increased habitat degradation and destruction that would occur as a result of the Services’ proposed approach would impact not only endangered and threatened species, but also the many co-occurring species and unique ecosystems that benefit from their protected status. For example, management for the threatened red-cockaded woodpecker has also fostered conservation of the longleaf pine ecosystems they inhabit, which are considered “one of the most species-rich ecosystems found outside the tropics” and “renowned for their high levels

FWS, *Environmental Conservation Online System: Conservation Plans by Type and Region*, <https://ecos.fws.gov/ecp/report/conservation-plans-type-region>, Attachment 14; U.S. FWS, *HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK i* (Dec. 21, 2016), Attachment 15. These Plans have mitigated the impacts of a variety of activities, including oil and gas production, logging, mining, and development, for scores of endangered and threatened species. *See, e.g.*, U.S. FWS, *Amended Oil and Gas Industry Conservation Plan for the American Burying Beetle in Oklahoma*, https://ecos.fws.gov/ecp/report/conservation-plan?plan_id=4426, Attachment 16; 66 Fed. Reg. 19792 (Apr. 17, 2001); U.S. FWS, *Mosaic Fertilizer, LLC*, https://ecos.fws.gov/ecp/report/conservation-plan?plan_id=4266, Attachment 17; U.S. FWS, *Escambia County Beaches*, https://ecos.fws.gov/ecp/report/conservation-plan?plan_id=4099, Attachment 18. The Services’ proposed reinterpretation would facilitate the destruction of habitats that are vital to species’ survival. This is a significant impact under NEPA.

²⁶ U.S. GAO, *ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 5* (Dec. 1994), Attachment 19.

of diversity, endemism, and species rarity.”²⁷ At least 86 bird species are found in longleaf pine communities.²⁸ At least 27 species of vertebrates have been documented using abandoned red-cockaded woodpecker cavities, including birds, snakes, lizards, squirrels, and frogs.²⁹ Overall, higher-quality red-cockaded woodpecker habitat is directly correlated with higher levels of species richness of birds, butterflies, amphibians, reptiles, and small mammals, an observation that is consistently confirmed throughout scientific literature.³⁰ Consequently, reducing habitat protections for the red-cockaded woodpecker would also reduce protections for ecologically valuable pine ecosystems and their myriad species. The case of the red-cockaded woodpecker illustrates how the Services’ proposed approach would have severe environmental consequences for numerous ecosystems and species even beyond those listed under the ESA, further reinforcing the significant harm flowing from the current proposed rescission and reinterpretation.

Moreover, by exposing both ESA-listed species and unlisted species to greater levels of habitat degradation and destruction, the Services’ proposed reinterpretation would also adversely impact the many wildlife-dependent industries and recreational activities that rely on them. These include hunting, recreational fishing, wildlife watching, and other outdoor activities that are enjoyed by more than 148 million Americans and contribute nearly \$400 billion to the economy each year.³¹

Reducing habitat protections for endangered and threatened species would also have environmental consequences for human communities. Intact habitats provide an array of valuable ecosystem services, such as carbon sequestration and improved water quality.³² Species

²⁷ S. RSCH. STATION, U.S. FOREST SERV., SOUTHERN FOREST RESOURCE ASSESSMENT 55, 621 (David N. Wear & John G. Greis eds., 2002), <https://www.fs.usda.gov/treearch/pubs/4833>, Attachment 20.

²⁸ JAMES B. GRAND & KEVIN J. KLEINER, U.S. FWS, PRIORITIZING LANDSCAPES FOR LONGLEAF PINE CONSERVATION 6 (2016), Attachment 21.

²⁹ Ralph Costa, U.S. FWS, *Red-Cockaded Woodpecker Brochure*, 12 (Oct. 2002), https://www.fws.gov/charleston/pdf/RCW/redcockadedwp_brochure.pdf, Attachment 22.

³⁰ Ronald E. Thill et al., *Shortleaf Pine-Bluestem Restoration for Red-Cockaded Woodpeckers in the Ouachita Mountains: Implications for Other Taxa*, in RED-COCKADED WOODPECKER: ROAD TO RECOVERY 657–71 (Ralph Costa & Susan J. Daniels eds., 2004), Attachment 23; Loren W. Burger, Jr. et al., *Effects of Prescribed Fire and Midstory Removal on Breeding Bird Communities in Mixed Pine-Hardwood Ecosystems of Southern Mississippi*, in PROCEEDINGS OF THE 20TH TALL TIMBERS FIRE ECOLOGY CONFERENCE, 107, 112 (Teresa L. Pruden & Leonard A. Brennan eds., 1998), Attachment 24; Ronald E. Masters et al., *Influence of Ecosystem Restoration for Red-Cockaded Woodpeckers on Breeding Bird and Small Mammal Communities*, in THE ROLE OF FIRE IN NONGAME WILDLIFE MANAGEMENT AND COMMUNITY RESTORATION: TRADITIONAL USES AND NEW DIRECTIONS, 73, 73 (W. Mark Ford et al. eds., 2002), Attachment 25.

³¹ U.S. FWS., *New Survey Shows Americans Spent \$394 Billion Participating in Hunting, Fishing, and Wildlife-Associated Activities in 2022*, (Oct. 12, 2023), <https://www.fws.gov/press-release/2023-10/americans-spent-394b-hunting-fishing-and-wildlife-associated-activities-22>, Attachment 26.

³² See generally INTERGOVERNMENTAL SCI.-POL’Y PLATFORM ON BIODIVERSITY & ECOSYSTEM SERVS., SUMMARY FOR POLICYMAKERS OF THE IPBES GLOBAL ASSESSMENT REPORT ON BIODIVERSITY AND ECOSYSTEM SERVICES (Sandra Díaz et al. eds., 2019), Attachment 08.

themselves also provide an array of environmental benefits. Among the many examples, freshwater mussels, over 60% of which are endangered or threatened, are considered “one of nature’s greatest filtration systems”: a single mussel can filter as many as 10 gallons of water per day.³³ Insect pollinators, many of which are imperiled, provide an estimated \$34 billion worth of pollination services that support the nation’s food production.³⁴ By facilitating habitat degradation, the Services’ approach would diminish the many environmental benefits that species and their habitats provide.³⁵

As the above discussion illustrates, the Services’ proposed action will have significant, far-reaching environmental consequences that warrant analysis in a full environmental impact statement. Simply put, the Services propose to upend a regulation that has ensured the protection of millions of acres of habitat for hundreds of threatened and endangered species for over 50 years. To fail to conduct full environmental review of such an action would fly in the face of NEPA’s “requirement that environmental protection be considered ‘to the fullest extent possible.’” *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1118 (D.C. Cir. 1971).

VI. Removing and Reinterpreting the Definition of “Harm” Will Affect Nearly All Listed Species and Requires ESA Consultation.

If the effect of the proposed repeal of the definition of “harm” is to implement a new policy of no longer protecting wildlife from take that significantly destroys and degrades habitat, then the proposed rulemaking and policy change may adversely affect hundreds of endangered and threatened animals in the United States, is likely to jeopardize the continued existence of many, and requires the Services to consult on these effects under Section 7 of the ESA.

Section 7(a)(2) of the ESA requires that

³³ Holly Richards, *Freshwater Mussels and Fish: A Timeless Love Affair*, FWS.GOV (May 15, 2023), <https://www.fws.gov/story/2023-05/freshwater-mussels-and-fish-timeless-love-affair>, Attachment 27.

³⁴ *Pollinators Need and Provide Help*, FWS.GOV (Sept. 7, 2023), <https://www.fws.gov/story/2023-09/pollinators-need-and-provide-help>, Attachment 28; U.S. Nat’l Sci. Found., *Economic Value of Insect Pollination Services in U.S. Much Higher Than Thought, Study Finds* (Feb. 18, 2021), <https://www.nsf.gov/news/economic-value-insect-pollination-services-us-much>, Attachment 29.

³⁵ The Services’ proposed approach raises the risk of altering industry behavior. For example, under the current system, industries account for the need to mitigate the impacts of their activities on species habitat in evaluating the costs and benefits of engaging in a particular project. Removing the need for mitigation of habitat modification harms could alter this calculus, making previously uneconomic projects more appealing and thereby increasing activities that degrade habitat. Additionally, a number of species have received protections without being listed because the possibility of future ESA regulation incentivized industries to develop conservation plans. *See, e.g.*, Endangered and Threatened Wildlife and Plants; Finding for the Gopher Tortoise Eastern and Western Distinct Population Segments, 87 Fed. Reg. 61834, 61859, 61866–67 (Oct. 12, 2022); U.S. Fish & Wildlife Serv., *Gopher Tortoise*, <https://www.fws.gov/project/gopher-tortoise>, Attachment 30. Decreasing the regulatory protections afforded to listed species could diminish the incentive to enter into protective pre-listing agreements, such as candidate conservation agreements. These unique risks of the Services’ proposed approach must be accounted for and analyzed in a full environmental impact statement.

[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.

16 U.S.C. § 1536(a)(2). In the preamble to the Notice of Proposed Rulemaking, the Services contend “promulgation of rules that govern their implementation of the Act is not an action that is in itself subject to the Act’s provisions, including section 7(a)(2).” 90 Fed. Reg. at 16,105. But the plain language of the statute has no exceptions: “[e]ach [f]ederal agency” has an obligation to consult on “any action authorized, funded, or carried out by such agency” that may adversely affect a threatened or endangered species. 16 U.S.C. § 1536(a)(2). While formal consultation to determine if a proposed rulemaking action implementing the ESA jeopardizes the existence of a listed species should be exceedingly rare, given the intent of the Act to conserve endangered and threatened species and not adversely affect these species, the Services must consult on “any action” including any proposed rulemakings or similar agency actions that may adversely affect endangered or threatened species and “insure” that the action “is not likely to jeopardize the continued existence of any endangered species or threatened species.” *Id.*

Rulemakings are agency actions requiring compliance with Section 7(a)(2) of the ESA. *See, e.g., W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011) (“The minimum threshold for an agency action to trigger consultation with FWS is low, and we conclude that the regulatory amendments here — which affect 160 million acres of public land, home to hundreds of special status species — handily meet that threshold.”). Congress has also directed that in fulfilling the requirements of Section 7, agencies “shall use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). Both Services have identified the loss or degradation of habitat as a factor, and often the primary factor, in causing an animal’s decline that requires listing it as endangered or threatened and/or protection of habitat as essential to provide for the conservation and recovery of the species.³⁶

The Services share responsibilities for administering the ESA and have adopted joint regulations for implementing these responsibilities under Section 7 of the Act. 50 C.F.R. pt. 402. Those regulations confirm that the requirements and procedures of Section 7 of the Act apply to the actions of all federal agencies, including the Services. *Id.* § 402.01(a) (“Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.”). Further, the Services’ own regulations define “action” to specifically include agency rulemaking actions such as “the promulgation of regulations.” *Id.* § 402.02. Each federal agency, including the Services, is required to “review its [proposed] actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.” *Id.* § 402.14(a). If an agency determines that an “action may affect listed species or critical habitat,” *id.*, the agency must consult with FWS and/or NMFS depending on the affected species to ensure that its contemplated action “is not likely to

³⁶ *See supra* Section III.B.

jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. § 1536(a)(2). If the proposed action is “likely to adversely affect” a listed species, formal consultation is required, and the appropriate Service must prepare a biological opinion, 50 C.F.R. § 402.14, that details “how the agency action [at issue] affects the species or its critical habitat” and determine whether the proposed action is likely to jeopardize the continued existence of any listed species. *Id.* § 1536(b)(3)(A).

FWS has established procedures for intra-agency reviews and consultations under Section 7 of the ESA. U.S. FWS, ENDANGERED SPECIES CONSULTATION HANDBOOK app. E (1998) (“FWS Handbook”). “Internal [FWS] actions involving listed, proposed, and candidate species will promote the conservation of those species to the greatest extent practical under Federal law.” *Id.* at E-2. The FWS Handbook reaffirms that actions requiring compliance with Section 7 include rulemaking actions such as “the promulgation of regulations” by FWS. *Id.* at E-6. FWS Ecological Services Offices are the designated source for lists of species that may be affected by the proposed FWS action and the lead on informal and formal consultation. *Id.* at E-3, E-17.

As discussed previously, the Services have in various documents related to the listing or recovery of 92% of endangered or threatened vertebrate animals in the United States identified the loss, modification, or degradation of habitat as a factor causing the decline of the animal and its listing and/or affecting its recovery. *See* Attachment 01. Examples include:

Frosted Flatwoods Salamander

“Habitat loss and degradation from agriculture, urbanization, and silvicultural practices have resulted in the loss of more than 80 percent of its pine flatwoods habitat. Surviving populations are currently threatened by the continued destruction and degradation of their habitat.” Endangered and Threatened Wildlife and Plants; Final Rule to List the Flatwoods Salamander as a Threatened Species, 64 Fed. Reg. 15,691, 15,691 (Apr. 1, 1999) (codified at 50 C.F.R. pt. 17).

Loggerhead Sea Turtle

“Destruction and modification of loggerhead nesting habitat in the Northwest Atlantic results from coastal development and construction, placement of erosion control structures and other barriers to nesting, placement of nearshore shoreline stabilization structures, beachfront lighting, vehicular and pedestrian traffic, beach erosion, beach sand placement, removal of native vegetation, and planting of non-native vegetation.” Endangered and Threatened Species; Determination of Nine Distinct Population Segments of Loggerhead Sea Turtles as Endangered or Threatened, 76 Fed. Reg. 58,868, 58,917 (Sept. 22, 2011) (codified at 50 C.F.R. pts. 17, 223, 224).

Steelhead (Rainbow Trout)

“West Coast steelhead have experienced declines in the past several decades as a result of forestry, agricultural, mining, and urbanization activities that have resulted in the loss, degradation, simplification, and fragmentation of habitat. Water storage, withdrawal, conveyance, and diversions for agriculture, flood control, domestic, and hydropower purposes (especially in the Columbia River and Sacramento-San Joaquin River Basins) have greatly reduced or eliminated historically accessible

habitat. Modification of natural flow regimes have resulted in increased water temperatures, changes in fish community structures, depleted flow necessary for migration, spawning, rearing, flushing of sediments from spawning gravels, reduced gravel recruitment and the transport of large woody debris.” Endangered and Threatened Species: Final Listing Determinations for 10 Distinct Population Segments of West Coast Steelhead, 71 Fed. Reg. 834, 856 (Jan. 5, 2006) (codified at 50 C.F.R. pts. 223, 224).

Florida Scrub Jay

“The Florida scrub jay (*Aphelocoma coerulescens coerulescens*) is exclusively confined to scrub habitat in peninsular Florida. Much of the coastal scrub formerly inhabited by the bird has been cleared for beachfront hotels, houses, and condominiums. Many areas in the interior of Florida are presently being developed for citrus groves and housing. Clearly, the major cause of decline has been habitat destruction.” Endangered and Threatened Wildlife and Plants; Threatened Status for the Florida Scrub Jay, 52 Fed. Reg. 20,715, 20,715 (June 3, 1987).

Florida Panther

“Limiting factors for the Florida panther are habitat availability, prey availability, and lack of human tolerance. Habitat loss, degradation, and fragmentation is the greatest threat to panther survival, while lack of human tolerance threatens panther recovery.” U.S. FWS, FLORIDA PANTHER RECOVERY PLAN (*PUMA CONCOLOR CORYI*), THIRD REVISION ix (2008).

The proposed rule rescission and change in interpretation of “harm” may adversely affect these, and many other, species and is likely to jeopardize the continued existence of many species. The Services must complete consultation under Section 7(a)(2) prior to finalizing the proposed rulemaking and ensure that this action is not likely to jeopardize the continued existence of any of these species.

For endangered or threatened animal species that may be adversely affected by the proposed rulemaking, the Services must prepare a biological opinion to determine whether the proposed change in their interpretation of “harm” and implementation of the ESA would jeopardize the continued existence of any of the species. The assessments of adverse impacts must be species by species. *Ctr. for Biological Diversity v. Regan*, 734 F.Supp.3d 1, 42 (D.D.C. 2024). Under the Services’ joint Section 7 regulations, the biological opinion “shall include” a “detailed discussion of the environmental baseline of the listed species and critical habitat” and a “detailed discussion of the effects of the action on listed species or critical habitat.” 50 C.F.R. § 402.14(h)(1). The Services are expressly required to “[r]eview all relevant information ... available;” to “[e]valuate the current status and environmental baseline of the listed species;” to “[e]valuate the effects of the action and cumulative effects on the listed species;” and, in the end, to “[a]dd the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species . . . formulate the Service’s opinion as to whether the action is likely to jeopardize the continued existence of listed species.” *Id.* § 402.14(g). The ESA and the implementing regulations require the Services to “use the best scientific and commercial data available” in making these assessments. *Id.* § 402.14(g)(8); accord 16 U.S.C. § 1536(a)(2).

As stated by the U.S. Supreme Court in *TVA v. Hill*, 437 U.S. 153, 173 (1978),

[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command *all federal agencies* ‘to insure that *actions authorized, funded, or carried out by them do not jeopardize the continued existence*’ of an endangered species or ‘result in the destruction or modification of habitat of such species’ 16 U.S.C. § 1536 (1976 ed.). *This language admits of no exception.*

(Emphasis deleted and added). If the effect of the Services’ proposed repeal of the definition of “harm” is to implement a new interpretation of “harm” that no longer protects wildlife from take that significantly destroys and degrades habitat, the proposed action may adversely affect hundreds of endangered animals in the United States, is likely to jeopardize the continued existence of many, and requires the Services to consult on these effects under Section 7 of the ESA. There is “no exception” for the Services’ proposed rulemaking because “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’” *Id.* at 194.

CONCLUSION

The proposed rescission of the harm definition and reinterpretation of harm to exclude take from habitat degradation would wreak havoc on ecosystems, upending current and anticipated protections for rare species and habitats across the region. How and where we protect habitats is vital to preventing extinction and ensuring the long-term recovery of many iconic American species. The Services must return to the conservation-driven, science-based approach mandated by the ESA and should accordingly abandon their proposal to rescind the definition of “harm” and reinterpret the term in a manner that is inconsistent with the purposes of the Act and Supreme Court precedent that has been applied for over 50 years.

Thank you for your consideration of these comments.

Sincerely,



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