Getches-Wilkinson Center for Natural Resources, Energy, and the Environment
UNIVERSITY OF COLORADO **BOULDER**
UNIVERSITY OF COLORADO LAW SCHOOL

May 16, 2025

Ms. Gina Schultz
Acting Assistant Director
Ecological Services
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: U.S. Fish and Wildlife Service, Docket # FWS-HQ-ES-2025-0034 – Rescinding the Definition of "Harm" Under the Endangered Species Act

Thank you for the opportunity to comment on the notice of proposed rulemaking (NPRM or Notice) from the U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) (collectively, Services), which would rescind the regulatory definition of "harm" in the Endangered Species Act (ESA) regulations.[1] These comments are submitted on behalf of environmental and natural resources law professors from around the country who have an expertise in the laws and policies that govern management of wildlife and other natural resources, including the Endangered Species Act. The commenters are some of the leading scholars in this field of law and have studied and written about these laws and policies for many decades. Many of them also have experience working in or representing federal wildlife management agencies and/or working in private practice and representing the regulated community. These comments are submitted on their own behalf, and not on behalf of their affiliated institutions.

The law professor signatories to this letter strongly urge FWS and NOAA to withdraw the notice of proposed rulemaking, leaving in place the regulatory definition of harm as set forth in the existing ESA regulations. In the alternative, FWS and NOAA must prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA), informed by robust public participation, prior to deciding whether to rescind the regulatory definition of harm.

These comments are divided into two sections. Section 1 critiques the statutory interpretation laid out in the notice of proposed rulemaking and establishes why the existing definition of harm correctly includes "significant habitat modification or destruction where it actually kills or injured wildlife * * *."[2] The existing definition of "harm," which includes impacts to habitat that actually kill or injure members of a protected species, is the best reading of the statute and the only reading that gives full meaning to all of the important sections of the ESA, which were carefully crafted by Congress. In contrast, the proposal here – to eliminate the

[1] 90 Fed. Reg. 16102 (April 17, 2025).
[2] 50 C.F.R. § 17.3.

regulatory definition of harm – unlawfully seeks to render important sections of the ESA and prior Congressional actions amending the statute virtually meaningless. Thus, the interpretation of the statute in the NPRM is plainly incorrect. Section 2 addresses the agencies' statutory duty under the National Environmental Policy Act to prepare an EIS in determining whether to rescind or modify the regulatory definition of harm.[3] The approach proposed here – to rescind the regulation without any consideration of environmental effects – plainly conflicts with NEPA.

I. The Definition of "Take" In the ESA Must Necessarily Include Modification or Destruction of Habitat that Causes Actual Injury or Death to a Listed Species.

Section 9 of the Act prohibits any person, including governmental entities,[4] from "tak[ing]" any endangered fish or wildlife species or from violating any regulation pursuant to section 4 of the Act governing threatened fish or wildlife species, unless authorized in accordance with section 10 of the ESA.[5] Congress defined "take" as meaning to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[6]

In 1981, the FWS modified the definition of "harm" to mean--

> an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering.[7]

Admittedly, for many years Section 9 was sporadically enforced. As one of the lawyers litigating *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* observed recently, "[t]he development of the law surrounding take of endangered and threatened wildlife species has

---

[3] 42 U.S.C. § 4332.

[4] The term person is defined expansively to mean any--

> individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

16 U.S.C. § 1532(13).

[5] 16 U.S.C. § 1538(a)(1). Section 9 also prohibits the importation, exportation, as well as the sale, possession and trade in interstate or foreign commerce of such species. *Id*. at § 1538(a), (c), (d). *See generally* Frederico Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109 (1991); Michael E. Field, *The Evolution of Wildlife Taking Concept From its Beginning to its Culmination in the Endangered Species Act*, 21 HOUS. L. REV. 457 (1984); Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419 (1994); Lawrence R. Liebsman, Steven G. Davison, *Takings of Wildlife Under the Endangered Species Act After* Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 5 U. BALT. J. ENVTL. L. 137 (1995). The constitutionality of the "take" prohibition was upheld in *National Ass'n of Home Builders v. Babbitt*, 949 F. Supp. 1 (D.D.C. 1996), *aff'd*, 136 F.3d 1041 (D.C. Cir. 1997).

[6] 16 U.S.C. § 1532(19).

[7] 50 C.F.R. § 17.3. When the FWS first promulgated its regulations, the service clarified the requirement of actual death or injury. 40 Fed. Reg. 44,412, 44,416 (1975). In 1981, the Associate Solicitor, Division of Conservation and Wildlife, recommended this clarification. 46 Fed. Reg. 29,490, 29,492 (1981).

been central to the overall evolution of the ESA," adding also that the Act's reach is affected by a determination of what conduct section 9 proscribes.[8] And before *Sweet Home*, case law under section 9 "was inconsistent and unpredictable."[9] Now after *Sweet Home*, "Justice Stevens' and Justice O'Conner's respective majority and concurring opinions are well-established ESA law."[10]

In *Sweet Home*, parties representing the logging industry brought a facial challenge to the regulation defining "harm," focused on the inclusion of habitat modification and degradation in the definition. Alleging that the regulation conflicted with the statute, the challengers argued that the statutory term "harm" only encompasses "direct application of force against protected species * * *."[11] The Supreme Court rejected the challenger's argument, holding that the plain meaning of the term "harm" is "to cause hurt or damage: to injure."[12] The linchpin of the analysis, therefore, is causation and not a vague notion of "direct application of force."

The Court also relied on the broad purpose of the ESA, which is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved * * *."[13] And the Court also emphasized that Congress amended the ESA in 1982 and authorized issuance of incidental take permits one year after FWS promulgated the definition of "harm" (which we discuss in more detail below).[14] The Court ultimately held that the Secretary's definition of harm was reasonable under *Chevron* and that the Court owes "some degree of deference to the Secretary's reasonable interpretation."[15] For the last thirty years, the federal government, the regulated community, Tribes, states, localities, and non-profit organizations have worked to protect and recover imperiled species through conservation of habitat, as discussed in more detail in these comments.

The Notice, invoking the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*,[16] which overturned the *Chevron* doctrine, erroneously posits a need to rescind the longstanding definition of *harm* and that the "single best meaning" is not the existing regulation (it averts offering a contrary meaning, however).[17] The Notice does not provide any independent interpretation of the statute but rather seems to rely on Justice Scalia's dissent in *Sweet Home*. To the extent that the Notice relies on the reasoning in Justice Scalia's dissent, we demonstrate below why that statutory interpretation is wrong.

Moreover, the Supreme Court was clear in *Loper Bright* that it was not calling into question earlier cases that had relied on *Chevron*.[18] "The holdings of those cases that specific agency actions

---

[8] Steven P. Quarles, Paul S. Weiland, and Brian Ferrasci-O'Mlley, *Another Take on "Take": The Section 9 Prohibition*, *in* ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 141, 142 (ABA 3d Ed. 2021).
[9] *Id*.
[10] *Id*.
[11] *Babbitt v. Sweet Hone Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697 (1995).
[12] *Id*. at 697-98.
[13] *Id*. at 698.
[14] *Id*. at 700.
[15] *Id*. at 703-04.
[16] 603 U.S. 369, 400 (2024).
[17] 90 Fed. Reg. 16103. The Notice merely suggests that "[n]or is any replacement definition needed." *Id*.
[18] 603 U.S. at 412.

are lawful * * * are still subject to statutory *stare decisis* despite our change in interpretive methodology."[19] The Supreme Court made clear that prior cases decided under *Chevron* would still have precedential effect as it relates to their ultimate holding – the validity of the agency action.

The Notice, however, evades this clear pronouncement and attempts to limit *Sweet Home* by stating that it "held only that the existing regulation is a permissible reading of the ESA, not the only possible such reading."[20] That is incorrect. In *Sweet Home*, the Supreme Court held that the regulatory definition of "harm" is valid.[21] The Supreme Court went out of its way to clarify that the change in interpretive methodology announced in *Loper* would not reopen earlier cases like *Sweet Home*, but this is exactly what the Notice attempts to do.

A. The Notice's interpretation of "harm" renders meaningless a term Congress specifically added to the ESA's definition of "take."

To begin with, the Notice overlooks Congress' deliberate decision to include the term "harm" in its purposely constructed definition of "take." The Notice opines, without any evidentiary foundation, that the definition somehow ignores "over a thousand years of history, and is inconsistent with the structure of the ESA."[22] To suggest our modern statutory laws (rather than the common law) are cabined by the Justinian code or such historic (pre-common law) sources is an erroneous form of statutory interpretation—and nothing in the Notice proffers any semblance of the history it is referencing.[23] Instead, when Congress included the term "harm" in the definition, it represented its first statutory use—specifically departing from history.[24]

Unless the statutory term "harm" includes modification of habitat, the term has no independent meaning that is not duplicative of the other terms included in the definition of take. If the term "harm" is limited to a "direct application of force" against a listed species, it would simply mean the same thing as "harass," "pursue," or "kill," which are all included in the definition of "take."[25]

> "If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."[26]

---

[19] *Id*.
[20] 90 Fed Reg at 16103.
[21] 515 U.S. at 687.
[22] 90 Fed. Reg. 16103.
[23] The Notice seemingly relies on Justice Scalia's dissent in *Sweet Home*. But nothing in the dissent even goes that far, relying instead on historic uses of the term "take," or dictionary definitions of the term "harm," and the oldest source appears to be only a few hundred years old referencing BLACKSTONE'S COMMENTARIES. 515 U.S. at 716-718.
[24] Quarles, *supra* note 8, at 145.
[25] 16 U.S.C. § 1532(19)
[26] Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts (2012) at 174.

The legislative history reflects Congress' decision to add the term "harm" to ensure that the term "take" would be afforded "the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take'" a species.[27] A House Report captures this sentiment, when it notes how—

> "Take" is defined broadly. It includes harassment, whether intentional or not. This would allow, for example, 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.[28]

And this history confirms that by including terms like "harm" or even "harass" Congress intended that the definition of the word "take" would include, through the use of the terms "harm" and "harass," activities such as habitat modification that indirectly impact species in some significant way.[29]

B. Section 10 of the ESA plainly reflects Congressional intent that habitat modification may cause the take of a listed species.

Second, the Notice's suggestion that habitat modification cannot (under a purported "best reading") constitute "harm" under Section 9 is belied by Congress' 1982 amendment to the Act. In 1982, Congress amended Section 10(a) (as well as Section 7, discussed below) to include an incidental take permit provision, widely heralded as a meaningful measure for facilitating conservation of listed species—albeit consistent with the needs of local communities and development.[30] Pursuant to Section 10(a)(1)(B) of the act, the Secretary "may permit, under such terms and conditions as he shall prescribe-any taking otherwise prohibited by Section 9(a)(1)(B) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[31]

---

[27] S. Rep. No. 307, 93d Cong., 1st Sess. 11 (1973). Some witnesses during the hearings commented on the specific absence of habitat modification in section 9 of the proposed legislation, and the issue apparently centered on ensuring the ability for cooperative federal and state efforts (now found in section 6 for cooperation with states—including 6(c)(4) for the acquisition of habitat, and then in section 4 for notification to the Governor). *See* LOWELL E. BAIER, THE CODEX OF THE ENDANGERED SPECIES ACT: VOL. 1: THE FIRST FIFTY YEARS 63 (2023).

[28] H.R. Rep. No. 412, 93d Cong., 1st Sess. 11 (1973).

[29] *See Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1067 (9th Cir. 1996); *Seattle Audubon Soc. v. Evans*, 952 F. 2d. 297, 303 (9th Cir. 1991)("[u]nder the Endangered Species Act enacted in 1973, in contrast, the word 'take' is defined in a broader way to include 'harass,' and 'harm…'"). Similarly, in *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995), the court found sufficient evidence that the activities were reasonably certain to injure a pair of protected nesting spotted owls, by significantly impairing their essential behavioral patterns, including breeding, feeding and sheltering. Because the activity was "reasonably certain" to injure the pair of owls, the claim satisfied the "`actual injury' requirement." *Id*. at 784. *Cf*. Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401, 1405 (9th Cir. 1996) (the Act prohibits habitat modification that causes "harm").

[30] Pub. L. No. 97-304, 96 Stat. 1411 (Oct. 13, 1982).

[31] 16 U.S.C. §1539(a)(1).

This 1982 amendment reflects Congress' unassailable understanding that the loss of habitat can, in appropriate circumstances, constitute "take" of a species, because a species can be "harmed" by the loss of habitat essential for that species. Indeed, Congress crafted the incidental take provisions in Section 10 just one year after FWS promulgated the regulatory definition of "harm," thus indicating lawmakers' clear understanding that Section 9 of the Endangered Species Act prohibits habitat modification that causes death or injury of members of a protected species, as interpreted by FWS.

"Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."[32] Here, Congress incorporated the term "take," as understood by its existing regulatory interpretation, into its amendment of the ESA in 1982, creating the incidental take provisions in Section 10, which authorize activities like modification of habitat that would otherwise be prohibited by the statute.

The 1982 amendment responded to and was modeled after the resolution of a dispute over a development project at San Bruno Mountain in Northern California, an area the FWS intended to designate as critical habitat for the listed mission blue butterfly and another proposed species.[33] The relevant parties negotiated a habitat conservation plan that involved private funding for the acquisition and management of habitat for the butterfly, and by all accounts a victory for the butterfly, the FWS, and the involved parties.[34] The 1982 amendments codified this understanding and application of section 9 to habitat modification, and secured the efficacy of shielding the landowner from take liability after investing in the development of a habitat conservation plan. The conference committee explained that this provision created a procedure "whereby those persons whose actions may affect endangered or threatened species may receive permits for the

---

[32] *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

[33] H. Rep. No. 97-835, at 30-31 (1982).

[34] *See generally* BAIER, *supra* note 27, at 137-144. For an account written in part by one of the early participants involved in drafting the ESA and familiar with the history, see Douglas P. Wheeler, Ryan M. Rowberry, *Habitat Conservation Plans and the Endangered Species Act*, *in* ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 221, 222 (ABA, Donal C. Baur, William Robert Irvin, eds. 2010). As these authors (particularly Douglas Wheeler) observed when quoting Congress, "Congress intended to achieve two primary purposes: (1) modification of the broad reach of section 9's stringent take prohibitions to encourage long-term 'creative partnerships between the public and private sectors and among government agencies' in the interest of multiple species and habitat conservation; and (2) a clear commitment to the concept of ecosystem conservation." *Id*. at 222. *See also* Quarles, *supra* note 8, at 171-72. For further appreciation of how ecosystem protection is critical to species survival, see Mr. Wheeler's description of both the implementation of the ESA and a California program, in Douglas P. Wheeler, *An Ecosystem Approach to Species Protection*, 10 NAT. RES. & ENVT. 7 (1996). Notably, the Chair of the House Committee, when reporting on proposed legislation, specifically identified habitat destruction as one of the principal threats to species. See BAIER, *supra* note 27, at 71; *see also id*. at 74. Mr. Wheeler, as noted above, was part of the Nixon administration's drafting team (called the "Train Team" after CEQ Chair Russell Train) for what eventually became the 1973 ESA. *See id*. at 53, 66, 70. Indeed, Mr. Wheeler indicated that the concept of take needed to be expanded (adding "pursue," "shoot", "wound", "trap", and "collect."). *Id*. And part of the reason for adding specific other terms, contrary to Justice Scalia's use of the *noscitu*r canon in *Sweet Home*, arguably was to ensure the ESA would account for the international convention. *See Id*. at 67.

incidental taking of such species, provided the action will not jeopardize the continued existence of the species. This provision addresses the concerns of private landowners who are faced with having otherwise lawful actions not requiring federal permits prevented by Section 9 prohibitions against taking."[35] The conference committee also anticipated that conservation plans could address both listed as well as unlisted species.

Moreover, the Notice's implicit suggestion that habitat modification would not constitute harm could upset decades of programs and landowner agreements all focused on the development habitat-based plans initiated because of the relationship of habitat impacts to possible section 9 liability. We now have over 1,200 section 10 incidental take permits that are based on the development of habitat conservation plans (HCPs).[36] Some of these are "multiple species habitat conservation plan[s] (MSHCP), which protect[] more than a single species and their shared habitat."[37] In the words of Douglas Wheeler (and his co-author), an important figure in the history of the Act's early and subsequent development, "HCPs and MSHCPs are tools which make real the 50-year old promise of ecosystem management in the Act."[38] Many of these plans were facilitated by the Services' adoption of policies,[39] such as the Safe Harbor and No-Surprises policies,[40] along with other habitat based initiatives, including the development of Candidate Conservation Agreements (CCAs), or Candidate Conservation Agreements with Assurances (CCAAs),[41] or habitat banks. Following these policies, "HCPs have become a widely accepted means of accommodating development while protecting endangered species and their habitat."[42] The significant risk to these programs counsels a greater appreciation than offered in the Notice to the language in *Loper Bright,* which expressly held that prior cases applying *Chevron*, such as *Sweet Home*, would be subject to *stare decisis*.[43]

C. Section 7 of the ESA likewise plainly reflects Congressional intent that habitat modification may cause the take of a listed species.

Justice Scalia's *Sweet Home* dissent dubiously employs Congress' reference to critical habitat and the statute's Section 7 protection of critical habitat from destruction or adverse

---

[35] H. Rep. No. 97-835, at 29.
[36] Brett Hartl and Jessica Owley, *Rebuilding the Endangered Species Act: An Environmental Perspective*, *in* ENDANGERED SPECIES ACT: LAW, POLICY AND PERSPECTIVE 262, 490 (ABA Donald C. Baur, Ya-Wei Li eds 2021).
[37] Douglas P. Wheeler, Dale Ratliff, *The Future of Section 10-Multiple Species Habitat Conservation Plans?, in* ENDANGERED SPECIES ACT: LAW, POLICY AND PERSPECTIVE 187 (ABA Donald C. Baur, Ya-Wei Li *eds* 2021).
[38] *Id*. at 203.
[39] *See generally* Timothy Male and Aimee Ford, *Landowner Incentives, in* ENDANGERED SPECIES ACT: LAW, POLICY AND PERSPECTIVE 203 (ABA Donald C. Baur, Ya-Wei Li *eds* 2021).
[40] Endangered Species Act Incidental Take Permit Revocation Regulations, 69 Fed. Reg. 71723 (Dec. 10, 2004); Final Safe Harbor Policy, 64 Fed. Reg. 32,717 (June 17, 1999); Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. 8859 (Feb. 23, 1998).
[41] Final Policy for Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,726 (June 17, 1999).
[42] Wheeler & Ratlif, *supra* note 37, at 177.
[43] 603 U.S. 412, recognized by the Notice, at 90 Fed. Reg. 16103.

modification as evidence to support a narrow interpretation of "harm."[44] His opinion erroneously argues that including habitat protection under Section 9 would render superfluous the protection afforded to critical habitat in Section 7.[45]

This understanding of the ESA ignores a crucial part of the ESA's history: When it amended the statute in 1982 to add a permit scheme to allow non-federal entities to incidentally take protected species, lawmakers added a parallel process to authorize federal agencies to incidentally take protected species as a result of agency actions that otherwise comply with section 7(a)(2) – including the prohibition on destroying or adversely modifying critical habitat. In other words, Congress explicitly added protections to Section 7 *over and above* that section's existing protections for critical habitat. Congress therefore made very clear when it amended Section 7 that impacts to habitat can result in take of a listed species, and that Section 7 requires FWS to impose limits on federal actions to minimize this take in part through *additional* protections for species' habitat.

When FWS engages in formal consultation under Section 7, if FWS concludes that death or injury to members of a protected species is likely as a result of the agency action, FWS includes in its Biological Opinion an incidental take statement (ITS) that specifies the "impact of such *incidental taking on the species*" as well as "reasonable and prudent measures" and associated terms and conditions to implement those measures that the Secretary considers necessary or appropriate to minimize such impact.[46] These additional measures to minimize incidental take apply to agency actions that already comply with section 7's ban on destroying or adversely modifying critical habitat,[47] demonstrating that Justice Scalia was incorrect in his view that reading "harm" as including protections for habitat would render superfluous Section 7's critical habitat provisions.

Section 7's incidental take statement requirements also demonstrate that Congress clearly saw prohibited take as encompassing impacts to habitat that kill or injure protected species. When a listed species covered by Section 9's take prohibition is a marine mammal, the ESA explicitly requires that the terms and conditions to minimize incidental take authorized by an ITS to include protections for these species' habitat.[48] This reflects Congress' intent to embrace the MMPA's broad definition of take to include impacts to habitat, as well as the MMPA's parallel requirement to minimize this take through measures to protect marine mammals' habitat. It would of course make no sense for Congress to require that FWS and the National Marine Fisheries Service impose habitat protection requirements to minimize incidental take of ESA-listed marine mammals but read Section 7(b)(4)(C)(ii) as not authorizing similar measures to minimize incidental take of other

[44] 515 U.S. at 723-26.
[45] *Id*. at 724.
[46] 16 U.S.C. § 1536(b)(4)((C)(i)-(iv) (emphasis added).
[47] *See id*. at § 1536(b)(4)(A).
[48] Congress also included in Section 7 a reference to the Marine Mammal Protection Act (MMPA); when issuing incidental take statements for marine mammals also protected by the ESA, FWS must "specify those measures that are necessary to comply with section 1371(a)(5) of" the MMPA.16 U.S.C. § 1536(b)(4)(C)(iii). That section of the MMPA creates authorizations of incidental take of marine mammals, which must include "other means of effecting the last practicable impact on such species or stock *and its habitat*." 16 U.S.C. § 1371(a)(5)(A)(i)(II)(aa), (D)(ii)(I).

listed species. Not surprisingly, therefore, for many years FWS has routinely – and correctly – imposed measures to protect the habitat of terrestrial species as well as marine mammals as a routine element of reasonable and prudent measures in incidental take statements.

In short, Section 7 of the ESA reflects Congress's intent that modification of habitat may result in take of a listed species. Justice Scalia's analysis in *Sweet Home* misreads the statute and ignores the important statutory sections discussed above.

D. The policies and purposes of the ESA would be severely compromised if the definition of take does not include modification of habitat that actually kills or injures a listed species.

Finally, the ESA's emphasis on the importance of ecosystems further demonstrates a congressional intent to include habitat modification within the definition of "take," particularly by the inclusion of harm in the definition of "take." Congress' declared purpose when enacting the ESA is that it would "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."[49] Bipartisan recognition in Congress and during varying administrations have appreciated that, in the words of Lynn Scarlett, "[t]he ESA should focus on ecosystem health and species recovery."[50] She observed how "[a]ll agree, at least in principle, that if new approaches could be identified that would both improve the effectiveness of habitat conservation efforts for species and reduce the burden upon landowners and other regulated interests, those new approaches should be embraced."[51] And she added how "[p]rotection of habitat is a key to sustaining and recovering endangered species."[52]

Not surprisingly, therefore, various programs under the Act have targeted ecosystem health as the mechanism for protecting what are sometimes several species dependent upon a particular ecosystem. There are, for instance, now multispecies recovery programs under Section 4 geared toward protecting an ecosystem to promote the recovery of species within that ecosystem. There are special Section 4(d) rules that allow parties to avoid take liability by engaging in habitat-related land use measures.[53] Also, some of the cooperative efforts that fit under the umbrella of Section 6 of the Act, for cooperative federal and state initiatives, involve habitat acquisition or protection.[54]

---

[49] 16 U.S.C. § 1531(b). *See* BAIER, *supra* note 27, at 69.

[50] Statement of P. Lynn Scarlett, Deputy Secretary, U.S. Department of the Interior, Before the House Committee on Natural Resources, Regarding Implementation of the Endangered Species Act of 1973, May 9, 2007.

[51] *Id*.

[52] *Id*. The Nixon administration appreciated, as well, the importance of habitat for protecting species by also proposing a threefold increase in money for habitat acquisition. *See* BAIER, *Supra* note 27, at 57. *See also* ESA § 5, 16 U.S.C. § 1534.

[53] *See generally* Robert L. Fischman, *Using Practice-Based Regulations to Promote Collaborative Recovery of Threatened Species*, *in* THE CODEX OF THE ENDANGERED SPECIES ACT: THE NEXT FIFTY YEARS 51 (Lowell E. Baier, John F. Organ, and Christopher E. Segal *eds*. 2024).

[54] For instance,

> State-funded habitat programs like the Wyoming Wildlife and Natural Resource Trust, Great Outdoors Colorado, and Nebraska Environmental Trust have focused millions of dollars into on-the-ground enhancements. More notably, cooperative management strategies include multiple

And then, of course, are the host of initiatives all designed to improve, expand, or protect species habitat to avoid the need to list a species in the first place, including those under Section 10. One factor for listing, after all, is the "present or threatened destruction, modification or curtailment of a species' habitat or range."[55]

II. The Services Must Prepare an Environmental Impact Statement Pursuant to the National Environmental Policy Act Prior to Finalizing Any Regulations That Modify the Definition of "Harm" or "Take" To Exclude Modification of Habitat to Actually Kills or Injures Wildlife.

NEPA provides that all agencies must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment."[56] Federal agencies have long understood that the preparation of regulations is a "major federal action" that requires environmental review.[57] Here, the Services concede that they have not prepared any environmental review to comply with the requirements of NEPA regarding their apparent decision to rescind the regulatory definition of "harm."[58] The Services allege in the Notice that they do not need to do so because either: 1) the decision to rescind the definition of "harm" is nondiscretionary, or 2) the action proposed in the notice is categorically excluded from environmental review. The Notice clarifies, however, that the Services are "continuing to consider the extent to which our proposed regulation changes may have a significant effect on the human environment * * *."[59]

Here, the Services must prepare an EIS prior to changing the regulatory definition of take to exclude habitat modification that actually kills or injures a listed species.

A. In the Notice, the Services incorrectly characterize the proposed regulatory action as "nondiscretionary."

The Services rely on the Supreme Court's decision in *Loper Bright* to conclude that its proposed amended to the regulations are "compelled by the best reading of the statutory text."[60]

---

governmental agencies and private sector representation, including private landowners, have added to the capacity and ability of state wildlife agencies to meet greater challenges.

Temple Stoellinger, Michael Brenan, Sara Brodnax, Ya-Wei (Jake) Li, Murray Feldman, and Bob Budd, *Improving Cooperative State and Federal Species Conservation Efforts*, *in* THE CODEX OF THE ENDANGERED SPECIES ACT: THE NEXT FIFTY YEARS 212, 216 (Lowell E. Baier, John F. Organ, and Christopher E. Segal *eds*. 2024).

[55] 16 U.S.C. § 1533(a)(1)(A). Habitat availability is component of how to develop a species status assessment for species under the Act. See generally Conor P. McGowan, Nathan Allan, and David R. Smith, *The Species Status Assessment: A Framework for Assessing Species Status and Risk to Support Endangered Species Management Decisions*, *in* THE CODEX OF THE ENDANGERED SPECIES ACT: THE NEXT FIFTY YEARS 87 (Lowell E. Baier, John F. Organ, and Christopher E. Segal *eds*. 2024).

[56] 42 U.S.C. § 4332(C)(1).

[57] *See*, *e.g.*, 40 C.F.R. § 1508.1 (w)(1)(ii) (2024) (rescinded by 90 Fed. Reg. 10,610 (Feb. 25, 2025)); *see also* 40 C.F.R. § 1501.11(a)(2)(A) (agency actions appropriate for programmatic review include "regulations").

[58] 90 Fed. Reg. at 16104.

[59] *Id*. at 16105.

[60] Id. at 16104.

Thus, according to the Services, their proposal is supposedly "nondiscretionary" and therefore exempt from environmental review under NEPA.[61]

To illustrate the serious flaws in the Services' reasoning, it's helpful to clarify how NEPA and the Administrative Procedure Act apply to agency rulemakings. As discussed above, Congress declared that all federal agencies must prepare an EIS prior to finalizing federal regulations if such federal actions would have a significant effect on the human environment.[62] The NEPA document, which often takes the form of a programmatic EIS, provides important information on environmental effects and alternatives to the proposed action, and this analysis can inform the agency's final decision in the rulemaking proceedings as well as its interpretation of the relevant statutory authorities.[63]

The APA governs judicial review of agency decisions, including promulgation of regulations and approval of Environmental Impact Statements, and provides that federal courts are to "decide all relevant questions of law [and] interpret constitutional and statutory provisions * * *."[64] *Loper Bright* addressed the standard of review to be applied by a federal court when reviewing an agency's interpretation of the governing statute.[65] "The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions."[66] The Supreme Court also clarified, however, that courts may "seek aid from the interpretations of those responsible for implementing particular statutes," stating that those interpretations may provide "informed judgment to which courts and litigants may properly resort for guidance" under *Skidmore v. Swift & Co*.[67]

This discussion clarifies that *Loper Bright* does not relieve agencies of their duties under NEPA to prepare environmental impact statements on proposed regulations that might include or implicate an interpretation of the governing statute. *Loper Bright* applies at the stage of judicial review under the APA, in which a court identifies the "best reading of the statute."[68] Agencies, however, must still abide by all the existing procedural requirements and safeguards in making original decisions, including NEPA and public notice and comment. The information developed during the environmental review process, and the public comments on the proposed regulations, support development of the "informed judgment" of the agency that the courts may respect under *Skidmore*. Thus, even though a court may eventually decide on "the best reading of the statute," the requirements of NEPA still apply to the rulemaking process.

---

[61] *Id*. (*citing Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 766-70 (2004)).
[62] 42 U.S.C. § 4332(C).
[63] *See*, *e.g.*, Draft Environmental Impact Statement for the Safer Affordable Fuel-Efficient Vehicles Rule for Model Year 2021-2026 Passenger Cars and Light Trucks (July 2018) (Docket No. NHTSA-2017-0069) (https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/ld_cafe_my2021-26_deis_0.pdf).
[64] 5 U.S.C. § 706.
[65] *Loper Bright*, 603 U.S. at 394.
[66] *Id*. at 9
[67] *Id*. (citing *Skidmore v. Swift & Co*., 323 U.S. 134 (1944)).
[68] *Id*. at 400.

In addition, the Services mistakenly rely on *Public Citizen* in asserting that the proposed regulatory amendment is "nondiscretionary."[69] That case involved a challenge to the promulgation of regulations by the Federal Motor Carrier Safety Administration (FMCSA) that would allow cross-border operations of Mexican motor carriers.[70] Under the statute, FMCSA was required to grant registration to Mexican motor carriers that met safety, fitness and financial requirements. And FMCSA had no statutory authority to impose or enforce emission controls.[71] Thus, it was under this unique factual setting that the Supreme Court held an EIS was not required under the "rule of reason" since there was insufficient causal connection between the FMSCA's issuance of the proposed regulations and the entry of Mexican trucks.[72]

In contrast to *Public Citizen*, the current situation involves a substantive question of statutory interpretation. First, the Supreme Court in *Loper Bright* clarified that the holdings of prior cases that relied in *Chevron* "are still subject to statutory *stare decisis* despite our change in interpretive methodology."[73] Thus, the Services are still bound by the holding in *Sweet Home* that the definition of "harm" is consistent with the statute. Unlike the regulations at issue in FMCSA, a change in the Services' substantive interpretation of the statute would certainly cause environmental impacts that must be reviewed in an EIS. Moreover, if the Service's position were correct in this case, an agency could simply conclude at the outset of a rulemaking that its interpretation of that statute was the best and only reasonable one, thereby allowing the agency to bypass environmental review. That approach to rulemaking conflicts with Congress' intent as reflected in NEPA and stretches the holding in *Loper Bright* far beyond the breaking point. The requirements of NEPA still apply to agency rulemaking proceedings, and environmental review is still critical to inform the agency's work. The information developed through environmental review and public participation will be important to the agency's promulgation of regulations and should inform the important work of the federal courts in interpreting federal statutes.

B. The Services may not categorically exclude from environmental review the proposed rescission of the regulatory definition of "harm."

In the Notice, the Services propose to categorically exclude the rule recission from NEPA review pursuant to 43 C.F.R. § 46.210(j), which applies to:

> "regulations * * * that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effect are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will be later subject to the NEPA process, either collectively or case-by-case."

The Notice does not provide any further explanation describing why the proposed recission of the regulatory definition of "harm" fits in this category. Without such an explanation, we cannot comment meaningfully on the agency's determinations under NEPA.

---

[69] 90 Fed. Reg. at 16104.
[70] 541 U.S. at 756.
[71] *Id*. at 758.
[72] *Id*. at 768.
[73] 603 U.S. at 376.

Regardless, it's obvious that this proposed change in the regulations does not qualify for a categorical exclusion under 43 C.F.R. § 46.210(j). The recission of the regulatory definition of "harm" – and the decision to eliminate modification of habitat that actually kills or injures a listed species – from the definition of take is substantive. In fact, it would be one of the most significant substantive changes to the ESA since its original enactment by Congress. Imperiled species across the country are threatened by habitat degradation, and this proposed substantive change to the regulation and a change in how the term "take" is interpreted would likely have far reaching effects on conservation of biodiversity on a national and international scale. It's plainly obvious that eliminating habitat modification from the definition of "take" will have a significant impact on the environment.

Furthermore, even if this category applied, which it does not, the Services would still be required to prepare an Environmental Impact Statement because of extraordinary circumstances.[74] The Services must assess the extent to which the proposed regulation would have "significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on Critical Habitat for these species."[75] The Services must also take into account potential impacts on unique areas like parks, wilderness areas, wildlife refuges, wetlands, and national monuments, which often all provide habitat for listed species.[76] Additional factors include the extent to which the action is "highly controversial" or the effects involve "unique or unknown risks."[77] All of these factors require preparation of an EIS prior to a decision making substantive changes to the definition of "take" in the ESA.

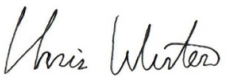
There is a wealth of existing scientific information documenting the fact that habitat destruction is one of the most serious and pervasive threats to imperiled species. For example, in a recent study, the authors examined the entire International Union for Conservation of Nature (IUCN) Red List database and found 88.3% of the 20,784 species on the list were impacted by habitat destruction.[78] Where species were imperiled due to a dominant threat, habitat destruction was identified as that dominant factor for 71.3% of the species. The authors conclude that "habitat destruction should become a greater focus of global environmental efforts" not less, as proposed by this rule change.

In short, the Services have no basis to exclude from NEPA review this proposed change to the regulations implementing the Endangered Species Act. By excluding modification of habitat that actually kills or injures a listed species from the statutory prohibitions, this agency action threatens to cause widespread, pervasive, long-lasting detrimental impacts to imperiled species across the country. The Services are required by federal law to analyze the direct, indirect, and cumulative effects of this change in statutory interpretation, and they must do so with robust, up front public involvement.

---

[74] 43 C.F.R. § 46.215.
[75] *Id*. at § 46.215(h).
[76] Id. at § 46.215(b).
[77] Id. at § 46.215(c)-(d).
[78] Hogue, A.S. & Breon, K. (2022). The greatest threat to species. *Conservation Science and Practice*, 4(5), e12670 (available at http://doi.org/10.1111/csp2.12670).

Sincerely,



Chris Winter
Executive Director

The institutions of the law professors are listed below for affiliation purposes only.

Prof. William Andreen
Research Professor of Law Emeritus
The University of Alabama School of Law

Prof. Hope Babcock
Professor Emerita
Georgetown Law

Prof. Jack Beermann
Philip S. Beck Professor of Law
Boston University School of Law

Prof. Karrigan Bork
Professor of Law
University of California, Davis School of Law

Prof. Paul Boudreaux
Professor of Law
Stetson University School of Law

Prof. Alex Camacho
Chancellor's Professor of Law
Faculty Director, Center for Land, Environment, and Natural Resources
University of California, Irvine School of Law

Prof. Jamison E. Colburn
Professor of Law & Goldstein Faculty Fellow
Penn State University

Prof. Christopher Courchesne
Associate Professor of Law
Director, Environmental Advocacy Clinic
Interim Director, Environmental Law Center
Vermont Law & Graduate School

Prof. Tim Duane
Professor Emeritus
Environmental Studies
University of California, Santa Cruz

Prof. Robert L. Glicksman
J.B. and Maurice C. Shapiro Professor of Environmental Law
George Washington University Law School

Prof. Steve C. Gold
Professor of Law and Judge Raymond J. Dearie Scholar
Rutgers Law School

Prof. Burke Griggs
Washburn University School of Law

Prof. Noah Hall
Professor of Law
Wayne State University Law School

Prof. Emily Hammond
Professor of Law
Director, Academic Sustainability Programs
George Washington University Law School

Prof. Stephen M. Johnson
Professor of Law
Mercer University Law School

Prof. Sam Kalen
Roberrt H. McKinney Chair in Environmental Law
Indiana University Robert H. McKinney School of Law

Prof. Madeline Klass
Professor Emeritus
Thomas Jefferson School of Law

Prof. John H. Knox
Henry C. Lauerman Professor of International Law
Wake Forest University School of Law

Prof. Albert Lin
Professor of Law
University of California, Davis School of Law

Prof. Kevin Lynch
Professor of Law
University of Denver Sturm College of Law

Prof. Heather Merfeld
Pro Tem Faculty
University of Oregon School of Law

Prof. Anthony Moffa
Professor of Law
University of Maine School of Law

Prof. Pat Parenteau
Professor of Law Emeritus and Senior Fellow for Climate Policy
Vermont Law and Graduate School

Prof. Justin Pidot
Ashby Lohse Chair in Water & Natural Resources
Co-Director, Environmental Law Program
University of Arizona James E. Rogers College of Law

Prof. Zyg Plater
Professor of Law
Coordinator of the Boston College Land and Environmental Law Program
Boston College Law School

Prof. Jamie Pleune
Associate Professor of Law (Research) & Wallace Stegner Research Fellow
University of Utah, S.J. Quinney College of Law

Prof. Melissa Powers
Jeffrey Bain Faculty Scholar & Professor of Law
Lewis & Clark Law School

Prof. David Raack
Professor of Law
Ohio Northern University Pettit College of Law

Prof. Edward P. Richards
Professor Emeritus
Paul M. Herbert Law Center
Louisiana State University

Prof. Shannon Roesler
Charlotte and Frederick Hubbell Professor of Environmental and Natural Resources Law
Faculty Director, Hubbell Environmental Law Institute
University of Iowa College of Law

Prof. Dan Rohlf
Professor of Law and Of Counsel, Earthrise Law Center
Lewis and Clark University

Prof. Douglas A. Ruley
Director
Environmental Justice Clinic
University of Miami School of Law

Prof. Scott Schang
Professor of Practice
Director, Environmental Law and Policy Clinic
Wake Forest University School of Law

Prof. Lawrence Schnapf
Adjunct Professor Law
New York Law School

Prof. Joshua Schwartz
E.K. Gubin Professor of Government Contracts Law
George Washington University Law School

Prof. Mark Squillace
Raphael J. Moses Professor of Law
University of Colorado Law School

Prof. Doug Williams
Professor of Law
Saint Louis University

Professor Sandi Zellmer
Professor and Director of Natural Resources Law Clinic
ABIII School of Law
University of Montana