National Wildlife Federation * Conservation Coalition of Oklahoma * Conservation Federation of Missouri * Idaho Wildlife Federation * Indiana Wildlife Federation * Iowa Wildlife Federation * Kansas Wildlife Federation * Kentucky Waterways Alliance * Louisiana Wildlife Federation * Montana Wildlife Federation * National Aquarium * Natural Resources Council of Maine * Nebraska Wildlife Federation * North Carolina Wildlife Federation * North Dakota Wildlife Federation * Prairie Rivers Network * South Carolina Wildlife Federation * Vermont Natural Resources Council

May 19, 2025

Submitted via Regulations.gov

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RE: Rescinding the Definition of “Harm” Under the Endangered Species Act Docket No. FWS-HQ-ES-2025-0034

Dear Acting Directors Souza and Grimm:

On behalf of our more than 7.8 million members and supporters, our organizations urge that the rule proposing the removal of the regulations defining “harm” under the Endangered Species Act not be finalized. Instead, the proposed rule should be withdrawn and the existing regulatory definitions of harm should be left intact.

Habitat is essential to all fish, wildlife, and plants. Harm to habitat constitutes harm to the species that depend on that habitat. Congress explicitly prohibited “harm” to endangered species in the definition of “take” in the Endangered Species Act (ESA). The U.S. Fish and Wildlife Service and National Marine Fisheries Service finalized narrowly targeted definitions of “harm” decades ago that prohibit harm to habitat that actually kills or injures wildlife, and “may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns," including, variously, breeding, feeding, sheltering, spawning, rearing, or migrating.[1] Those definitions have proven helpful in providing

[1] 50 CFR 17.3; 50 CFR 222.102.

clarity and boundaries regarding the implementation of the ESA, and became well established cornerstones of the Act. The Fish and Wildlife Service's definition has been upheld by the Supreme Court. The agencies have not established an administrative record that would support the withdrawal of the regulations defining harm, as exemplified by numerous examples of harm to listed species as a result of harming vital habitats.

The ESA makes it very clear that its purpose is not just to prevent the direct killing of endangered species, but to conserve the habitats and ecosystems upon which they depend. As described in more detail below, the purpose of the Act is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved".[2] Protecting habitat is critical for preventing the extinction of, and recovering, species listed under the ESA. The proposed rule would significantly weaken the effectiveness of the ESA, contrary to the language and intent of the law, and should be withdrawn.

Summary of scientific basis establishing harms to species from harms to habitat

The destruction, fragmentation, and elimination of habitat through land-use change is the leading driver of species declines globally in terrestrial and freshwater ecosystems.[3] Analysis of data from the International Union for the Conservation of Nature (IUCN) Red List found that habitat loss threatened 88.3% of imperiled species, and that it was the primary threat for 71.3% of imperiled species globally – and that habitat loss threatened more species than all of the other threats combined.[4,5]

Likewise, within the U.S., land use change remains the most prevalent threat to species.[6] For species that have already experienced declines dramatic enough to warrant federal protection under the ESA, decades of assessments of ESA listings have indicated that habitat loss is a leading threat to species on the brink of extinction – and these threats are intensifying.[6,7,8] Currently, approximately one-third of all plants and animals in the U.S. are at increased risk of extinction, and 40% of ecosystems are at risk of collapse across the entirety of their ranges, and habitat destruction and degradation is a primary threat.[9]

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[2] 16 U.S.C. § 1531(b).
[3] IPBES. (2019). Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (Version 1). Zenodo. https://doi.org/10.5281/zenodo.6417333. N.B.: In oceans, overexploitation is the leading driver of decline.
[4] The other major threats are overexploitation, invasive species, pollution, and climate change. Note that climate change is likely to become a more significant threat in the future, and it is likely to accelerate habitat loss and degradation for many species.
[5] Hogue, A.S. & Breon, K. (2022). The greatest threats to species. *Conservation Science and Practice*, e12670. https://doi.org/10.1111/csp2.12670.
[6] Niederman, T. E., Aronson, J. N., Gainsbury, A. M., Nunes, L. A., & Dreiss, L. M. (2025). US Imperiled species and the five drivers of biodiversity loss. *BioScience*, biaf019.
[7] Evans, D.M. et al. (2016). Species Recovery in the United States: Increasing the Effectiveness of the Endangered Species Act. Ecological Society of America. *Issues in Ecology,* Report No. 20.
[8] Wilcove, D. S., Rothstein, D., Dubow, J., Phillips, A., & Losos, E. (1998). Quantifying threats to imperiled species in the United States. *BioScience*, 48(8), 607-615.
[9] NatureServe. (2023). *Biodiversity in Focus: United States Edition*. NatureServe: Arlington, VA.

Across the country, the ESA has been successful in contributing to preventing the extinction of more than 99% of species listed, and more than 100 species have either been downlisted or delisted as the result of recovery. Yet of the 23 species proposed for delisting as the result of presumed extinction by the Fish and Wildlife Service in 2021, habitat alteration and loss were identified as threats at the time of listing or drivers of decline for 22 of the 23 species.[10] For many of these species, habitat modification was the primary threat or driver of decline identified.

In addition to species whose declines have required the use of federal resources in their recovery, state wildlife and natural resource agencies have identified over 13,000 Species of Greatest Conservation Need. These include species with low or declining populations that already, or may in the future, require protection under the ESA if threats to the species are not adequately addressed. For states across the country, agency-identified threats to species are dominated by habitat related impacts, such as residential and commercial development, energy production mining, transportation and service corridors, and more.[11,12] Conserving habitat is critical for avoiding the need for significant federal resource expenditure to recover thousands of species whose declines are accelerating due to threats to their habitats if they decline to the point where they meet the criteria for listing under the ESA.

The declines and rebounds of avian species across North America offer a clear example of the direct impact of habitat destruction–and restoration–on species populations. In the 20th century, populations of wetland-dependent waterfowl, such as wood duck and Northern pintail, declined drastically, some to the brink of extinction, as their wetland habitats were drained and converted. Today, due to legislative actions taken to safeguard and restore wetland habitat like the North American Wetlands Conservation Act, duck populations are 24% higher than they were 50 years ago. However, bird species whose habitats have not been afforded such legal protections and investments have continued to decline. For example, forest-dwelling species, such as along the Atlantic coast of the Southeast U.S, have continued to decline as their habitats have been fragmented and converted.[13,14]

Wildlife cannot persist when its habitat is destroyed or significantly altered. All living organisms need food, water, and suitable habitat to survive. Significant habitat modifications not only cause death or displacement to unsuitable alternative habitats, they can also cause direct and indirect injury by disrupting normal behavior patterns, to the detriment of a species' recovery and survival.

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[10] Endangered and Threatened Wildlife and Plants; Removal of 23 Extinct Species From the Lists of Endangered and Threatened Wildlife and Plants. 86 Fed. Reg. 54298, September 30, 2021.
[11] New Mexico Department of Game and Fish. (2016). State Wildlife Action Plan for New Mexico. New Mexico Department of Game and Fish, Santa Fe, New Mexico, USA
[12] Texas Parks and Wildlife Department. (2023). State Wildlife Action Plan: Texas 2023 Comprehensive Revision. Austin, TX.
[13] Johnston, A., Rodewald, A. D., Strimas-Mackey, M., Auer, T., Hochachka, W. M., Stillman, A. N., ... & Fink, D. (2025). North American bird declines are greatest where species are most abundant. *Science*, 388(6746), 532-537.
[14] North American Bird Conservation Initiative. (2022). *The State of the Birds*, United States of America, 2022. StateoftheBirds.org

Summary of legal support for existing definitions of harm

The proposed rule eliminating the longstanding definition of "harm" from the regulations implementing the ESA is contrary to the language and intent of the ESA, would undermine a fundamental purpose of the ESA, and would inject significant uncertainty into the scope of activities considered unlawful under the Act. The statutory definition includes "harm" as a prohibition under the definition of "take", and "harm" has been interpreted by the Services for decades to encompass habitat modification that can lead to injury or death of endangered, and most threatened, species, including by "significantly impairing essential behavioral patterns", including "breeding, feeding, or sheltering" for species under the jurisdiction of the Fish and Wildlife Service, and additionally spawning, rearing, and migrating for species under the jurisdiction of NMFS.[15] The proposal to remove these definitions would lead to harms to endangered and threatened species despite a clear prohibition on such harm in the law and in regulations implementing the ESA.

Congressional intent clearly makes habitat conservation and protection central to the ESA. Congress enacted the ESA with the express purpose of conserving not just individual animals, but the ecosystems on which they depend. This is clearly stated in the ESA's statutory purpose: "The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved..."[16] Moreover, Congress found, "The destruction of natural habitats of endangered species and threatened species is the major cause of species extinction..."[17] This intention of Congress was further clarified by the 1982 amendments to the Act adding Section 10 that specified incidental take of species can be permitted "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." The ESA also requires that "all Federal departments and agencies shall seek to conserve endangered and threatened species,"[18] and defines "conserve" as encompassing "all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to this act are no longer necessary," including "all activities associated with scientific resources management," and specifically "habitat acquisition and maintenance."[19] These statements reflect an unmistakable legislative intent to link species protection with habitat protection.

Further, the ESA mandates science-driven decision making. Congress intended for implementation of the ESA to be grounded in best available scientific data. This is codified in multiple sections of the statute, expressly stating "The Secretary shall make determinations... solely on the basis of the best scientific and commercial data available..."[20] By arbitrarily removing regulatory protections for habitat, the Service would be acting contrary to the scientific consensus and violating the ESA's expressed intent to rely on objective biological data. This proposed rule signals a move away from science-based policy and toward political expediency,

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[15] 50 CFR 17.3; 50 CFR 222.102.
[16] 16 U.S.C. § 1531(b).
[17] 16 U.S.C. § 1531(a)(5).
[18] 16 U.S.C. § 1531(c)(1).
[19] 16 USC § 1532(3).
[20] 16 U.S.C. § 1533(b)(1)(A).

which is incompatible with both the statute and the Constitution's requirement that agencies faithfully execute the laws passed by Congress.

As the Services point out in the proposed rule, the Fish and Wildlife Service's regulatory definition of habitat was upheld by the US Supreme Court in a 6-3 decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.[21] The minority dissenting opinion the Services rely on to justify the withdrawal of the regulatory definitions of harm points out that if Congress did not define "take" in the ESA, historic understandings of that word could be applied to limit its meaning. But Congress did define "take" in the ESA, and included "harm" in the definition of prohibited actions against endangered and threatened species under the ESA, along with "harass", neither of which necessarily align with those historical understandings. The dissent's understanding of "take" outside of the context of the ESA is not relevant.

Further justification in the proposed rule points to arguments in the Court's dissent relying on the principle of *noscitur a sociis*, which holds that a word is known by the company it keeps, and therefore *harm* and the other words defining *take* apply only to direct application of force against the animal taken. The dissent asserted that harm is 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."[22] However, the Court's majority opinion recognized Congressionally granted authorization to the Secretary in 1982 to issue permits under Section 10 of the ESA for *incidental* takings that were either direct or indirect. The purpose of the *incidental take* permits would not be logical if only direct and intentional action were included under the word *harm.*

The Services' justification for rescission is flawed and a misrepresentation of the *Chevron*, *Loper Bright* and *Sweet Home* decisions. *Loper* has no bearing on agency actions to revise or promulgate regulations – it merely governs how courts review agency actions going forward. Additionally, the Supreme Court specifically stated that *Loper* does not invalidate any previous decision utilizing *Chevron* deference, which includes *Sweet Home.* Therefore *Loper* is not relevant to this proposed rule. However, even considering this proposal through the lens of *Loper*, it does not invalidate "permissible readings" of regulations simply because they are "not the only possible such reading."

Moreover, *Loper's* overturning of *Chevron* had no impact on *Sweet Home*, not only because it does not apply retroactively, but also because the decision was not based solely, or even primarily, on *Chevron* deference. Instead, the Court's reasoning rested squarely on "traditional tools of statutory construction" including analysis of the statutory text, assessment of the ESA's stated purposes in 16 U.S.C. § 1531 explicitly including conserving ecosystems, and a detailed legislative history evaluation. These evidentiary sources are fully consistent with modern textualist principles expressed in *Loper* and remain authoritative in the absence of *Chevron*. The Court's decision in *Sweet Home* stands on a firm foundation of traditional statutory construction, not simply on deference. As such, the *Loper* decision can not be relied upon to displace the core findings of *Sweet Home*. To specifically rescind the definition of "harm" and reinterpret that

[21] *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. at 687 (1995).
[22] *Id.* at 719-20.

term to regulate only direct, intentional killing despite the Court's decision in *Sweet Home* would be a violation of the Services' constitutional obligation to "take care that the laws be faithfully executed."[23]

Many of the most serious threats to species survival result not from direct physical harm, but from the degradation, fragmentation, and destruction of habitat. Excluding habitat modification from the interpretation of "harm" when implementing the ESA, unless there is direct intent to harm species, would create a dangerous regulatory blind spot, which ignores the critical role habitat plays in species survival and recovery.

Unintended consequences of proposed changes for landowners

The proposed rule increases uncertainty both for those who have not yet completed habitat consultation – and potentially also for those who have. In this proposed rulemaking, the Services do not address how the change would affect the Section 10 incidental take permitting schemes and the implementation of existing habitat conservation plans under Section 10. The proposed change could not only increase uncertainty for private landowners but potentially lead to criminal or civil penalties or increased legal or economic risk.

For example, amendments to the ESA in Section 10(a)(1)(B) allow for private landowners and other non-federal parties to destroy or degrade some habitat through an incidental take permitting system with habitat conservation planning. Habitat conservation plans offer certainty to landowners by ensuring that they will not be subjected to future restrictions or obligations in exchange for minimizing and mitigating impacts that could reduce a species survival.

To receive incidental take permits under Section 10, a landowner must develop a habitat conservation plan. Section 10 has helped to balance public and private interests and reduce conflict. Their benefits to wildlife may extend beyond listed species by conserving valuable habitat that prevents future listings, and the conservation of functioning ecosystems can also provide other valuable public goods related to stormwater absorption, reduced erosion, and enhanced pollination for agriculture, among many others. Options such as habitat banking, habitat mitigation credits, and mitigation fund payments offer flexibility for landowners.

The proposed recission could create confusion among non-federal parties, by reducing the incentive to undertake habitat conservation planning and by implying that they are not liable for death and injury of listed species as the result of significant habitat modification. As a result, if a threatened or endangered species present on a property is killed or injured during significant habitat modification, a landowner may not have coverage for incidental take that they would have had if they had developed a habitat conservation plan and obtained an incidental take permit. Yet there is no doubt that habitat modifications can cause both direct and indirect harm to species, constituting take, or that such harm to a listed species is in violation of the ESA.

As noted above, the very concept of "incidental take permits" established by Congress in the ESA contradicts the Services' claims that even significant habitat modification cannot result in

[23] U.S. Const. art. II, § 3.

"take," because it does not constitute direct actions against individual organisms. But incidental take permits, by definition, do not authorize *direct and intentional* take – they authorize indirect, accidental take, i.e., take that is "*incidental to, and not the purpose of*, the carrying out of an otherwise lawful activity."[24]

Examples of the Impacts of Eliminating the Definition of Harm under the ESA

Existing regulations provide a measured, science-based definition of harm. This definition is underpinned by decades of rigorous ecological research and empirical evidence that directly demonstrate that habitat improvement and protection are crucial for the survival and recovery of ESA listed and other depleted species.

Monarch Butterflies

The definition of "harm" has been central to protecting imperiled species such as the monarch butterfly (*Danaus plexippus*) primarily through habitat conservation and restoration efforts. The latest Species Status Assessment of monarch butterflies identifies loss and degradation of breeding, migratory, and overwintering habitats as primary drivers of monarch declines, in addition to climate change and pesticide use.[25] Protecting and restoring monarch habitat that includes locally adapted milkweed and nectar plants, as well as overwintering habitats, is essential for the recovery of the species. If the definition of "harm" is removed from the ESA implementing regulations, the following implications for the monarch butterfly are likely:

- Weakened Habitat Protections: If "harm" is not explicitly defined to encompass habitat modification, it would no longer be clear that the ESA prohibits actions that significantly modify or degrade monarch butterfly habitat unless those actions directly kill or injure individual butterflies. This could undermine the legal basis behind many programs and actions that conserve critical breeding, migratory, and overwintering habitats essential for monarch survival.
- Reduced Effectiveness of Conservation Measures: Habitat loss is the leading threat to monarchs. Removing the definition of "harm" would make it more difficult to prevent or mitigate habitat destruction from agriculture, development, or pesticide use, including through incentive-based programs for private landowners, even if these activities lead to further population declines.
- Increased Risk of Decline: The monarch's recovery depends on landscape-scale habitat conservation. Without clarity that habitat modification is a form of take, monarch populations could face accelerated declines, potentially pushing them closer to endangered status.

Eliminating the definition of "harm" from the regulations implementing the ESA and reinterpreting the term would weaken key protections for monarch butterfly habitats and the species itself, severely compromising recovery efforts and likely resulting in further population

[24] 16 U.S.C. § 1539(a)(2) (emphasis added).
[25] U.S. Fish and Wildlife Service. (2024). *Monarch Butterfly (*Danaus plexippus*) Species Status Assessment Report.* Version 2.3. Midwest Regional Office.

declines, despite ongoing conservation work and proposed threatened status under the law. The elimination of “harm” could potentially accelerate the species' status to endangered and leave much of its remaining habitat unprotected.

Atlantic sturgeon

One pertinent example of how harm to habitat harms marine species is that of the Atlantic sturgeon, a federally listed endangered species that is managed by the Atlantic States Marine Fisheries Commission (ASMFC). The 2024 Atlantic sturgeon stock assessment update for this species indicates that habitat loss is one of the factors that is contributing to its currently depleted population status and that there have been reductions in productivity due to habitat loss.[26] Additionally, the National Oceanic and Atmospheric Administration (NOAA) identifies habitat degradation and impediments such as dams, poor water quality, water withdrawals, industrialization and development, and dredging as significant threats to the species, their habitat, and their survival. In particular, there is a critical need to maintain the integrity and availability of the habitat like hard-bottom areas for spawning.[27]

Offshore Wind Energy

Robust implementation of the ESA, including reliance on the statute and the current definition of “take” to include “harm” to habitat, leads to more responsible offshore wind development. Under the existing definition, risks from habitat modification are more clearly identified and addressed through mitigation. If this definition is rescinded, the Services risk overlooking significant impacts, setting a precedent not only for offshore energy development, but for all development affecting listed species habitat. Rescinding the definition of “harm” would increase risk to species and directly conflict with concerns raised in the recent Executive Order on offshore wind energy—which emphasized the need for rigorous marine mammal protection and alleged legal shortcomings in the permitting process.[28]

Responsibly developed offshore wind energy is a critical climate solution. The efficacy of this solution is contingent upon a robust regulatory framework that ensures the protection and recovery of imperiled wildlife, however. Efficiency in permitting, while desirable, becomes unsustainable if it compromises environmental protection. Streamlining processes without adequate environmental safeguards will undermine long-term sustainability for future generations. This proposal to limit the ESA’s reach by eliminating the long-standing regulatory definition of “harm” not only undermines the robust framework intended by Congress and President Nixon when signed into law with a broad statutory definition of take, but signals a larger retreat from science-based natural resource management.

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[26]Atlantic States Marine Fisheries Commission. (2024). Atlantic Sturgeon Stock Assessment Update https://asmfc.org/wp-content/uploads/2025/01/AtlanticSturgeonStockAssessmentUpdate_August2024.pdf

[27]NOAA. (2025). Atlantic Sturgeon https://www.fisheries.noaa.gov/species/atlantic-sturgeon

[28] The White House. (2025, January 20). *Temporary withdrawal of all areas on the Outer Continental Shelf from offshore wind leasing and review of the federal government’s leasing and permitting practices for wind projects*. https://www.whitehouse.gov/

Private Lands, Pesticides

The US Fish and Wildlife Service and National Marine Fisheries Service evaluate pesticides not only on their direct toxicity to listed species but also on their impacts to habitat quality and to prey resources. Exposure to pesticides can harm species in ways beyond ingestion or contact by impacting breeding or feeding resources. Rescinding the regulatory definitions of "harm" under the ESA, and reinterpreting that term to align with the Scalia dissent from the *Sweet Home* case, could allow habitat modifications that imperil listed species and would additionally create confusion.

The proposed rule leaves in place the adverse modification standard under Section 7 of the ESA, and Section 10 of the ESA requires incidental take permits for activities that may result in the take of a listed species. The existing regulatory definition of "harm" has played an important role in clarifying that habitat destruction can constitute take and thus require incidental take permits. These permits provide a mechanism for non-federal entities including landowners, land managers, pesticide applicators, and developers to avoid liability by minimizing harm to listed species in their planning. The proposed rule would create confusion that would likely reduce compliance with the ESA. Without regulatory clarity, fewer applicants may seek permits for incidental take, increasing unpermitted take, resulting in fewer opportunities for conservation measures through the permitting process[29]. Species would continue to experience elevated threats from activities such as clearing, mowing, draining, or pesticide use.

Many listed species have significant percentages of their range on private lands,[30] and some species occur entirely on non-federal lands.[31] Many private lands conservation programs have contributed to species conservation and recovery resulting in delisting or downgrading. Given the higher rates of habitat loss and future threats of habitat modification or conversion on private lands, species would be at greater risk. Requiring evidence of direct injury or mortality is also challenging given many impacts such as to invertebrates and other short-lived species that are harder to track and detect in real time.

Wetlands

The proposed changes ignore the fundamental importance of wetland and other habitat types to the survival of fish and wildlife species, and if finalized will lead to more listings and ultimately the extinction of species. Wetlands, which account for just about 5 percent of land area in the lower 48 states, provide the only habitat for more than one third of the nation's threatened and endangered species and support an additional 20 percent of the nation's threatened and endangered at some time in their life cycle. These same wetlands are home to 31 percent of the

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[29] Stanley, A. E., Epanchin-Niell, R., Treakle, T., & Iacona, G. D. (2024). Attributes of preemptive conservation efforts for species precluded from listing under the U.S. Endangered Species Act. *Conservation Biology*, 38, e14200. https://doi.org/10.1111/cobi.14200

[30] Eichenwald, A.J., Evans, M.J., & Malcom, J.W. (2020). US imperiled species are most vulnerable to habitat loss on private lands. *Front Ecol Environ,* 18(8): 439–446, https://doi.org/10.1002/fee.2177

[31] GAO. (1994). *Endangered Species Act: Information on Species Protection on Nonfederal Lands*. https://www.gao.gov/products/rced-95-16

nation's plant species.[32] Despite the importance of this vital habitat, at least ten states have lost more than 70 percent of their wetlands, while 22 states have lost 50 percent or more of their original wetland acreage.[33]

These habitat losses are a major contributor to the crisis facing the nation's fish and wildlife. For example, approximately 40 percent of the nation's freshwater fish species–which are particularly affected by the loss of wetland habitats–are now rare or imperiled.[34] Nearly 60 percent of the nation's globally significant freshwater mussel species are imperiled or vulnerable, and an additional 10 percent are already extinct.[35]

Procedural Deficiencies with Promulgation of the Rule

The Services have not provided a sufficient basis for withdrawing their approximately 50 year old regulation under the Administrative Procedures Act. If an agency seeks to change its policies, it must provide a sufficient justification for these changes. As discussed above, *Loper Bright* does not provide a rationale for re-interpreting harm after five decades of use by the agency and after the Supreme Court reaffirmed the definition in *Sweet Home* thirty years ago.

The Services argue that the rescission of the definition of harm would not be a significant change, and that the proposed rulemaking should be exempted from environmental review. The categorical exclusion of this proposed rulemaking from review under the National Environmental Policy Act (NEPA) cannot be justified. The effort to alter the definition of harm does not qualify for a categorical exclusion, because it meets the definition of "extraordinary circumstances" based on several criteria listed in 43 CFR 46.215, including (b-f) and most notably (h): "Have 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."

Nor are the Services exempt from NEPA review based on their unwarranted assertion that they are somehow compelled to make this change as the result of *Loper Bright*. That decision is

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[32] (https://www.fws.gov/wetlands-month/essential-habitats last visited 05-12-25); (https://www.fws.gov/story/2023-04/why-healthy-wetlands-are-vital-protecting-endangered-species# last visited 05-12-25); Environmental Protection Agency, Economic Benefits of Wetlands, EPA843-F-06-004 (May, 2006) (factsheet).

[33] T.E. Dahl and S.M. Stedman. (2013). *Status and trends of wetlands in the coastal watersheds of the Conterminous United States 2004 to 2009*. U.S. Department of the Interior, Fish and Wildlife Service and National Oceanic and Atmospheric Administration, National Marine Fisheries Service. (46 pp); Dahl, T.E. (2006). *Status and trends of wetlands in the conterminous United States 1998 to 2004*. U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. (112 pp); Dahl, T.E. (2000). *Status and trends of wetlands in the conterminous United States 1986 to 1997*. U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. (82 pp); Dahl, T.E., and Johnson, C.E. (1991). *Status and trends of wetlands in the conterminous United States, mid-1970's to mid-1980's*. U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. (28 pp).

[34] Jelks, H. L., S.J. Walsh, N.M. Burkhead, et al. (2008). Conservation status of imperiled North American freshwater and diadromous fishes. *Fisheries*, 33: 372-407.

[35] Williams, J. D., M. L. Warren, K. S. Cummings, J. L. Harris, and R. J. Neves. (1993). Conservation status of freshwater mussels of the United States and Canada. *Fisheries,* 18: 6–22; Lydeard, C., R. H. Cowie, W. F. Ponder, et al. (2004). The global decline of nonmarine mollusks. *BioScience*, 54 321-330.

irrelevant to the Service's proposal, and additionally does not call into question or overturn prior cases that had relied on the Chevron framework. (Even if it did, the courts affirmed the definition of "harm" in *Sweet Home*.)

Similarly, the promulgation of this regulation would not be exempt from the procedural requirements of the ESA, including consultation on impacts under section 7(a)(2), given the significant impacts the Services' action to remove of the definition would have on ESA listed species. When an action may negatively impact a threatened or endangered species, 7(a)(2) requires consultation of "each federal agency" for "any action authorized, funded, or carried out by such agency."[36] The Services are not exempt.

Conclusion

Across terrestrial, freshwater, and marine environments, the health and availability of habitat are critical to species survival. These ecosystems are interconnected. When habitats are degraded or destroyed, the impacts affect not only listed species, but also the ecosystem services that human communities rely on for clean water, storm protection, fisheries, and climate resilience. Weakening these protections threatens human well-being as well as endangered and threatened species and ecosystems. Rescinding this definition would mark a profound setback in our nation's efforts to prevent extinction and promote recovery of species. The Services have not developed an administrative record that supports withdrawing the longstanding regulatory definitions of harm.

The American public strongly supports the ESA. This proposal will significantly undermine the effectiveness of the Act. Wildlife cannot exist in a vacuum. Conservation of critical habitat is conservation of species, and harm to critical habitat is harm to species. This proposal is not supported by the American public and is not in the interests of the citizens of this county nor the species that need the ESA for their very survival.

We strongly oppose the proposal by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to rescind the regulatory definition of "harm" under the Endangered Species Act (ESA). We strongly urge the Services to withdraw this proposed rule and instead strengthen the ESA's implementation to meet the growing challenges of biodiversity loss.

[36] 16 U.S.C. § 1536(a)(2).

National Wildlife Federation, Conservation Coalition of Oklahoma, Conservation Federation of Missouri, Idaho Wildlife Federation, Indiana Wildlife Federation, Iowa Wildlife Federation, Kansas Wildlife Federation, Kentucky Waterways Alliance, Louisiana Wildlife Federation, Montana Wildlife Federation, National Aquarium, Natural Resources Council of Maine, Nebraska Wildlife Federation, North Carolina Wildlife Federation, North Dakota Wildlife Federation, Prairie Rivers Network, South Carolina Wildlife Federation, Vermont Natural Resources Council