**COMMENTS OF THE ATTORNEYS GENERAL OF THE COMMONWEATH OF MASSACHUSETTS AND THE STATES OF ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, ILLINOIS, MAINE, MARYLAND, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT AND WASHINGTON**

May 19, 2025

**By Electronic Submission to www.regulations.gov**

Hon. Doug Burgum, Secretary
U.S. Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Hon. Howard Lutnick, Secretary
U.S. Department of Commerce
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**Comments on Proposed Rule, "Rescinding the Definition of 'Harm' Under the Endangered Species Act," Docket No. FWS–HQ–ES–2025–0034; FXES11110900000–256 FF09E23000; 250411–0064, RIN 1018–BI38; 0648–BN93**

Dear Secretaries Burgum and Lutnick:

The undersigned sixteen State Attorneys General of the Commonwealth of Massachusetts and the States of Arizona, California, Colorado, Connecticut, Illinois, Maryland, Maine, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington (together, the States), respectfully submit the following comments on the proposed rule of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together, the Services), entitled "Rescinding the Definition of 'Harm' Under the Endangered Species Act" (hereafter "Proposed Rescission"). The Services propose to rescind their longstanding respective regulatory definitions of "harm" within the Endangered Species Act's (ESA's) definition of "take." *See* 50 C.F.R. §§ 17.3 (FWS harm rule), 222.102 (NMFS harm rule); *see* 16 U.S.C. § 1532(19) (ESA definition of "take"). This change risks undermining decades of progress in species conservation and places America's wildlife under an even greater threat of extinction. The States strongly urge the Services to withdraw this rule.

## I. INTRODUCTION AND SUMMARY OF COMMENTS

For decades, the Services' regulatory definition of "harm" has meant that the "take" prohibition in ESA section 9, and the accompanying incidental take permit process in ESA section 10,

require the adverse impacts of myriad human activities on our nation's most vulnerable species and their habitats to be adequately minimized and mitigated. These regulations currently define "harm" to include "significant habitat modification or degradation" that "actually kills or injures" fish or wildlife by "significantly impairing" the species' "essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. §§ 17.3, 222.102. That definition is legally sound and grounded in well-established science, and is critical to ensuring that the ESA's conservation mandate is adequately fulfilled.

In 1995, the U.S. Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (*Sweet Home*), expressly upheld FWS's regulatory definition of harm as consistent with the plain language, purposes, structure, and legislative history of the ESA. As the Supreme Court correctly recognized, the ESA's critically important species conservation goals simply cannot be realized without "harm" being understood to encompass *some* types of habitat modification and degradation. Thus, as explained in detail in Part IV.A below, the Services' longstanding harm definition is entirely consistent with the "best meaning" of the ESA's definition of "take." *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400, 409 (2024) (*Loper Bright*).

By contrast, the Services' rationale for the Proposed Rescission—that the *dissenting* opinion in *Sweet Home* now represents the "best meaning" of the statute, and consequently is compelled by the Supreme Court's recent decision in *Loper Bright*, 603 U.S. at 400—is arbitrary, capricious, an abuse of discretion and contrary to law, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq*. The Services' rationale is directly contrary to the holdings and reasoning of both *Sweet Home* and *Loper Bright*, and also runs afoul of numerous other cases interpreting and applying the term "harm" in the ESA's definition of "take." The Services' rationale also is directly contrary to the plain language, purposes, structure and legislative history of the ESA and creates internal inconsistencies within the ESA. Moreover, the rationale for the Proposed Recission is based on a selective and misleading reading of the plain language of the Services' existing harm definitions, which restricts the circumstances under which habitat modification or degradation constitutes a prohibited "take" under section 9. And if adopted, the Proposed Rescission would create internal inconsistencies with FWS's own take permitting regulations.

Additionally, as explained in Part IV.B below, the Services have failed to account for the States' and other stakeholders' substantial reliance on the Services' longstanding existing regulatory definitions of harm. Finally, as explained in Part IV.C below, the Services propose to unlawfully adopt the Proposed Rescission without complying with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq*.

For all of these reasons, the States strongly urge the Services to withdraw this unlawful and arbitrary proposal as contrary to the APA, ESA and NEPA.

## II. OVERVIEW AND BACKGROUND

### A. Overview and Purposes of the ESA

Congress enacted the ESA over fifty years ago as a bipartisan effort to "halt and reverse the trend toward species extinction." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (*TVA v. Hill*). "Congress was concerned about the unknown uses that endangered species might have and about the unforeseeable place such creatures may have in the chain of life on this planet." *Id*. at 178–79. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id*. at 180. The statute enshrines a national policy of "institutionalized caution" in recognition of the "overriding need to devote whatever effort and resources [are] necessary to avoid further diminution of national and worldwide wildlife resources." *Id.* at 177, 194 (internal quotation and emphasis omitted). "[T]he language, history, and structure of the [ESA] … indicates beyond doubt that Congress intended endangered species to be afforded the *highest of priorities*." *Id*. at 174 (emphasis added); *see also id.* at 194. That overriding goal "is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id*. at 184.

As Congress found: "[v]arious 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). The ESA further declares that endangered and threatened species of "fish, wildlife, and plants are of esthetic, ecological, historical, recreational, and scientific value to the Nation and its people." *Id.* § 1531(a)(3). The overarching purposes of the ESA are to "provide a means whereby *the ecosystems* upon which" both endangered and threatened species depend "may be conserved," and to provide a program for the conservation of such species. *Id.* § 1531(b) (emphasis added).

Accordingly, the ESA declares "the policy of Congress that all Federal departments and agencies—including the Services—*shall* seek to conserve endangered … and threatened species and *shall* utilize their authorities in furtherance of the purposes of [the ESA]." *Id*. § 1531(c)(1) (emphasis added); *see also id*. § 1536(a)(1) ("[t]he Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter"); *TVA v. Hill*, 437 U.S. at 184 ("*every agency of government* is committed to see that" the ESA's "purposes are carried out") (emphasis added)).

The ESA broadly defines "conserve" as "the use of 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 chapter are no longer necessary," *i.e.*, to the point of full recovery. 16 U.S.C. § 1532(3); *see also Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv*., 378 F.3d 1059, 1070 (9th Cir. 2004) ("the ESA was enacted not merely to forestall extinction of species … but to allow a species to recover"); *Sierra Club v. U.S. Fish & Wildlife Serv*., 245 F.3d 434, 438 (5th Cir. 2001) ("the objective of the ESA is to enable listed species not merely to survive, but to recover from their endangered or threatened status").

The ESA achieves its overarching conservation purposes through multiple programs—all of which are critical to the ESA's success. Section 4 prescribes the process for the Services, which are jointly responsible for implementing the ESA, to list a species as "endangered" or "threatened," and to designate "critical habitat" for each listed species. 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C).[1] The ESA provides listed species and designated critical habitat with significant protections to ensure that species expand their ranges and recover to sustainable population levels as mandated by the ESA.

Section 7 requires federal agencies to consult with the Services to "insure" that any action they propose to authorize, fund, or carry out "is not likely to jeopardize the continued existence of any endangered … or threatened species or result in the destruction or adverse modification of" any designated critical habitat. *Id.* § 1536(a)(2).

Section 9 makes it unlawful for any "person," as broadly defined, to "take" an endangered and threatened species. *Id.* §§ 1532(13), 1538(a)(1)(B). The ESA further defines "take" as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct." *Id.* § 1532(19). Section 4(d) authorizes the Services to extend by regulation any or all of these section 9 prohibitions to threatened species. *Id.* §§ 1533(d), 1538(a)(1)(G), (a)(2)(E).

Section 10, which was added by Congress in 1982, authorizes the Services to permit a person to take a listed species "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." *Id.* § 1539(a)(1)(B). In order to obtain an "incidental take permit" under section 10(a), a permit applicant must prepare a conservation plan specifying, *inter alia*, the likely impact of such taking, steps that will be taken to minimize and mitigate these impacts, the funding available for such measures, and any alternative actions considered. *Id*. § 1539(a)(2)(A). An incidental take permit can only be issued if the relevant Service finds that "the taking will be incidental," that the amount of authorized taking will not result in jeopardy to the listed species, and that the permit applicant will minimize and mitigate the impacts of such taking "to the maximum extent practicable" and "will ensure that adequate funding for the plan will be provided," among other measures. *Id*. § 1539(a)(2)(B).

Since its enactment in 1973, the ESA has provided significant benefits and recovery success stories for imperiled species, protecting our nation's priceless and irreplaceable natural heritage. Indeed, 39 listed species have fully recovered, and the ESA has prevented the extinction of more than 99% of species under its protection.[2] As but one example, our national bird and symbol, the

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[1] In general, FWS is responsible for listing and managing terrestrial and freshwater fish, wildlife, and plant species, while NMFS is responsible for most marine species and anadromous fish species. The ESA defines an endangered species as one "in danger of extinction throughout all or a significant portion of its range," while a threatened species is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. §§ 1532(2), (6). The ESA defines "critical habitat" as areas within and outside the geographic area occupied by the species that are "essential for the conservation of the species." *Id.* §1532(5)(A).

[2] Noah Greenwald, et al., *Extinction and the U.S. Endangered Species Act*, PEER J. 7:E6803 (2019), available at: https://doi.org/10.7717/peerj.6803.

bald eagle, once facing extinction across most of its range, has now recovered and was delisted in 2007. 72 Fed. Reg. 37,346 (July 9, 2007). Importantly, the ESA allows economic growth while continuing to protect biodiversity. Where necessary to achieve the ESA's important species and habitat conservation goals, proposed projects are simply required to incorporate permit conditions or design modifications to avoid or mitigate harmful impacts to imperiled species or their habitats, thereby benefitting everyone.[3] This type of approach is standard practice in land use permitting regimes.

### B. The Existing Harm Regulations and Proposed Rescission

FWS first promulgated the "harm" regulation in 1975, and subsequently amended it in 1981 to emphasize that "actual death or injury of a protected animal is necessary for a violation." *Sweet Home*, 515 U.S. at 691 n.2 (citing 40 Fed. Reg. 44,412, 44,416 (1975) and 46 Fed. Reg. 54,748, 54,750 (1981)). Since 1981, FWS has defined "harm" as "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 behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (emphasis added).

Since 1999, NMFS has defined "harm" very similarly as "an *act* which *actually* kills or injures fish or wildlife. Such an act may include *significant* habitat modification or degradation which *actually kills or injures* fish or wildlife by *significantly* impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering." 50 C.F.R. § 222.102 (emphases added); *see* 64 Fed. Reg. 60,727 (1999) (adding NMFS definition of "harm" in 50 C.F.R. § 222.102).

Now, some fifty years later, the Services propose to rescind these regulatory definitions of harm. 90 Fed. Reg. 16,102 (Apr. 17, 2025). The Services claim that the "existing regulatory definition[s] of 'harm,' which includes habitat modification, runs contrary to the best meaning of the statutory term 'take,'" and that they are undertaking this change to "adhere to the single, best meaning of the ESA." *Id*. at 16,102 (citing *Loper Bright*, 603 U.S. at 400).

## III. STATE INTERESTS IN A STRONG ESA, AND ADVERSE EFFECTS OF THE PROPOSED RESCISSION ON THESE STATE INTERESTS

The States have concrete interests in preventing and remedying harm to their natural resources, including imperiled species and their habitats. Many States, including California and Washington, hold their fish and wildlife resources in trust for the benefit of all state residents. For many decades, our States have depended upon the Services' interpretation and implementation of the ESA's take prohibition, including their broad definitions of "harm," to aid

[3] *See, e.g.*, Jacob W. Malcolm & Ya-Wei Li, *Data Contradict Common Perceptions about a Controversial Provision of the US Endangered Species Act*, 112 Proc. Natl. Acad. Sci. U.S.A., 15844—15849 (2015) (from 2008–2015, "no project [was] stopped or extensively altered as a result of FWS concluding either jeopardy or destruction/adverse modification of critical habitat"), available at: https://doi.org/10.1073/pnas.1516938112.

States in protecting federally listed species that reside within their borders, some of which also are protected by state endangered species and other natural resource laws.

A robust and effective ESA is essential to protecting our States' interests and continuing progress toward the national policy of recovering endangered and threatened species. The Services' existing harm regulations are critical to this effort by ensuring that myriad human activities, which can adversely affect listed species and their habitats in many ways, are fully evaluated and adequately mitigated.

The ESA's species and habitat protections, as implemented through the Services' harm regulations, also promote state and national economic benefits. For example, protection of listed species through protection of their habitats, as currently required by the ESA and the regulatory harm definitions, support not only listed species, but also diverse habitats that support wildlife tourism, recreation and other beneficial economic activities. Indeed, wildlife tourism generates billions of dollars annually for all states while supporting thousands of jobs.[4] In 2022 alone, FWS reports that over 145 million people engaged in wildlife watching activities in the United States, leading to increased jobs in both the private and public sectors.[5] Protected nature preserves also create higher residential land values.[6] Additionally, habitat protections also can benefit hunters, fishers and trappers because protection of imperiled species' habitats also can help to support healthy populations of non-protected game species.

The Proposed Rescission, however, would adversely affect the fish, wildlife, and plant resources of our States and our States' ability to help prevent federally listed species from sliding further toward extinction. With the weakening of federal protections, the burden of protecting vulnerable species and habitats would fall more heavily on our States, detracting from our efforts to carry out our own programs and increasing state costs and burdens. Even assuming an increase in state funding for these efforts, our States still would not be able to wholly fill the resulting gaps in federal protections for migratory species or species whose ranges fall partially outside of state borders.

The Proposed Rescission also would adversely affect federal-state cooperative efforts. The ESA specifically directs the Services to "cooperate to the maximum extent practicable with states" in implementing the statute, and gives states a special "seat at the table" to ensure adequate and fully informed implementation of the ESA's conservation mandates. 16 U.S.C. § 1535(a). Most, if not all, of the undersigned States have entered into cooperative agreements with the Services pursuant to ESA section 6, to help preserve and recover federally listed species within their borders. *Id*. § 1535(c). These States receive federal funding to implement their cooperative

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[4] U.S. FISH AND WILDLIFE SERVICE, 2022 Economic Contributions of Wildlife Watching in the United States (2024), available at: https://www.fws.gov/sites/default/files/documents/2024-06/2022-economic-contributions-of-wildlife-watching-in-the-united-states.pdf.

[5] *Id.*

[6] *See* Loomis et. al., *Ecosystem Service Values Provided by National Parks to Residential Property Owners*, 220 Ecological Economics 108175 (2024) (estimating that residential sales prices were on average 9.8% higher for houses within 2 kilometers of National Park boundaries), available at: https://www.sciencedirect.com/science/article/abs/pii/S0921800924000727.

agreements and also have expended significant state resources to protect federally listed species. *Id*. § 1535(d). Many States assist in implementation of federal habitat conservation plans (HCPs), candidate conservation agreements and safe harbor agreements (the latter two are now referred to collectively as "conservation benefit agreements"), as well as associated take permits issued pursuant to ESA section 10(a). Some of these also are joint federal-state conservation plans and agreements that also have been approved under relevant state laws, such as the California Endangered Species Act and California Natural Community Conservation Planning Act. All of these important conservation programs depend upon a broad interpretation of the term "harm" as including habitat modification and/or degradation. *See infra* section IV.B.1.

As a result of these federal-state cooperative efforts to implement the ESA within state borders, our States have prevented the extinction, and seen significant steps toward the recovery, of numerous imperiled species. For example, Massachusetts populations of the Atlantic Coast piping plover, which is listed as a threatened species along most of the East Coast, have increased nearly tenfold since the population was federally listed in 1985.[7] In California, the ESA has been instrumental in recovering the near-extinct California condor, which has been a multi-decade-long joint federal-state effort.[8]

In Oregon, the Oregon Coast coho salmon, an economically important species, was listed as threatened in 1998. Since 2000, these salmon populations have rebounded back into the 100,000s, due in substantial part to cooperative efforts of the State of Oregon, private landowners and federal agencies to restore fish habitat and improve fish passage pursuant to the ESA.[9] This increase in population has allowed Oregon to open fisheries back up on many coastal rivers, providing substantial economic benefit to rural Oregonians. And in Washington, the ESA's take prohibition is critical to preventing extinction of the Southern Resident killer whale, a population that is of great cultural significance and a key focus of wildlife tourism in the State.[10]

The Proposed Rescission would significantly narrow the scope of, and thereby weaken, the section 9 take prohibition, running contrary to the fundamental objectives of the ESA. This weakened section 9 prohibition, would, in turn, reduce incentives for non-federal entities to obtain take permits and mitigate for the destructive impacts of their projects on listed species and the habitat upon which these species depend for survival and recovery. The Proposed Rescission also would reduce incentives for these entities to participate in other voluntary programs that are designed to provide a net benefit for listed species, such as conservation benefit agreements. *See infra,* Part IV.B.2.

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[7] *Piping Plover*, MASS. DIV. OF FISHERIES AND WILDLIFE (April 23, 2025), https://www.mass.gov/info-details/piping-plover.

[8] *See* U.S. FISH AND WILDLIFE SERV., California Condor Recovery Program: 2024 Annual Population Status (2024), https://www.fws.gov/media/2024-california-condor-population-status-report; California Condor, U.S. FISH AND WILDLIFE SERV., https://www.fws.gov/cno/es/CalCondor/Condor.cfm.

[9] *See* NOAA FISHERIES, *Oregon Coast Coho Salmon*, https://www.fisheries.noaa.gov/west-coast/endangered-species-conservation/oregon-coast-coho-salmon

[10] *See* NOAA FISHERIES, *Southern Resident Killer Whale,* https://www.fisheries.noaa.gov/west-coast/endangered-species-conservation/southern-resident-killer-whale-orcinus-orca

## IV. COMMENTS ON THE PROPOSED RESCISSION

The Proposed Rescission violates the APA, ESA and NEPA because it is "arbitrary, capricious, an abuse of discretion," and "otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA requires an agency to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (*State Farm*) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). In reviewing the agency's explanation, a court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *State Farm*, 463 U.S. at 43 (cleaned up). A court will find an agency's decision arbitrary and capricious if, among other things, "the agency has relied on factors which Congress has not intended it to consider" or "entirely failed to consider an important aspect of the problem." *Id*.

The Services have not adequately explained or justified their Proposed Rescission under the APA, nor can they possibly do so, and the Proposed Rescission is contrary to the ESA and NEPA.

As explained in Part IV.A below, the Services' rationale for the Proposed Rescission is unlawful and contrary to the APA and the ESA for multiple reasons. First, it is directly contrary to the holdings and reasoning of the Supreme Court's decisions in both *Sweet Home* and *Loper Bright*. Second, the Services' rationale is directly contrary to the plain language, purposes, structure, and legislative history of the ESA, and if adopted, the Proposed Rescission would create internal inconsistencies within the ESA. Third, the Services' rationale for the Proposed Rescission runs afoul of numerous other cases interpreting and applying the term "harm" in the ESA's definition of "take." Fourth, the Services' rationale is based on a selective and misleading reading of the plain language of the existing harm regulations, and the Proposed Rescission would create internal inconsistencies with FWS's own take permitting regulations.

As explained in Part IV.B below, the Proposed Rescission also is contrary to the APA because the Services have failed to account for the States' substantial reliance on the Services' decades-old existing regulatory definition of harm.

Finally, as explained in Part IV.C below, final adoption of the Proposed Rescission without a comprehensive review of its environmental impacts, as the Services currently propose to do, would be a clear violation of the APA and NEPA.

For all of these reasons, the Proposed Rescission is contrary to law and relies on factors that Congress plainly did not intend for the agencies to consider; at the same time, it "entirely fail[s] to consider" multiple "relevant factors" and "important aspect[s] of the problem." *State Farm*, 463 U.S. at 43. The Services thus have committed a "clear error of judgment" in violation of the APA, ESA and NEPA. *Id.* The Proposed Rescission must be immediately withdrawn.

### A. The Proposed Rescission Would Violate the APA and Fundamentally Conflict with the Language and Purposes of the ESA

The Services' rationale for rescinding the longstanding definitions of "harm"[11] is that, by "includ[ing] habitat modification," they "run[] contrary to the best meaning of the statutory term 'take'" in the ESA, and that the Services "are undertaking this change to adhere to the single, best meaning of the ESA." 90 Fed. Reg. 16,102; *see also id*. 16,103. As their primary purported justification for this radical change in the longstanding regulatory scheme, the Services assert that the U.S. Supreme Court's decision in *Sweet Home*, 515 U.S. 687, upholding FWS's regulatory definition of harm, was based solely on the now-overruled "*Chevron*" doctrine of deference to agency regulations implementing ambiguous statutes.[12] 90 Fed. Reg. 16,013 (citing *Loper Bright*, 603 U.S. at 400). In *Loper Bright*, the Supreme Court held that a court must determine whether to uphold an agency regulation based on the *court's* interpretation of the "best meaning" of the statute, rather than on whether the *agency's* view is a reasonable interpretation of the statutory scheme. *Loper Bright*, 603 U.S. at 400, 408-409.

The Services flip *Loper Bright* on its head, using it as a purported basis to disregard the binding Supreme Court's decision in *Sweet Home—the judiciary's* final word on the meaning of "harm" in the ESA. Instead, the Services unlawfully interpose *the agencies'* own, newfound view that the *Sweet Home dissenting* opinion's interpretation of the term "harm"—which was expressly rejected by the *Sweet Home* majority—is now the "single, best meaning" of "take," based on the "centuries old understanding" of that term "as meaning to kill or capture a wild animal." 90 Fed. Reg. 16,102-16,103. Specifically, the Services assert that, under this common law understanding of "take" and the "noscitur a sociis" canon of statutory construction ("it is known by its associates"), all ten verbs in the ESA's definition of "take," including "harm," "should be construed to require an affirmative act directed immediately and intentionally against a particular animal," and "not an act or omission that indirectly and accidentally causes injury to a population of animals." *Id*. (citing *Sweet Home*, 515 U.S. at 717, 719-20) (Scalia, J., dissenting) (cleaned up).

The Services' strained rationale violates the APA and the ESA, and is directly contrary to the Supreme Court's holding and reasoning in *Sweet Home*. The Services also misinterpret and misapply the Supreme Court's decision in *Loper Bright*. It is *the Services'* newfound rationale that is contrary to the plain language, purposes, structure, and legislative history of the ESA, and which does not comport with the "best meaning" of the ESA's definition of "take." *Loper Bright*, 603 U.S. at 400, 408-409. Further, the Services' rationale contravenes decades of additional case law interpreting the meaning of "harm" within the ESA's definition of "take." Finally, the Services' rationale is arbitrary and capricious because it wholly ignores the limiting language in the text of the harm regulations themselves, and the fact that the Proposed Rescission would create internal inconsistencies within FWS's existing take permit regulations.

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[11] As discussed in Section II B, *supra*, FWS first enacted its regulation defining the term "harm" in the ESA's definition of "take" in 1975, and NMFS enacted its parallel harm regulation in 1999.

[12] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

### 1. The Services' rationale is based on a legally incorrect view of *Sweet Home*

The Services' conclusion that the Court in *Sweet Home* upheld FWS's existing harm regulation based *solely* on the now-overruled doctrine of *Chevron* deference is simply wrong. The Court in *Sweet Home* did not rely solely—or even primarily—on *Chevron* deference to uphold the harm regulation.[13] Rather, the Court upheld the regulation based on its own, independent interpretation of the statutory definition of "take" in the ESA (16 U.S.C. § 1532(19)), as well as the ESA's overarching purposes, overall structure, and legislative history. *Sweet Home*, 515 U.S. at 695-708.

In *Sweet Home*, the Court framed the question to be decided as "whether the Secretary [of the Interior] exceeded his authority under the [ESA] by promulgating that regulation." *Sweet Home*, 515 U.S. at 690. Following extensive analysis of the language, purposes, structure, and legislative history of the ESA, the Court ultimately held that the answer to this question was "no." *Id*. at 697-708. In so doing, the Court expressly rejected each of the respondents' three arguments as to why "*Congress* did not intend the word 'take' in § 9 to include habitat modification." *Id*. at 693 (emphasis added).

The Court began its statutory analysis by stating that "*the text* of the [ESA] provides three reasons for concluding that the Secretary's interpretation is reasonable." *Sweet Home*, 515 U.S. at 697 (emphasis added); *see Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1065 (9th Cir. 1996) (in *Sweet Home*, "[t]he Supreme Court determined *the text of the Act* provided three reasons for concluding that the Secretary's interpretation was reasonable") (emphasis added).

First, the Court emphasized that the "ordinary understanding of the word 'harm'"—the dictionary definition of which is "to cause hurt or damage" or to "injure"—supports the Secretary's harm definition. *Sweet Home*, 515 U.S. at 697. Within the context of the ESA, "that definition naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species." *Id*.

Second, the Court held that "the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid." *Sweet Home*, 515 U.S. at 698. One of the ESA's "central purposes," the Court explained, "is 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)) (emphasis added).[14] As the Court initially stated in *TVA v. Hill* and expressly reaffirmed in *Sweet Home*,

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[13] The majority opinion cited *Chevron* only twice in its analysis, and did not apply the *Chevron* two-step test in upholding the regulation. *See Sweet Home*, 515 U.S. at 703, 708.

[14] As discussed in Part II.A above, the ESA defines "conserve" and "conservation" broadly as "to use and the use of 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 chapter are no longer necessary," *i.e*. to the point of full recovery. 16 U.S.C. § 1532(3); *see*, *e.g*., *Gifford Pinchot.*, 378 F.3d at 1070 ("the ESA was enacted not merely to forestall the extinction of species … but to allow a species to recover"); *Center*

this conservation purpose "is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Sweet Home*, 515 U.S. at 699 (quoting *TVA v. Hill*, 437 U.S. at 184).

Third, the Court discussed the structure and context of the ESA as a whole, holding that "the fact that Congress in 1982 authorized the Secretary to issue permits for [section 9] takings … 'if such taking is incidental to, *and not the purpose of*, the carrying out of an *otherwise lawful* activity,' 16 U.S.C. § 1539(a)(1)(B), strongly suggests that Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings." *Sweet Home*, 515 U.S. at 700 (emphasis added). As discussed in Part II.A, this section 10(a) "incidental take permit" process requires permit applicants to prepare a conservation plan specifying, *inter alia*, the impact of the proposed taking, mitigation measures and available funding. 16 U.S.C. § 1539(a)(2)(A). The relevant Service may issue the permit if it finds that "the taking will be incidental" and the impact of the taking will be minimized and mitigated, among other findings. *Id*. § 1539(a)(2)(B).

The Court held that this section 10(a) incidental take permit process makes "clear that Congress had in mind foreseeable rather than merely accidental effects on listed species," and intended an unlawful "take" to include "activities not intended to harm an endangered species, such as habitat modification, … unless the Secretary permits them." *Sweet Home*, 515 U.S. at 700-01. The Court further explained that: "[n]o one could seriously request an 'incidental' take permit to avert § 9 liability for direct, deliberate action against a member of an endangered or threatened species, but respondents would read 'harm' so narrowly that the permit procedure would have little more than that absurd purpose." *Id*.

Fourth, the Court held that the legislative history of the 1973 Act likewise "[m]akes clear that Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions." *Sweet Home*, 515 U.S. at 704. For example, the Senate Report states that "'[t]ake' 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." *Id*. (quoting S. Rep. No. 93-307 at 7 (1973)) (emphasis added). The House Report contains a similar statement. *Id.* (quoting H.R. Rep. No. 93-412 at 15 (1973)). Indeed, the House Report even indicates that activities of bird watchers, who happen to disturb breeding and other activities of a listed bird species, could be prohibited as "take" by way of "harassment." *Id.* at 705 (quoting H.R. Rep. No. 93-412 at 15 (1973)). This further indicates that Congress considered "take" to include the indirect and unintentional adverse effects of human activities on listed species, and not just those effects that are direct and intentional. *Id*.

The Court further explained that the legislative history of section 10(a) also expressly indicates that "Congress had habitat modification directly in mind," as both the Senate and House Reports for that amendment "identified as the model for that permit process a cooperative state-federal response to" a development project in California that "threatened incidental harm to" an endangered species of butterfly by way of habitat modification. *Id.* at 707 (citing S. Rep. No. 97-418 at 10 (1982) and H.R. Conf. Rep. No. 97-835 at 30-32 (1982)).

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*for Native Ecosys. v. Cable*, 509 F.3d 1310, 1322 (10th Cir. 2007) (the ESA's definition of "conservation encompasses recovery").

In sum, the holding in *Sweet Home* was solidly grounded in the Court's own close review of the statutory definition of "take," and the text, purposes, structure, and legislative history of the ESA. It was not based solely or even primarily on *Chevron* deference to FWS's interpretation. By proposing to replace the Court's well-founded interpretation of the ESA with their own, the Services unlawfully usurp the judiciary's authority to "say what the law is," flouting *Loper Bright* itself. *Loper Bright*, 603 U.S. at 385 (cleaned up).

**2. The Services' rationale misinterprets and misapplies *Loper Bright***

Even if *Sweet Home* were based solely on *Chevron* deference (which it is not, as detailed above), the Services' existing harm definitions still are lawful under *Loper Bright*. In *Loper Bright*, the Court expressly stated that its prior cases upholding regulations based on *Chevron* deference remained valid and "are still subject to statutory *stare decisis* despite our change in interpretive methodology." *Loper Bright*, 603 U.S. at 412. The Court stated that "[m]ere reliance on *Chevron* cannot constitute a 'special justification' for overruling such a holding." *Id.* (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)).

While the Services somewhat begrudgingly acknowledge this aspect of *Loper Bright*, they nevertheless propose to rescind the harm regulations on the theory that *Sweet Home* "held only that the existing regulation is *a permissible* reading of the ESA, not *the only possible* such reading," as purportedly mandated by *Loper Bright*. 90 Fed. Reg. 16,103 (emphasis added). The Services' strained rationale is based on the pretext that, should a court *now* be called upon to review the harm regulations *de novo*, it would be *compelled* to reach the opposite conclusion as the *Sweet Home* majority, and find the regulations invalid as not based on the "best meaning" of the statute under *Loper Bright*. Therefore, the Services reason, they are duty-bound by *Loper Bright* to rescind their longstanding regulatory definitions. *Id.* (citing *Loper Bright*, 603 U.S. at 400).

In fact, however, the harm regulations clearly *would* survive review under *Loper Bright* because they *are* based on the "best meaning" of the ESA's definition of "take," for the reasons explained by the *Sweet Home* majority and in further detail in Part IV.A.3 below. For the same reasons, even if not the *only possible* reading of the statute, the harm regulations also are a wholly *reasonable* construction of the statute that still would survive review under *Skidmore* deference, which remains intact following *Loper Bright*. *See Loper Bright*, 603 U.S. at 388, 394-95, 402-03 (citing *Skidmore v. Swift & Co*., 323 U.S. 134, 139-40); *see also Loper Bright*, 603 U.S. at 394 ("interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning").[15]

[15] As explained in Part II.B, *supra*, the FWS first adopted its definition of "harm" in 1975, just two years after the ESA's passage.

### 3. The Proposed Rescission would violate the APA and ESA because it is contrary to the "best meaning" of the definition of "take" in the ESA

The Services' rationale for the Proposed Rescission also violates the APA because it is at odds with the "best meaning" of the statutory definition of "take" in the ESA. *See Nat'l Labor Relations Bd. v. Brown*, 380 U.S. 278, 292 (1965) ("[c]ourts must, of course, set aside [agency] decisions which rest on an erroneous legal foundation"); *Prill v. Nat'l Labor Relations Bd*., 755 F.2d 941, 947 (D.C. Cir. 1985) ("[a]n agency decision cannot be sustained" when it is based "on an erroneous view of the law"). The Services' rationale is completely divorced from the ESA's fundamental conservation purposes and the biological reality that endangered and threatened species cannot survive, let alone recover, without habitat. It is well-established that habitat loss is the primary cause of species decline. [16] It is also an inescapable biological fact that species need habitat to survive and recover—both of which are the overarching goals of the ESA. 16 U.S.C. § 1531(b), (c). No fish can survive without water; many birds cannot survive without trees.

In enacting the ESA, Congress viewed the prevention of habitat destruction as a primary goal of the statute. *See* 16 U.S.C. § 1531(a)(1) ("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") (emphasis added); *TVA v. Hill*, 437 U.S. at 179 ("[t]he two major causes of extinction are hunting and destruction of natural habitat.' Of these twin threats, Congress was informed that the greatest was destruction of natural habitats" (quoting S. Rep. No. 93-307 at 2) (additional citations omitted); *Palila v. Hawai'i Dep't of Land and Nat. Resources*, 639 F.2d 495, 498 (9th Cir. 1981) (*Palila I*) ("the [ESA's] legislative history [shows] that Congress was informed that the greatest threat to endangered species is the destruction of their natural habitat"). The ESA's overarching purposes consequently are to conserve (*i.e.* recover) listed species *and the ecosystems upon which they depend for survival*, 16 U.S.C. §§ 1531(b), 1532(3), which cannot be achieved unless the definition of "harm" is construed to include habitat modification.

#### a. The Services' rationale is contrary to the ordinary meaning, plain language, purpose, structure, and legislative history of the ESA

The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning," which "is determined by reference to the language itself, the

[16] *See e.g*., Aaron S. Hogue and Kathryn Breon, *The greatest threats to species*, 4(5) J. of Cons. Sci. & Prac., e12670 Mar. (2022) ("[o]f the 20,784 species for which data were available, *88.3%* were impacted by habitat destruction. … Regardless of how percentages are calculated, *habitat destruction threatens more species than all other categories combined*. … [W]hile it is important to address all environmental problems, *given the disproportionate impact* habitat destruction has on species, care should be taken to avoid solutions to other problems that exacerbate this destruction.") (emphasis added), available at: https://conbio.onlinelibrary.wiley.com/doi/full/10.1111/csp2.12670.

specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co*., 519 U.S. 337, 340-41 (1998); *see also Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. 435, 441 (2019) ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (citation omitted). If the plain language of the statute is clear, that is the end of the inquiry. *Robinson*, 519 U.S. at 340. If a particular statutory term is undefined, it must be given its "ordinary meaning." *Burrage v. United States*, 571 U.S. 204, 210 (2014); *see also United States v. Gallegos*, 613 F.3d 1211, 1214 (9th Cir. 2010) ("when a statute does not define a term, we generally interpret that term by employing the ordinary, contemporary, and common meaning of the words that Congress used") (citation omitted). If, on the other hand, the statutory language is ambiguous, a court "may use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent." *Gallegos*, 613 F.3d at 1214 (citation omitted).

Here, the Proposed Rescission is contrary to the plain language and ordinary meaning of the term "harm," and the purposes, structure, and legislative history of the ESA.

First, Congress's definition of "take" is broad, including all means by which a listed species may be killed, harmed, or otherwise injured by human activities or human "attempt[s] to engage in any such conduct." 16 U.S.C. § 1532(19). As mentioned, the "ordinary meaning" of the term "harm" likewise is broad and means "to damage or injure physically or mentally."[17] The statute's legislative history establishes that Congress intended "harm" to have a broad meaning, consistent with the fundamental purposes of the ESA and the broad definition of "take." S. Rep. No. 93-307 at 7 (1973) ("'[t]ake' 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"); H.R. Rep. No. 93-412 at 15 (1973) ("take" is defined in "the broadest possible terms," including unintentional actions). The Court in *Sweet Home* also found Congress's addition of the "obviously broad" term "harm" to the ESA via *a Senate floor amendment* to be a significant indication of legislative intent. *Sweet Home*, 515 U.S. at 705 (citing 119 Cong. Rec. 25683 (1973)).

To support their assertion that the harm definitions are inconsistent with the "best meaning" of "take," the Services quote the *Sweet Home* dissent's statement that "[i]f take were *not* elsewhere defined in the Act, none could dispute what it means, for the term is as old as the law itself." 90 Fed. Reg. 16,103 (quoting *Sweet Home*, 515 U.S. at 717) (Scalia, J., dissenting) (emphasis added). But "take" *is* defined in the ESA, as the majority pointed out, so the dissent's conjecture about how "take" should be construed in the absence of any definition is irrelevant. *Sweet Home*, 515 U.S. at 697, n.10.[18] Because "Congress explicitly defined the operative term 'take' in the ESA," this "obviate[es] the need for" a court to resort to common law in order to further

[17] *Harm*, MERRIAM-WEBSTER.COM DICTIONARY, available at: https://www.merriam-webster.com/dictionary/harm.

[18] And even the *Sweet Home* dissent subsequently acknowledges—somewhat begrudgingly—that "[t]he Act's definition of 'take' does expand the word" from its traditional common law meaning (albeit only "slightly" in the dissent's view—contrary to the statute's plain, broad language). *Sweet Home*, 515 U.S. at 718.

"probe" the precise meaning of that term. *Id*. at 697, n. 10. The Services' job "is to apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage*, 571 U.S. at 218 (cleaned up).

Second, a broad reading of "harm" within the definition of "take" is supported by the ESA's overarching conservation (*i.e*., recovery) purposes. *See Sweet Home*, 515 U.S. at 698-99; *Gifford Pinchot Task Force.*, 378 F.3d at 1070 ("the ESA was enacted not merely to forestall the extinction of species … but to allow a species to recover"). The Supreme Court in *TVA v. Hill* described the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," 437 U.S. at 180, which *Sweet Home* found to provide strong support for the harm regulation, 515 U.S. at 698-99, 703.

Third, Congress expressly, or at least implicitly, ratified the Services' definition of "harm" in enacting the incidental take permit and conservation planning process in ESA section 10(a) in 1982. 16 U.S.C. §§ 1539(a)(1)(B), (a)(2)(B). Congress is presumed to be "aware of an administrative or judicial interpretation of a statute and [adopts] that interpretation when it reenacts a statute without change." *Palila v. Hawaii Dept. of Land & Nat. Resources*, 852 F.2d 1106, 1109, n.6 (9th Cir. 1988) (*Palila II*) (quoting *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985)). As the Ninth Circuit recognized in *Palila II*, Congress's enactment of the section 10(a) amendments, without modifying the take prohibition "in any manner," "indicates satisfaction with the current definition of harm and its interpretation by the Secretary and the judiciary." *Id*.[19]

Additionally, the protections in sections 5 and 7 of the ESA are necessary, but insufficient, to achieve the ESA's overarching conservation goals, and do not duplicate the protections of the plainly broad meaning of section 9. *Sweet Home*, 515 U.S. at 702-03. Indeed, *Sweet Home* rejected the dissent's argument that the ESA's sole means of protecting habitat are found in (1) the section 5 land acquisition provision and (2) the duty of federal agencies under section 7 to

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[19] The *Sweet Home* dissent struggles to explain what Congress possibly could have meant by the phrase "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity" (16 U.S.C. § 1539(a)(1)(B)), if that term is not read to include unintentional takings by indirect as well as direct means. *Sweet Home*, 515 U.S. at 729-730 (Scalia, J., dissenting). While the dissent asserts that section 10(a)'s incidental take permit process would apply to "many otherwise lawful takings" that are still intentional and purposefully directed at a particular animal, it could come up with only one example of this, "as when fishing for unprotected salmon also takes an endangered species of salmon." *Id*. It is absurd to conclude that Congress adopted the section 10(a)'s incidental take permit process to achieve such a narrow objective.

The dissent also adopts the contorted rationale that the conservation plan requirement in section 10(a)(2)(A) is consistent with its cramped construction of "take," since a commercial fisherman can be required to prepare a conservation plan to mitigate for the impact of "sweeping up protected fish in his nets." *Id*. at 730, n.4. But the dissent simultaneously is compelled to acknowledge that *both* the Senate and House Committee reports on the incidental take permit amendment "clearly contemplate that it will enable the Secretary to permit environmental modification," directly undermining its parsimonious construction of section 10(a). *Id*. at 730.

avoid destroying or adversely modifying any designated critical habitat. *See Sweet Home*, 515 U.S. at 702-03 (majority op.); *contra id*. at 723-25 (Scalia, J., dissenting).

Section 5 establishes a federal land acquisition program to further the ESA's conservation purposes, 16 U.S.C. § 1534, but that program is limited in scope due to the fact that funds are insufficient even to acquire a small fraction of habitat that could benefit listed species. Section 7's duty to avoid destruction or adverse modification of habitat only applies to formally designated "critical habitat" that may be adversely affected by a *federal agency* action. 16 U.S.C. § 1536(a)(2). And the Services may exclude certain areas from designated critical habitat based on a cost-benefit analysis or if they determine the area is not essential to the species' conservation. *Id*. §§ 1532(5)(A), 1533(b)(2). Alternatively, the Services may determine not to designate critical habitat at all, or delay such designation, if they deem such designation to be not "prudent" or not "determinable." *Id*. §§ 1533(a)(3)(A), (b)(6)(C).

Reading the term "harm" in the ESA's definition of "take" to include habitat modification and degradation does not duplicate the habitat protections in sections 5 and 7, for several reasons. As discussed, section 5 establishes a federal land acquisition program from willing sellers which only is able to protect a small fraction of land needed to ensure the survival and recovery of listed species.

With regard to section 7, section 9 is broader than section 7 because it applies to non-federal (including private), as well as federal, entities and individuals. 16 U.S.C. §§ 1532(13); 1538(a)(1)(B). It also applies to the destruction or modification of all types of habitats, even areas that are not formally designated as "critical habitat" under section 7. *Id*.; *see also Sweet Home*, 515 U.S. at 703. However, in other respects, section 9 is narrower than section 7, in part because "take" of a listed species by way of habitat modification must foreseeably lead to actual death or other injury to members of a listed species. *See* 50 C.F.R. § 17.3 (FWS definition of harm); *id*. at 222.102 (NMFS definition of harm); *Sweet Home*, 515 U.S. at 703. This limits the circumstances under which habitat modification or degradation can be deemed a prohibited "take" under section 9.

Lastly, nothing in the text of sections 5 or 7 indicates that Congress intended these sections to be "the *exclusive* remedy for habitat modification by private landowners or that habitat modification by private landowners stood outside the ambit of § 9." *Sweet Home*, 515 U.S. at 706 n.19 (emphasis added).

**b. The Services' rationale misapplies basic principles of statutory construction and creates internal inconsistencies within the ESA**

Quoting the dissenting opinion in *Sweet Home*, the Services assert that, because the other nine statutory terms in the ESA's definition of "take" purportedly each involve "an 'affirmative act[] … directed immediately and intentionally against a particular animal—not [an] act[] or omission[] that indirectly and accidentally causes[s] injury to a population of animals," the term "harm" must be similarly narrowly construed. 90 Fed. Reg. 16,103 (quoting *Sweet Home*, 515 U.S. at 719-720) (Scalia, J., dissenting) (brackets in original).

But this rationale ignores the fundamental principle that a statute (here, the ESA, in its definition of "take") must not be construed so as to render any of its provisions superfluous. *Sweet Home*, 515 U.S. 698, 702; *see Duncan v. Walker*, 533 U.S. 167, 174 (2001) (courts must construe the statute "to give effect, if possible, to every clause and word of a statute" and not render any portion meaningless surplusage; describing this as a "cardinal rule"). If the statutory term "harm" is not interpreted broadly to encompass harm by way of habitat modification or degradation, then "harm" has no independent meaning that is not already encompassed within the other statutory terms, such as "harass," "wound," and "kill." *Sweet Home*, 515 U.S. at 697-98, 702. As the Supreme Court stated in *Sweet Home*: "[t]he statutory context of 'harm' suggests that Congress meant that term 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 Services' rationale also misapplies the "noscitur a sociis" principle ("it is known by its associates"). 90 Fed. Reg. 16,103. Indeed, the plain meaning of several other terms in the definition of "take" are *not* limited to "direct," and "intentional" "willful" or "deliberate," actions *specifically directed* to a particular animal or animals, as they claim was the meaning of "take" under the common law. 90 Fed. Reg. 16,103 (citing *Sweet Home*, 515 U.S. at 715, 717, 719-20, 722 (Scalia, J., dissenting), and *Geer v. Connecticut*, 161 U.S. 519, 523 (1896))[20] Rather, several terms within the ESA's take definition, such as "harass," "wound," and "kill," can refer to indirect and/or unintentional, as well as direct and/or deliberate, actions. In other words, these other terms do not *only* "refer to actions or effects that … require direct applications of force" or that are specifically "directed against a particular animal or animals." *Sweet Home,* 515 U.S. at 697-698 & n.11, 701-02 & n.15 (majority op.); *contra id*. at 718-20 (Scalia. J., dissenting).

Finally, the Proposed Rescission is arbitrary and capricious because it would create an inconsistency in the ESA's application to private parties. Private entities that require a federal permit or license, such as a dredge and fill permit under section 404 of the Clean Water Act (33 U.S.C. § 1344), are required to minimize and mitigate the impacts of their activities on listed species and designated critical habitat in the section 7 consultation process. 16 U.S.C. § 1536(a)(2), (b)(4). Similarly, under the Services' current regulatory definition of "harm," private parties that do not need a federal permit or license, still must minimize or mitigate the impacts of their proposed activities on listed species and habitat under section 10(a). Under the Proposed Rescission, however, private entities that do *not* require any federal permit or license for their activities generally would *not* be responsible for minimizing and mitigating the impacts of their activities on listed species' habitat, except perhaps in extreme circumstances, while federal permittees and licensees would. This distinction makes little sense.

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[20] The Services' citation of *Geer i*s not on point, as that case involves a discussion of the *government's* authority at common law to regulate the taking of wild game, which was held by the sovereign as a common resource for the benefit of the public at large; the case did not address the common law meaning of the term "take" *per se*. *See Geer*, 161 U.S. at 523 (discussing the common law's "recognition of the right … to control the taking and use of that which belonged to no one in particular, but was common to all. … [I]n all countries, the right to acquire animals *ferae naturae* by possession was recognized as being subject to the governmental authority and under its power, not only as a matter of regulation, but also of absolute control").

In sum, the Services' reliance on the *Sweet Home* dissent does not comport with the best meaning of "take" in the ESA, which, as shown above, is not limited to "affirmative conduct intentionally directed against a particular animal or animals." *Sweet Home*, 515 U.S. at 720. Therefore, the Services' reliance on deeply flawed legal reasoning, which the Supreme Court expressly rejected (*id*. at 701-702), is patently arbitrary, capricious, an abuse of discretion, and contrary to law.

#### 4. The Services' rationale violates the APA because it is contrary to other cases interpreting and applying the term "harm" in the ESA's definition of "take"

The Proposed Rescission also is contrary to decades of other case law interpreting the term "harm." Both before and after *Sweet Home* was decided, numerous federal Courts of Appeals have upheld a broad interpretation of the term "harm" as encompassing habitat modification and degradation. *See, e.g*., *Cascadia Wildlands v. Scott Timber Co*., 105 F.4th 1144, 1056-59 (9th Cir. 2024); *Marbled Murrelet,* 83 F.3d at 1064-68; *Sierra Club v. Yeutter*, 926 F.2d 429, 437-39 (5th Cir. 1991); *see also Palila II,* 852 F.2d at 1108 ("[t]he Secretary's inclusion of habitat destruction that could result in extinction *follows the plain language of the [ESA]*" (citing 16 U.S.C. § 1531(b)) (emphasis added)).

For example, in *Sierra Club v. Yeutter*, 926 F.2d 429, the Fifth Circuit held that the U.S. Forest Service's timber management practices, which included clearcutting, resulted in "take" of individual red-cockaded woodpeckers in violation of the ESA, reasoning that "[s]uch a course of conduct certainly impairs the [woodpecker's] 'essential behavioral patterns, including … sheltering,'" resulting in a violation of section 9. *Id.* at 438-39 (quoting 50 C.F.R. § 17.3). The Forest Service had admitted that it was not fully implementing its own wildlife management handbook for the red-cockaded woodpecker, and instead was permitting clearcutting within two hundred feet of woodpecker nesting cavity trees and failing to remove midstory hardwood, both of which practices lead to the bird's abandonment of the cavity trees. *Id.* at 438. The court upheld the district court's finding that these practices "'harmed' essential [red-cockaded woodpecker] behavioral patterns, interfered with breeding, and degraded its nesting and foraging habitat." *Id*. at 433.

Then, a year after *Sweet Home* was decided, the Ninth Circuit stated in *Marbled Murrelet* that, "[i]n this Circuit, we have repeatedly held that an imminent threat of future harm is sufficient for issuance of an injunction under the ESA," and that *Sweet Home* did not alter this test. 83 F.3d at 1064, 1068.[21] The court accordingly upheld a permanent injunction prohibiting a logging company from harvesting redwood trees that were nesting habitat for the endangered marbled murrelet. *Marbled Murrelet*, 83 F.3d at 1067-68. The court held that evidence that the timber stand was currently occupied by nesting murrelets, and that the logging would impair their breeding success and increase the likelihood of predator attacks on adults and chicks, was

[21] Citing *Forest Cons. Council v. Rosboro Lumber Co*., 50 F.3d 781, 783-784 (9th Cir. 1995), *National Wildlife Fed'n. v. Burlington Northern R.R. Co*., 23 F.3d 1508, 1511 (9th Cir. 1994), *Palila II*, 852 F.2d at 1108; *see also Sierra Club. v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995) (court may "enjoin private activities that are reasonably certain to harm a protected species").

sufficient to establish an imminent threat of harm to the species in violation of section 9 of the ESA. *Id*.

Most recently, in *Cascadia Wildlands*, the Ninth Circuit again stated that "we have also explicitly held that 'a habitat modification which significantly impairs the breeding and sheltering of protected species amounts to 'harm' *under the ESA*.'" 105 F.4th at 1156 (quoting *Marbled Murrelet*, 83 F.3d at 1067) (emphasis added). As in *Marbled Murrelet*, the *Cascadia Wildlands* court upheld a permanent injunction prohibiting harvesting of a timber stand that was nesting habitat for the marbled murrelet. *Id.* at 1158-59. The court held that "[t]he evidence more than supports the district court's conclusion that … [the] proposed timber harvest would specifically cause injury to the marbled murrelets" residing on the property, by removing nests, preventing murrelets from returning to the area to nest, and fragmenting the remaining breeding habitat. *Id*. at 1158. The Proposed Rescission defies this longstanding precedent.

**5. The Services' rationale violates the APA because it is based on an incorrect reading of the existing regulatory definitions of "harm" and would create inconsistencies with FWS's take permit regulations**

**a. The Services' rationale ignores the plain language of their own regulations**

The Services' statement that their longstanding harm regulations do not comport with the "best meaning" of the ESA's definition of "take" (90 Fed. Reg. 16,103) is arbitrary and capricious because it is based on a selective and misleading reading of their existing harm regulations—the plain language of which limits the circumstances under which habitat modification can be deemed to constitute "harm." 50 C.F.R. §§ 17.3, 222.102. Under both FWS's and NMFS's definitions of "harm," habitat modification or degradation must be "significant," and must be the cause of "actual[]" death or injury to listed animals. *Id*. And for purposes of establishing "harm" by way of "injury," the habitat modification must "significantly" impair the species' "essential behavioral patterns." *Id*.; *see Palila I*, 639 F.2d at 497 ("[t]o prove a violation of the Act … it must be shown that the alleged activity had some prohibited impact on an endangered species"); *Cascadia Wildlands*, 105 F.4th at 1156-57 (declining "to narrow" the harm regulation's "already circumscribed approach").

In upholding FWS's harm regulation, *Sweet Home* acknowledged the regulation's "actual" death or injury requirement and other limitations, and further read the plain text of the regulation as limited to habitat modification or degradation that is both the *proximate* and *foreseeable* cause of actual death or injury to listed animals. *Sweet Home*, 515 U.S. at 696, n.9 & 700, n.13 (majority op.); *id*. at 708-13 (O'Connor, J., concurring); *see also Cascadia Wildlands*, 105 F.4th at 1158 (in order "to prove 'harm' under the ESA," a plaintiff must provide "sufficient evidence that the challenged activity would 'proximately,' and foreseeably, cause" actual death or injury to protected animals).

As discussed above, this regulatory language is entirely consistent with the ESA's broad definition of "take," which covers myriad types of injuries to listed species, as well as the

overarching purposes, structure, and legislative history of the statute. Contrary to the dissenting opinion in *Sweet Home*, 515 U.S. at 715-36, and the Services' rationale here, the regulatory definition of harm is not untethered from the statutory text: the habitat modification must be shown to have lead, or be foreseeably likely to lead directly or indirectly, to death or injury to individual members of a listed species. *See Marbled Murrelet*, 83 F.3d at 1065 (under FWS's harm regulation, "harm from habitat modification alone, without any attendant harm to a protected species" is not prohibited); *accord Forest Cons. Council*, 50 F.3d at 784.

**b. The Proposed Rescission would create fundamental internal inconsistencies in FWS's own regulations**

The Proposed Rescission also is arbitrary and capricious because it would create internal inconsistencies and conflicts with FWS's recently revised incidental take and "enhancement of survival" permit regulations. *See* 89 Fed. Reg. 26,070 (Apr. 12, 2024). FWS amended these regulations in April 2024 to clarify the circumstances under which incidental take and enhancement of survival permits would be issued pursuant to ESA section 10(a) for "take" of listed species under an approved conservation plan, candidate conservation agreement, or safe harbor agreement. *Id*. (The latter two are now referred to jointly as "conservation benefit agreements." *Id*. at 26,071.)

As discussed in Part II.A above, a conservation plan (*i.e*., HCP) is a statutorily required component of an incidental take permit application pursuant to section 10(a)(1)(B) for development or other human activities that foreseeably will lead to "incidental take" of listed species. 16 U.S.C. § 1539(a)(1)(B) & (a)(2)(A); 50 C.F.R. §§ 17.22(b)(1), 17.32(b)(1) (conservation plan requirements for endangered and threatened species). The incidental take permit process ensures that the impacts of human activities on listed species and their habitat are avoided and mitigated through habitat protection, enhancement and monitoring, and other measures. 16 U.S.C. § 1539(a)(2); 50 C.F.R. §§ 17.22(b)(2) & (3), 17.32(b)(2) & (3). In exchange, incidental take permittees are insulated from liability for take due to their activities and receive broad "regulatory assurances" that further mitigation can only be required in specified circumstances. *See* 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5).

Conservation benefit agreements (formerly referred to as "candidate conservation agreements" and "safe harbor agreements") are voluntary conservation programs that permit landowners to obtain an "incidental take" permit under section 1539(a)(1)(B) or an "enhancement of survival" take permit under section 1539(a)(1)(A), along with significant regulatory assurances, in exchange for the landowners' commitment to undertake habitat protection, enhancement and monitoring measures that will create a net benefit for the listed species covered by the permit. *See, e.g.*, 50 C.F.R. § 17.22(c)(1)-(3), (c)(5); 17.32(c)(1)-(3), (c)(5).

Importantly, FWS's take permit regulations restrict issuance of "incidental take permits" under ESA section 10(a)(1)(B) to circumstances involving *non-purposeful* take of listed species that is "incidental to otherwise lawful activities" such as "resource extraction, commercial and residential development, and energy development," and are predicated on "minimizing and mitigating" the impacts of take of listed species resulting from these activities. 89 Fed. Reg. at

26,071. This is consistent with the Services' existing regulatory definition of "harm" and the Supreme Court's holding in *Sweet Home*.

In contrast, "conservation benefit agreements" *may* allow for "purposeful take that may result from implementing beneficial actions under the conservation agreement, such as reintroducing a species to a covered property or capturing and relocating a covered species." 89 Fed. Reg. 26,071. According to FWS, such "purposeful take" cannot be permitted as "incidental take" under ESA section 10(a)(1)(B), but must be permitted under an "enhancement of survival" permit issued pursuant to ESA section 10(a)(1)(A). *Id.* at 26,071-72.

Not only do these take permit regulations directly undermine the Services' rationale for the Proposed Rescission, but *both* the incidental take and enhancement of survival permit programs depend upon a broad interpretation of the term "harm" as prohibiting significant habitat modification or degradation that foreseeably may lead to death of or injury to members of a listed species. If "harm" does not include habitat modification or degradation, non-federal entities will have little to no reason to participate in these programs and to mitigate the adverse effects of their actions on listed species and their habitat. At a minimum, the Proposed Rescission would create widespread legal uncertainty and confusion regarding the scope and application of these important permit programs, and at worst would seriously undermine them.

In sum, for all the foregoing reasons, and contrary to the Services' stated rationale for the Proposed Rescission, there is nothing in the plain language or purposes of the ESA expressly compelling the conclusion that habitat modification must be *excluded* from the definition of "take." On the contrary, it is clear that Congress intended habitat modification to be *included* in this definition, and the Proposed Rescission creates unnecessary conflicts both within the ESA and its own regulations. The Services also have failed to consider how their implementation of the Proposed Rescission under the ESA may conflict with their statutory duties to implement other laws that also protect species and their habitats, including, but not limited to, the Marine Mammal Protection Act, Migratory Bird Treaty Act, and Bald and Golden Eagle Protection Act. Thus, the Proposed Rescission, as well as the Services' rationale therefor, are arbitrary, capricious, an abuse of discretion, and contrary to law under the APA and ESA.

### B. The Proposed Rescission Will Adversely Affect the States' Longstanding Reliance on the Existing Harm Regulations

The preamble to the Proposed Rescission states that "because it is the President's duty to see that the laws are faithfully executed, in all but the most unusual cases, we believe that reliance interests likely will be outweighed by the constitutional interest in repealing regulations that do not reflect the best reading of the statute." 90 Fed. Reg. 16,104. Nevertheless, the Services request public comment on "reliance interests." *Id.*

In *Federal Communications Commission v. Fox Television Stations*, 556 U.S. 502, 515 (2009) (*FCC v. Fox*), the Supreme Court held that an agency must provide a more detailed justification for its change in policy "when its prior policy has engendered serious reliance interests that must be taken into account." In these circumstances, "a reasoned explanation is needed for

disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id*. at 516; *accord Dep't of Homeland Security v. Regents of the Univ. of California*, 591 U.S. 1, 30 (2020) (*DHS v. Regents*) ("[w]hen an agency changes course, it must be 'cognizant that longstanding policies may have 'engendered serious reliance interest that must be taken into account'") (quoting *FCC v. Fox*, 556 U.S. at 515); *see also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996). Thus, here, as in *DHS v. Regents*, the Services are "required to assess whether there [are] reliance interests, determine whether they [are] significant, and weigh any such interests against competing policy concerns." 591 U.S. at 33.

As explained below, for decades, our States have relied on the Services' longstanding harm regulations to assist them in protecting federally listed species both within and across state borders, and in cooperating with the Services to implement the ESA's important policies and programs, including, among other things, HCPs, conservation benefit agreements, and recovery plans. If adopted, the Proposed Recission would force our States to fill the resulting regulatory gaps, creating significant additional financial, administrative, and regulatory burdens for our States. *New Jersey v. EPA*, 989 F. 3d 1038, 1046 (D.C. Cir. 2021) (noting that "exacerbated [state] administrative costs and burdens imposed by [a federal rule] … constitute a concrete and particularized injury").

At the same time, federal funding cuts threaten several critical state species conservation programs, such as State Wildlife Grants and Competitive State Wildlife Grants, placing the onus on our States to allocate additional funding to these programs. And even if our States manage to shoulder these additional burdens that the Services now seek to abdicate, states cannot easily conserve species and habitat across state lines, and also cannot as effectively encourage regional habitat conservation efforts as can the Services.

### 1. Conservation success stories under the current harm definitions

Many of the nation's most successful ESA recovery stories would not have been possible without the Services' broad, long-held definition of harm as including habitat modification and degradation. Habitat protection is the most essential and effective conservation tool for protecting imperiled species. Without habitat—which rarely aligns with state boundaries—species and ecosystems simply cannot persist, and other conservation tools become virtually meaningless in the absence of significant habitat protection. HCPs, conservation benefit agreements, and other joint federal-state cooperative habitat preservation programs, protect both listed and unlisted species within and across state lines. All of these arrangements are predicated on the definition of "harm" as including modification and degradation of habitat. The Proposed Rescission thus jeopardizes both existing and proposed federal-state species and habitat conservation planning efforts.

For example, piping plover populations have more than doubled along the East Coast in the past approximately 20 years as a result of FWS's planning and cooperative efforts between federal, state, and local partners. Indeed, the piping plover's recovery story exemplifies the importance of habitat conservation and the effectiveness of HCPs. In FWS's own words, "the survival and

recovery of [piping plovers] *remains dependent on range-wide conservation of remaining habitats*."[22] As discussed in Part III, under the auspices of Massachusetts's HCP, the State's piping plover population has increased *nearly tenfold* since the population was federally listed in 1985—from 139 to 1193 breeding pairs.[23] The goal of Massachusetts's plan was to "increase plover conservation and recovery while simultaneously increasing recreational opportunities," many of which have the potential to "take" piping plovers.[24] The Massachusetts's plan's combination of impact minimization protocols and statewide take limits, which are predicated in part on the FWS's existing harm definition, have protected and expanded the plover population while simultaneously improving recreational opportunities and coastal resilience to sea-level rise.[25]

In California, since 1991, the State has worked cooperatively with the FWS on seventeen joint HCPs (approved under ESA section 10(a)) and state "natural community conservation plans" (NCCPs, approved under California's Natural Community Conservation Planning Act, Cal. Fish & Game Code § 2800 *et seq*.). These large scale, regional conservation plans encompass over five million acres in eight counties and thirty-six cities—which local governments have partnered with FWS and the California Department of Fish and Wildlife—and cover multiple federally and state listed and unlisted species and their habitats.[26]

These joint HCPs/NCCPs identify and provide for the regional protection of plants, animals, and their habitats, while allowing compatible and appropriate economic activities. Additionally, there are six more joint HCPs/NCCPs currently under development, involving two counties and four cities, which, once approved, will cover nearly 1.5 million acres. These plans provide for significant permit streamlining and regulatory certainty for multiple state and local governments and private entities, in exchange for significant, long-term protection, monitoring and adaptive management of numerous covered species and their habitats. In working collaboratively with the FWS to review, approve and implement these joint HCPs/NCCPs, the State of California has long relied on the FWS's broad interpretation of "harm" in the ESA's definition of "take" as including habitat modification and degradation.

And similarly, in Washington's south Puget Sound, regional HCPs, in conjunction with the U.S. Army's Joint Base Lewis-McChord Integrated Natural Resource Management Plan, are

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[22] *Abundance And Productivity Estimates – 2018 Update Atlantic Coast Piping Plover Population*, U.S. FISH AND WILDLIFE SERV. (2018), available at: https://www.fws.gov/sites/default/files/documents/news-attached-files/Abundance-Productivity-2018-Update_final-with-tables.pdf (emphasis added).
[23] *Piping Plover*, MASS. DIV. OF FISHERIES AND WILDLIFE (April 23, 2025), available at: https://www.mass.gov/info-details/piping-plover.
[24] Jonathan Regosin, *Success on the Sand*, 66 MASS. WILDLIFE 6 (NOV. 4, 2016), available at: https://www.mass.gov/doc/piping-plover-management-story-in-massachusetts-wildlife-magazine/download.
[25] *Id.*
[26] *See Natural Community Conservation Planning,* CAL. DEP'T OF FISH AND WILDLIFE, https://wildlife.ca.gov/Conservation/Planning/NCCP. Twenty-five other federal and state agencies also have signed on to these joint plans.

protecting unique prairie habitats which are home to the threatened Mazama pocket gopher subspecies.

In addition to these examples of regional federal-state HCPs, the Services' current regulatory definitions of "harm" also encourage voluntary conservation agreements with states and private landowners, which have helped protect millions of acres and directed hundreds of millions of dollars to species and habitat conservation, often preventing the need to list a species in the first place. For example, the Sage Grouse Initiative has more than 1,100 participating ranches in eleven western states, conserving 4.4 million acres of land, an area twice the size of Yellowstone National Park in an effort to conserve sagebrush habitats and keep the greater sage-grouse—as well as numerous other sagebrush-dependent species – off the threatened and endangered species lists.[27] The Sage Grouse Initiative is part of the Working Lands for Wildlife program, a program that explicitly recognizes the integral connection between species and habitat protection through its shift from species-centric to "biome-centric" conservation.[28]

Other types of voluntary conservation programs, such as conservation benefit agreements, have helped ensure the survival and recovery of many different listed species.[29] For example, in Washington, the Washington Department of Fish and Wildlife holds two programmatic Candidate Conservation Agreements with Assurances (CCAAs), approved by the FWS under section 10(a) of the ESA, which have improved the status of covered species and provide regulatory assurances to private landowners enrolled in these agreements.

The Fisher CCAA has over sixty large and small forest landowners enrolled, effectively protecting over 3.5 million acres of fisher habitat. This agreement was instrumental in the Service's decision to not list fishers in Washington. The endangered island marble butterfly CCAA also has incentivized habitat protection on private lands, and it is working to expand the butterfly populations. In addition, the Washington Department of Natural Resources' Natural Heritage Program also carries out activities through a cooperative agreement with FWS, which has led to the delisting of three plants in recent years (golden paintbrush, water howelia, and

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[27] *Historic Conservation Campaign Protects Greater Sage-Grouse | ESA Listing* Averted, WORKING LANDS FOR WILDLIFE (2025), available at: https://www.wlfw.org/historic-conservation-campaign-protects-greater-sage-grouse-esa-listing-averted/.

[28] *From Bird to Biome: Keeping the Range Intact for Wildlife and People,* WORKING LANDS FOR WILDLIFE (2025), available at: https://www.wlfw.org/from-bird-to-biome-keeping-the-range-intact-for-wildlife-and-people/.

[29] *See, e.g.*, *Downlisting of Red-cockaded woodpecker from endangered to threatened*, U.S. FISH AND WILDLIFE SERV. (Oct. 24, 2024), available at: https://www.fws.gov/press-release/2024-10/downlisting-red-cockaded-woodpecker-endangered-threatened; *A promising future for a California plant once believed extinct: How a Southern California developer helped save the San Fernando Valley spineflower*, U.S. FISH AND WILDLIFE SERV. (May 2, 2018), available at: https://www.fws.gov/story/2018-05/promising-future-california-plant-once-believed-extinct-how-southern-california#:~:text=%E2%80%9CNow%2C%20less%20than%2020%20years,counties%20for%20the%20spineflower's%20benefit; *Conservation Benefit Agreements for Private Property Owners*, U.S. FISH AND WILDLIFE SERV. (May 2024), available at: https://www.fws.gov/sites/default/files/documents/2024-05/conservation-benefit-agreements-fact-sheet.pdf.

Bradshaw's lomatium). These recoveries were successful because of a focus on habitat protection, including the protection of south Puget Sound prairie soils.

In the absence of a definition of harm that includes habitat destruction or modification, many of these programs would never have possible, and the Proposed Rescission threatens the viability of any future such efforts.

### 2. Prohibiting significant habitat modification under section 9 provides important regulatory certainty to stakeholders

The importance of the species and habitat protections provided by the foregoing types of HCPs and conservation benefit agreements, and the States' reliance on the Services' participation and cooperation in these agreements, cannot be overstated. These conservation plans and agreements are predicated on, and integrally connected to, the Services' current definitions of "harm" under the ESA. These plans and agreements protect listed species and the habitat upon which they depend for their survival and recovery, and effectively balance the species conservation mandate of the ESA with development and resource extraction interests. They allow important projects, industries, and recreational activities to continue while providing critical mitigation, conservation, monitoring and adaptive management efforts that preserve our nation's most imperiled species.

Further, the regulatory assurances provided in these agreements (as discussed in Part IV.A.5.b above) also help create regulatory certainty for private landowners. In 2016, the Services noted that "Congress intended the HCP program to address listed and at-risk species *in an ecosystem context*, generate long-term commitments to conserve such species, and deliver regulatory assurances to project proponents."[30] If the current regulatory definitions of "harm" are rescinded, private entities will no longer be sufficiently incentivized to work with federal, state and local authorities to preserve species under section 10(a). Important dialogues between States and the federal government may falter. Non-federal, including private, landowners also will suffer, losing the predictability of incidental take coverage and regulatory assurances under section 10(a), as they will no longer know what types of activities are prohibited under section 9 and what are not. And as discussed, this will place additional financial, administrative and regulatory burdens on the States.

In sum, many of the ESA's greatest successes—and benefits to the States—would not have been achieved absent the "harm" definitions that the Services now propose to rescind. Conservation plans and conservation benefit agreements approved under ESA section 10(a) promote effective and efficient cooperative management of the nation's significant natural resources while allowing our regulated industries the certainty necessary to succeed economically. The Proposed

[30] U.S. FISH AND WILDLIFE SERVICE & NAT'L MARINE FISHERIES SERVICE, HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK, p. 1-2 (Dec. 21, 2016), available at: https://www.fws.gov/sites/default/files/documents/habitat-conservation-planning-handbook-entire_0.pdf. (emphasis added).

Recission jeopardizes the success of the ESA, ignores significant state and private reliance interests, contributes to regulatory uncertainty, and directly harms the States' interests.

### C. Because No NEPA Exemption Applies to the Proposed Rescission, the Services Must Prepare a NEPA Analysis Prior to any Final Action

NEPA requires federal agencies to take a "hard look" at the environmental consequences of proposed major federal actions that may significantly affect the quality of the human environment. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see* 42 U.S.C. §§ 4332(c). If the proposed action would have a "reasonably foreseeable significant effect on the quality of the human environment," then the federal agency "shall issue" an environmental impact statement. 42 U.S.C. § 4336(b)(1). Even if a proposed action will not have a "reasonably foreseeable significant effect," or the significance of the effect is "unknown," the agency still must prepare an environmental assessment under NEPA. *Id.* § 4336(b)(2).

Here, the Services admit that the Proposed Rescission is a "deregulatory action" that "may have a significant economic impact on a substantial number of small entities," due to the removal of significant protections for listed species and their habitat, which they claim have impeded economic growth. 90 Fed. Reg. at 16,104. However, the Services incorrectly assert that their NEPA obligations are excused by the rule's purportedly "nondiscretionary" nature or by an existing NEPA categorical exclusion. *Id*. at 16,104-05. Neither circumstance applies here.

#### 1. The Proposed Rescission is a "major federal action" that will have a reasonably foreseeable significant environmental effect

As described in Parts III and IV.B *supra*, rescinding the "harm" definitions will have a significant negative impact on conservation of imperiled species and the habitats upon which these species depend. It thus indisputably qualifies as a "major federal action significantly affecting the quality of the human environment," thereby requiring NEPA review. 42 U.S.C. § 4332(c). Moreover, the Services themselves have determined that the Proposed Rescission is "significant" for purposes of Executive Order 12866 and the Regulatory Flexibility Act. *See* 90 Fed. Reg. at 16,104. That conclusion rests on the presumption that the rescission will "redu[ce] burden[s]" on previously regulated entities. *Id.* The Services also expressly categorize the Proposed Rescission as a "deregulatory action." *Id*.

The Services' existing regulatory definition of harm protects imperiled species from significant habitat modification or degradation resulting from myriad economic development activities and that "actually kill[] or injure[] wildlife." *See* 50 C.F.R. §§ 17.3, 222.102. Consequently, any reduced economic burden from the Proposed Rescission would be directly linked to an increased injury to imperiled species. Thus, because the rule is expected to be "economically significant," it necessarily also must be considered *environmentally* significant for purposes of NEPA review. 42 U.S.C. § 4336(b)(1).

### 2. The Proposed Recission is not a "non-discretionary" rule statutorily excluded from NEPA

The Services claim that no NEPA review is required because the Proposed Rescission is "compelled by the 'best reading' of the statutory text" and therefore is "nondiscretionary." 90 Fed. Reg. at 16,104 (quoting 42 U.S.C. § 4336(a)(4)). But that conclusion is flawed in several respects.

First, the Proposed Recission is not required by any order, opinion, or court judgment. On the contrary, as discussed in detail in Part IV.A.1 above, the current definition of "harm" was upheld by the Supreme Court in *Sweet Home*. That decision noted that the definition was supported by "an ordinary understanding of the word," the canon disfavoring surplusage, the ESA's broad conservation purpose, and the subsequent amendment of the ESA, among other things. *Sweet Home*, 515 U.S. at 697-701. The Court's statement that it "owe[d] some degree of deference to the [Services]' reasonable interpretation," in line with *Chevron*, was an additional gloss but did not displace the rest of the opinion's statutory analysis. *Id*. at 703-704.

Second, contrary to the Services' analysis, even if *Chevron* were an indispensable pillar of the Court's analysis in *Sweet Home*, the Court's recent decision in *Loper Bright*, 603 U.S. 369, plainly does not *compel* the Proposed Rescission. 90 Fed. Reg. 16,104 (stating that, because the Proposed Rescission "is compelled by the best reading of the statutory text," it "is a nondiscretionary action"). As discussed in Part IV.A.2 above, *Loper Bright* is clear that "prior cases that relied on the *Chevron* framework … are still subject to statutory stare decisis," and that "mere reliance on *Chevron* cannot constitute a 'special justification' for overruling such a holding." *Loper Bright*, 603 U.S. at 412. Thus, a regulatory definition upheld strictly on *Chevron* grounds would still be controlling unless and until overturned by the Supreme Court.

Third, the Proposed Rescission is fundamentally different from those agency actions considered "nondiscretionary" for purposes of the statutory NEPA exemption in section 4336(a)(4). Under the statute, a proposed agency action is nondiscretionary only where the agency "does not have authority to take environmental factors into consideration in determining whether to take the proposed action." 42 U.S.C. § 4336(a)(4). *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), cited by the Services (90 Fed. Reg. 16,104), is distinguishable. In that case, the Supreme Court held that, because the Federal Motor Carrier Safety Administration did not have legal authority to exclude Mexican motor carriers from operating within the United States, "the preparation of an EIS would serve 'no purpose' in light of NEPA's regulatory scheme as a whole" and would essentially be an exercise in futility. *Id*. at 767.

Here, however, environmental impacts are front and center to the Services' decision making under the ESA, and the Services plainly have "authority to take environmental factors into consideration," in determining whether to undertake the Proposed Rescission. 42 U.S.C. § 4336(a)(4). Nor is the Proposed Rescission mandated in any way by *Loper Bright*. In sum, nothing requires the Services to rescind the definition of "harm" that has been in place since 1975 and which has been expressly upheld by the Supreme Court. The Proposed Rescission

therefore is a discretionary agency action and NEPA clearly requires review of the rule's environmental impacts.

### 3. The Proposed Rescission does not qualify for a categorical exclusion under NEPA

Perhaps sensing the weakness of their claim that the Proposed Rescission is "nondiscretionary," the Services also assert that the rule is subject to a categorical exclusion for "policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects 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 16,104-05 (quoting 43 C.F.R. § 46.210(i)). No aspect of that exclusion applies here.

First, rescinding the longstanding regulatory "harm" definitions is not a matter of "administrative, financial, legal, technical, or procedural" housekeeping. Those definitions have stood for decades and play a critical role in conserving imperiled species as mandated by the ESA. The definitions remove any doubt that modifying a listed species' habitat in a way that harms its essential biological functions constitutes prohibited "take" under ESA section 9. The Proposed Rescission therefore plainly has a significant substantive effect and is not merely a technical or procedural rule. Indeed, the Services effectively admit as much in stating that the Proposed Rescission is a deregulatory action that will have significant, positive economic effects on a "substantial number" of entities. 90 Fed. Reg. 16,104.

Second, this is not a rule "whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and [that] will later be subject to the NEPA process, either collectively or case-by-case." 43 C.F.R. § 46.210(i). To start, as already discussed, it does not require conjecture to conclude that the Proposed Rescission would allow for greater instances of habitat destruction, thereby negatively affecting listed species and their habitat. Moreover, by its terms, the cited categorical exclusion only applies if the proposed agency action will be subject to NEPA review *at a later date*. Here, take by way of habitat modification would only be subject to NEPA review in cases where a person requires a federal permit or license, or a federal agency directly undertakes an activity; the vast majority of non-federal actions would be excluded from later NEPA review. Environmental review therefore must be conducted now, to fully understand and evaluate the effect of the Services' proposed action and assess potential alternative actions at the outset, rather than wait for a case-by-case application that may or may not occur.

Finally, even if all of the conditions under 43 C.F.R. § 46.210(i) were met, the Proposed Rescission still would qualify as an extraordinary circumstance requiring NEPA review. *Id*. § 46.215. If an action meets the standard for an extraordinary circumstance, "further analysis and environmental documents must be prepared for the action." *Id*. § 46.205(c)(1). The Department of the Interior's NEPA implementing regulations explicitly include as extraordinary circumstances those actions that have significant impacts on listed species or designated critical

habitat. *Id*. § 46.215(h).[31] The Proposed Rescission clearly meets this standard and thus cannot be excluded from NEPA review under any analysis.

## V. CONCLUSION

For all of the foregoing reasons, the undersigned States urge the Services to immediately withdraw the patently unlawful Proposed Rescission as in clear violation of the APA, ESA and NEPA.

As a commentator aptly stated over forty years ago:

> the expansive view of taking is the only logical approach to use in order to provide any hope for saving endangered species. By definition, an endangered species is on the brink of survival. To purport to place a high national priority on saving such species and then not to prohibit actions that destroy the only habitat in which the species can survive is the height of hypocrisy.

Field, Michael, *The Evolution of the Wildlife Taking Concept from its Beginning to its Culmination in the Endangered Species Act*, 21 HOUSTON L. REV. 457, 502 (1984).

Thank you for your consideration of these comments.

[31] The regulations governing NMFS' NEPA procedures similarly define "extraordinary circumstances" to include actions that would have "adverse effects on species or habitats protected by the ESA … that are not negligible or discountable." *See* NOAA, NAO-216-6A Companion Manual at 5 (Jan. 13, 2017).

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