IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DISTRICT

NATIONAL WILDLIFE FEDERATION; SOUTH CAROLINA WILDLIFE FEDERATION; NORTH CAROLINA WILDLIFE FEDERATION; FLORIDA WILDLIFE FEDERATION; LOUISIANA WILDLIFE FEDERATION; ASSOCIATION OF NORTHWEST STEELHEADERS; CONSERVATION COUNCIL FOR HAWAI'I; Plaintiffs, v. UNITED STATES FISH AND WILDLIFE SERVICE; DOUG BURGUM, in his official capacity as Secretary of the United States Department of the Interior; NATIONAL MARINE FISHERIES SERVICE; HOWARD LUTNICK, in his official capacity as Secretary of the United States Department of Commerce; Defendants.	**FIRST AMENDED COMPLAINT** Case No. 2:26-cv-02897-RMG

INTRODUCTION

1. For over fifty years, through twenty-five congressional terms and ten presidential administrations, the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, has protected endangered and threatened wildlife from habitat destruction and degradation, the leading cause of extinction, and other indirect harms. This action challenges the U.S. Fish and Wildlife Service's ("FWS") and National Marine Fisheries Service's ("NMFS") (collectively "the Services") recent decision to abandon these protections by rescinding their longstanding regulatory definitions of "harm" and unlawfully, without public notice and comment, rewriting the statutory definition of "take."

2. Congress passed the ESA in 1973 in response to an escalating crisis: the rapid loss of our nation's wildlife due to rampant habitat destruction and degradation. With the ESA, Congress sought "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b).

3. In the ESA's very first sentence, Congress found that species had been "rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." *Id*. § 1531(a)(1). The ESA aims to correct that imbalance: Congress made it unlawful for any person to kill, harm, or otherwise "take" an endangered species without authorization, *id.* §§ 1532(19), 1538(a)(1), but it also established mechanisms to authorize such "take" where it is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity," *id.* § 1539 (a)(1)(B); *see also id.* § 1536(b)(4), (o).

4. Recognizing Congress's intent to address the paramount threat of habitat loss, the Services interpreted and implemented "take" prohibited under the ESA to include significant habitat modification and degradation that kills or injures endangered or threatened wildlife by significantly impairing essential behavioral patterns, such as breeding, feeding, or sheltering. 50 C.F.R. §§ 17.3, 222.102 (2025). This approach, codified in the Services' regulatory definitions of "harm," was adopted contemporaneously with the passage of the ESA and remained consistent for over five decades.

5. Upon reviewing FWS's "harm" definition in 1995, the Supreme Court rejected an attempt to restrict "take" to direct, intentional acts and instead held that the ESA's text, structure, purpose, and legislative history all support that "harm" includes killing or injuring endangered or threatened wildlife via habitat destruction. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 695–707 (1995).

6. In contravention of this half-century of consistent interpretation and the Supreme Court's decision, the Services suddenly rescinded and reversed their regulatory definitions of "harm" under the ESA in July 2026. *See* Rescinding the Definition of "Harm" Under the Endangered Species Act, 91 Fed. Reg. 43,300 (July 14, 2026) (to be codified at 50 C.F.R. pts. 17, 222) ("the Harm Rescission" or "Final Rule"). Improperly invoking the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Services claimed that "the single, best reading of the statute" compelled them to "mak[e] clear that habitat modification or degradation does not qualify as 'take.'" 91 Fed. Reg. at 43,306.

7. Yet the Services did not stop there. While their Federal Register notice for the Harm Rescission framed their objective solely as rescinding the definition of "harm," one of ten subcomponents in the statutory definition of "take," Rescinding the Definition of 'Harm' Under the Endangered Species Act, 90 Fed. Reg. 16,102 (proposed Apr. 17, 2025) (to be codified at 50 C.F.R. pts. 17, 222) ("Proposed Rule"), the Services now purport to have accomplished a second, even more expansive action: the reinterpretation of "take" itself.

8. On September 14, 2026, FWS Director Brian Nesvik and NMFS General Counsel John Luce issued two identical directives to their respective agencies setting out how the agencies would be interpreting and enforcing the scope of the ESA's "take" prohibition moving forward. *See* Brian Nesvik, Director, U.S. Fish & Wildlife Serv., Scope of the Endangered Species Act's "Take" Prohibition Following the Harm Rule (91 Fed. Reg 43300) (Sept. 14, 2026) ("FWS Take Directive") (attached as Exhibit A); John Luce, General Counsel, Nat'l Oceanic & Atmospheric Admin., Scope of the Endangered Species Act's "Take" Prohibition Following the Harm Rule (91 Fed. Reg 43300) (Sept. 14, 2026) ("NMFS Take Directive") (attached as Exhibit B).

9. As declared in the FWS Take Directive and NMFS Take Directive (collectively, the "Take Directives"), the Services now intend to impermissibly limit *all* forms of "take" under the ESA—not just "harm"—to "only an affirmative act that is intentionally and purposefully directed at a particular animal." *See* Ex. A at 1; Ex. B at 1. The Services provided no public notice and comment opportunity for this reinterpretation, which would eliminate the regulation of "incidental take" that Congress expressly provided for in the ESA.

10. This action challenges the unlawful and arbitrary Harm Rescission and Take Directives. Both the Harm Rescission and the Take Directives contravene bedrock principles of the ESA and the Supreme Court's holding in *Sweet Home* and undermine critical protections that have fostered the survival and recovery of numerous endangered and threatened species.

11. The Harm Rescission and Take Directives are not the product of reasoned decisionmaking and are arbitrary and capricious and not in accordance with law under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*

12. The Harm Rescission and Take Directives were also promulgated without the environmental analysis required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*

13. The Harm Rescission was also promulgated in violation of Section 7 of the ESA, 16 U.S.C. § 1536. Section 7 requires all federal agencies to engage in consultation to ensure that their actions are not likely to jeopardize endangered and threatened species or adversely modify their critical habitats, yet the Services refused to conduct any such analysis for a rulemaking that deprives listed species of one of the ESA's most important protections.

14. The Take Directives also embody a substantive reinterpretation of policy adopted without proper notice and comment under the APA.

15. For these violations of law, Plaintiffs seek an order (1) declaring the Harm Rescission and the Take Directives unlawful, (2) vacating the Harm Rescission and the Take Directives, (3) enjoining Defendants from relying on the Harm Rescission and the Take Directives in any way, and (4) reinstating the rescinded "harm" definitions.

JURISDICTION AND VENUE

16. This action is brought pursuant to the APA, 5 U.S.C. §§ 701–706, and the ESA, 16 U.S.C. § 1540(g)(1). This Court has jurisdiction over Plaintiffs' claims under 28 U.S.C. § 1331 (federal question) and may issue a declaratory judgment and further relief requested pursuant to 5 U.S.C. § 706 and 28 U.S.C. §§ 2201–2202. Pursuant to the ESA citizen suit provision, 16 U.S.C. § 1540(g), Plaintiffs provided the Services, the Secretary of the Interior, and the Secretary of Commerce with sixty days' written notice of their intent to sue for failure to consult on the Rescission in violation of ESA Section 7(a)(2) on July 14, 2026. *See* Exhibit C.

17. Venue is proper in this District under 28 U.S.C. § 1391(e) because all Defendants are either agencies or officers of the United States acting in their official capacity, no real property is involved in this action, a Plaintiff and a number of Plaintiffs' members reside in this District, and consequences of the Defendants' violations of law giving rise to the claims will occur in this District. Venue is proper in this Division under Local Civ. Rule 3.01(A)(1) because the defendant federal agencies do business relating to the events and claims at issue in the Charleston Division. In addition, Plaintiff South Carolina Wildlife Federation does business relating to the events of omissions alleged in this Division. *See* Local Civ. Rule 3.01(A)(2).

PARTIES

PLAINTIFFS

18. The plaintiff organizations in this case, along with their members, are committed to conserving "endangered species and threatened species" and "the ecosystems upon which endangered species and threatened species depend." 16 U.S.C. § 1531(b).

19. Plaintiff National Wildlife Federation was established in 1936. Building on the nation's conservation heritage, the National Wildlife Federation is dedicated to ensuring that wildlife, people, and ecosystems thrive in a rapidly changing world and in the face of urgent biodiversity and environmental crises. The National Wildlife Federation is headquartered in Reston, Virginia and works with 52 state and territory affiliates around the country. Among its efforts, the National Wildlife Federation works to develop, promote, and enact science-based solutions to conservation challenges, and its programs help protect numerous endangered and threatened species and their habitats. Members of the National Wildlife Federation include those who regularly enjoy observing specific endangered and/or threatened species. These members actively work to advance the conservation of these species and their habitats, which range from the iconic South Carolina longleaf pine forests where threatened red-cockaded woodpeckers carve out cavities for shelter, to the vast caverns where endangered Virginia big-eared bats and northern long-eared bats return each year to hibernate, to the clear, free-flowing waters that endangered Black Warrior waterdogs and threatened flattened musk turtles call home.

20. Plaintiff South Carolina Wildlife Federation is a not-for-profit corporation and the oldest conservation organization in South Carolina. It was officially organized in 1946, with operations dating back to 1931. The South Carolina Wildlife Federation is incorporated under the laws of South Carolina. It has approximately 2,000 members. The South Carolina Wildlife

Federation works to promote sound stewardship of South Carolina's natural resources, including endangered and threatened species and their ecosystems. Its conservation and education programs focus on protecting habitat for wildlife throughout South Carolina, including in the South Carolina Lowcountry. The South Carolina Wildlife Federation's members regularly recreate in the habitats of endangered Atlantic sturgeon, threatened red-cockaded woodpeckers, threatened loggerhead sea turtles, and other federally listed species, and many enjoy observing and/or photographing these species. Members also include those engaged in ecotourism that relies on the endangered and threatened species of South Carolina's rapidly developing Lowcountry and surrounding coastal waters.

21. Plaintiff North Carolina Wildlife Federation is North Carolina's oldest and largest statewide non-profit conservation organization. Since 1945, the North Carolina Wildlife Federation has worked with citizens, outdoor enthusiasts, hunters and anglers, government, and industry to safeguard North Carolina's natural resources. Its mission is to protect and promote natural areas throughout the state—both as habitats for native wildlife and as recreational, hunting, fishing, and wildlife observation areas for its members. The North Carolina Wildlife Federation engages in policy, research, education, and direct, hands-on conservation projects. It is headquartered in Raleigh, North Carolina and works on wildlife and habitat issues throughout the state. The North Carolina Wildlife Federation has members with recreational and professional interests in endangered and threatened species, such as those dedicated to the research and recovery of the threatened red-cockaded woodpecker and the conservation of its longleaf pine habitat.

22. Plaintiff Florida Wildlife Federation is a non-profit conservation organization composed of thousands of citizens in Florida and beyond. The Florida Wildlife Federation was

founded in 1936, and it uses a combination of grassroots organizing, advocacy, and litigation to protect iconic Florida wildlife, endangered and threatened species, and ecosystems. Its members include anglers, hunters, outdoor enthusiasts, and conservationists, all united by a common mission of preserving, managing, and improving Florida's ecosystems. A number of the organization's members are conservation professionals dedicated to safeguarding federally listed species like the threatened West Indian manatee, the threatened red-cockaded woodpecker, and the threatened Florida scrub jay, including through habitat-focused ESA programs.

23. Plaintiff Louisiana Wildlife Federation is a nonprofit organization founded in 1940 and representing a broad constituency of conservationists including hunters, anglers, birders, and other outdoor enthusiasts who believe in the conservation and protection of the state's natural resources. A focus of the organization is to promote and defend Louisiana's natural habitats and wildlife recovery, including as a priority habitat for threatened and endangered species. The Louisiana black bear, the official state mammal, was listed as federally threatened under the ESA. The Federation and others worked to secure proper management and protection and restoration of its habitat, and it was declared recovered in 2016, demonstrating the value of protection under the ESA. The Louisiana Wildlife Federation has 10,150 members and supporters including members with professional, research, and recreational interests in endangered fish and wildlife species like the red-cockaded woodpecker, the Louisiana pinesnake, and the whooping crane.

24. Plaintiff Association of Northwest Steelheaders is the Oregon affiliate of the National Wildlife Federation. One of the oldest conservation and sport fishing advocacy organizations in the Pacific Northwest, the Association of Northwest Steelheaders was founded in 1960 and has over 1,200 members and volunteers. It serves all Pacific Northwest residents

who value strong salmon and steelhead runs, clean water, and the sport of angling. Through education and advocacy, the Association of Northwest Steelheaders works to ensure healthy fish populations and habitats for present and future generations to enjoy.

25. Plaintiff Conservation Council for Hawai‘i is the Hawai‘i affiliate of the National Wildlife Federation and is dedicated to protecting native Hawaiian plants, animals, and ecosystems for future generations. One of Hawai‘i’s oldest wildlife organizations, Conservation Council for Hawai‘i is headquartered in Honolulu and has been on the forefront of Hawai‘i’s conservation movement since 1950. Its over 5,500 members and supporters include scientists, farmers, fishers, hunters, educators, artists, business owners, community leaders, elected officials, and more. Conservation Council for Hawai‘i has been a leader in shaping some of Hawai‘i’s most important conservation policies and programs and has worked to protect its incredible biodiversity and over 400 endangered and threatened species, the most of any U.S. state. Conservation Council for Hawai‘i’s members have recreational and professional interests in many of these endangered and threatened species. They include professionals dedicated to the conservation of the endangered Kiwikiu (Maui parrotbill), the endangered ‘Ākohekohe (crested honeycreeper), and other unique birds that call Hawai‘i’s forests home.[1]

26. Plaintiffs and their members are injured by the challenged Harm Rescission and Take Directives. Plaintiffs’ members include individuals with professional and economic interests in listed species, such as ecotourism operators in Charleston, South Carolina whose business depends on taking trips to view endangered wildlife in its natural habitat in Cape Romain National Wildlife Refuge and surrounding environments. These individuals will

[1] All plaintiff organizations described in paragraphs 19 through 25 above submitted comments in opposition to the Proposed Rule.

likewise be injured if significant habitat degradation is no longer prohibited under the ESA given the rampant development in coastal areas near Charleston. Plaintiffs' members also include individuals who enjoy observing, studying and/or photographing endangered and threatened species that are imperiled by habitat loss, and these members have specific plans to visit these species' habitats again to continue engaging with them. Two of Plaintiffs' members have worked extensively to protect longleaf pine habitat in the South Carolina Lowcountry and the red-cockaded woodpeckers that depend on these ecosystems. The challenged Harm Rescission and Take Directives would harm these members' interests by allowing rampant future habitat destruction in the rapidly developing coastal areas of South Carolina.

27. Another member has spent years of her career working on the Savannah Harbor deepening and the protection of the habitat of endangered sturgeon harmed by deepening. With the Harm Rescission and Take Directives, she fears the currently planned next deepening will be conducted without mitigation for sturgeon. Another member is a photographer for National Geographic magazine who regularly photographs multiple endangered species throughout the Southeast in their natural habitats. Under these regulatory changes, his ability to continue this work, including specific plans to pursue wildlife photography projects in 2026, 2027, and 2028, will be diminished as habitats are no longer protected from threatened destruction. Another member regularly protects threatened red-cockaded woodpeckers by working with property owners to establish safe harbor agreements on their properties. He then conducts research on the woodpeckers protected under these safe harbor agreements. He intends to continue this work, which is his career, in the future. But now these regulatory changes will impede his conservation work by essentially eliminating the very program he relies on to preserve and study woodpeckers.

28. Plaintiff organizations all commented on the Proposed Rule, and are harmed by the agencies' failure to engage in any NEPA process for the challenged Harm Rescission and Take Directives. Had the agencies conducted an appropriate NEPA review, Plaintiffs and their members would have participated in the public process, and the outcome of this rulemaking may have been altered. Similarly, Plaintiff organizations are harmed by the Services' failure to conduct consultation pursuant to Section 7, which would have provided an opportunity to evaluate the impact of the Harm Rescission on threatened and endangered species and may likewise have altered the outcome of the rulemaking.

29. Finally, the challenged Harm Rescission and Take Directives threaten the development of a number of specific conservation programs and measures, devised pursuant to Sections 7 and 10 of the ESA, that are closely tied to members' species interests. For example, a number of individuals are currently working as part of a dedicated group to establish, or renew, habitat conservation plans that will protect endangered and threatened species from "takes" resulting from ongoing habitat destruction. They plan to continue working to establish and renew these habitat conservation plans, but if habitat destruction and modification is no longer regulated under the ESA, they are concerned that these habitat conservation plans that they have worked so hard to pursue will no longer move forward.

30. As these examples illustrate, Plaintiffs' members have significant, particularized, and concrete interests in specific endangered and threatened species and their habitats that are and will continue to be injured by the Harm Rescission and Take Directives. Plaintiffs' members also have significant concrete interests in the lawful implementation of NEPA. Plaintiffs and their members would have participated in the NEPA process to promote the thorough consideration of the impacts of the Harm Rescission to these species and their habitats and

corresponding alternatives to the proposed action, including alternatives that could have avoided or mitigated such harms. They were denied this opportunity by Defendants' failure to conduct a NEPA analysis and provide a NEPA public comment opportunity during the process. All of these injuries are fairly traceable to the challenged actions and would be redressed if Plaintiffs' requested relief is granted.

DEFENDANTS

31. Defendant United States Fish and Wildlife Service, an agency within the Department of the Interior, is responsible for implementing the requirements of the ESA with respect to endangered and threatened terrestrial and freshwater plant and animal species.

32. Defendant Doug Burgum is sued in his official capacity as Secretary of the United States Department of the Interior. Mr. Burgum is responsible for the administration of the ESA with respect to endangered and threatened terrestrial and freshwater plant and animal species.

33. Defendant National Marine Fisheries Service, an agency within the Department of Commerce, is responsible for implementing the requirements of the ESA with respect to endangered and threatened marine species and anadromous fish species.

34. Defendant Howard Lutnick is sued in his official capacity as Secretary of the United States Department of Commerce. Mr. Lutnick is responsible for the administration of the ESA with respect to endangered and threatened marine species and anadromous fish species.

BACKGROUND

I. Endangered Species Act of 1973

35. "In response to growing concern over the extinction of many animal and plant species, Congress enacted the Endangered Species Act of 1973." *Gibbs v. Babbitt*, 214 F.3d 483, 487 (4th Cir. 2000) (citation omitted). The ESA is "the most comprehensive legislation for the

preservation of endangered species ever enacted by any nation." *TVA v. Hill*, 437 U.S. 153, 180 (1978).

36. "'The plain intent of Congress in enacting this statute . . . was to halt and reverse the trend toward species extinction, whatever the cost.'" *Sweet Home*, 515 U.S. at 699 (quoting *Hill*, 437 U.S. at 184).

37. In shaping legislation to achieve this aim, Congress started from the finding that habitat destruction and degradation are the primary drivers of extinction and biodiversity loss. *See Hill*, 437 U.S. at 178–79 (citing legislative history, including H.R. Rep. No. 93-412 (1973) and S. Rep. No. 93-307 (1973)).

38. Accordingly, the ESA set out not only "to provide a program for the conservation of . . . endangered species and threatened species," but also "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Congress defined "conservation" and "conserve" to mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." *Id.* § 1532(3).

39. "[E]xamination of the language, history, and structure of the [ESA] . . . indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Hill*, 437 U.S. at 174.

40. In pursuing these objectives, Section 9(a)(1) forms the "cornerstone" of the statute. *Gibbs*, 214 F.3d at 487. Section 9 prohibits the "take" of any endangered species. 16 U.S.C. § 1538(a)(1)(B); *see also id.* § 1533(d) (providing for the regulatory extension of the take prohibition to threatened species); 50 C.F.R. pt. 17 subpt. D (containing take prohibitions

applicable to threatened species under FWS jurisdiction); 50 C.F.R. pt. 223 subpt. B (containing take prohibitions applicable to threatened species under NMFS jurisdiction).

41. Congress intended "take" to apply "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 93-307, at 7 (1973) *as reprinted in* 1973 U.S.C.C.A.N. 2989, 2995.

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

43. Congress made clear from the outset that Section 9(a)(1)(B) prohibits a breadth of takings, "whether intentional or not." H.R. Rep. No. 93-412, at 11 (1973). As the 1973 House Report explained, the provision "would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young." *Id.*

44. In addition to the Act's take prohibition, Section 7 requires "[e]ach [f]ederal agency" to "insure" that the actions that it funds, authorizes, or carries out "[are] not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of their designated "critical habitat." 16 U.S.C. § 1536(a)(2); *see* 50 C.F.R. pt. 402. To fulfill this substantive mandate, Section 7(a)(2) requires federal agencies to consult with the Services to determine the effects of federal action on listed species. 16 U.S.C. § 1536(a)(2).

45. Section 7's "language admits of no exception." *Hill*, 437 U.S. at 173. Its procedural and substantive requirements apply to the Services' own actions, including "the

promulgation of regulations." U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., *Endangered Species Consultation Handbook*, 1-5–1-6, E-6 (1998); 50 C.F.R. § 402.02.

46. Through these provisions, the ESA has protected listed wildlife for over fifty years from habitat destruction and degradation. As the Services themselves have recognized, such habitat destruction threatens the survival and recovery of the vast majority of endangered and threatened species.

II. The Harm Definition[2]

47. In keeping with Congressional intent, the Services since 1973 have consistently implemented Section 9, governing the "take" of listed species, to prohibit significant habitat modification and degradation that kills or injures endangered or threatened wildlife.

48. To codify this approach to Section 9, FWS proposed and then promulgated the original definition of "harm" in 1975, just eighteen months after the Act was passed. *See* Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,412–13 (Sept. 26, 1975) (to be codified at 50 C.F.R. pt. 17).

49. When it promulgated the harm definition, FWS explained that the definition was consistent with the Act's emphasis on "the habitat needs of listed species": "Congress specifically acknowledged these needs by stating . . . '[t]he purposes of this Act are to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved[.]'" *Id.* (quoting 16 U.S.C. § 1531(b)). The 1975 regulation included the core concepts that remained for fifty years: harm was defined as "an act or omission which actually injures or kills wildlife, including acts which . . . significantly disrupt essential behavioral patterns," such

[2] Because the Services have indicated that they consider their respective regulatory definitions of "harm" to be "materially identical," 90 Fed. Reg. at 16,103, they are collectively referred to in this Complaint as the "Harm Definition," except as otherwise specified.

as "breeding, feeding or sheltering," and "significant environmental modification or degradation which has such effects." 50 C.F.R. § 17.3 (1975).

50. In 1981, FWS clarified the definition to confirm that the requirement of actual death or injury applied to habitat modification. Endangered and Threatened Wildlife and Plants; Final Redefinition of "Harm," 46 Fed. Reg. 54,748 (Nov. 4, 1981) (to be codified at 50 C.F.R. pt. 17). In making this clarification, FWS retained an explicit reference to harm from habitat modification and degradation. *Id.* at 54,749.

51. The 1981 FWS definition read: "Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such an 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." *Id.* at 54,750.

52. In promulgating this clarification of its definition of "harm," FWS emphasized that "Congress made its intent to protect species and their habitat very clear" and "intended to create a definition of take which included all of the various ways of killing or injuring protected wildlife." *Id*. at 54,749.

53. FWS's harm definition remained unchanged for over forty-four years, until the Services' Harm Rescission in 2026.

54. NMFS adopted a substantially similar definition of harm in 1999. Endangered and Threatened Wildlife and Plants; Definition of "Harm," 64 Fed. Reg. 60,727, 60,727 (Nov. 8, 1999) (to be codified at 50 C.F.R. pt. 222). The NMFS definition read: "Harm in the definition of 'take' in the Act means 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." *Id.* at 60,731.

55. NMFS emphasized that the definition was "not a change in existing law" but rather sought to affirm that NMFS's "interpretation of harm is consistent with that of FWS." *Id.* at 60,727. NMFS further emphasized that the definition effectuated a "Congressional intent to protect the habitats of listed species." *Id.*

56. NMFS's harm definition likewise remained unchanged until the Services' Harm Rescission in 2026.

III. The 1982 Incidental Take Amendments to the ESA

57. In 1982, shortly after FWS affirmed the key elements of its harm definition, Congress amended the ESA.

58. To resolve "potential conflicts between endangered species and the actions of private developers," S. Rep. No. 97–418, at 10 (1982), Congress established a permitting scheme for "incidental" take, i.e. "any taking otherwise prohibited by [Section 9(a)(1)(B)] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity," 16 U.S.C. § 1539(a)(1)(B). Under Section 10(a), the Services may issue permits for incidental take pursuant to certain requirements, including a habitat conservation plan that minimizes and mitigates the impact of such take. *See id.* § 1539(a)(2).

59. Congress also added a mechanism to address incidental take under Section 7. *See* H.R. Conf. Rep. 97-835, at 27 (1982). If, during the Section 7 consultation process, either of the Services concludes that a federal action will take members of a listed species, but will not be so severe as to jeopardize the continued existence of that species, then the Service must provide an incidental take statement authorizing the anticipated incidental take. 16 U.S.C. § 1536(b)(4),

(o)(2). The incidental take statement must specify the amount or extent of incidental take as well as measures to monitor and minimize such take. *Id.* § 1536(b)(4); 50 C.F.R. § 402.14(i)(1). Consultation must be immediately reinitiated if the specified amount or extent of incidental taking is exceeded. *Id*. §§ 402.14(i), 402.16(a).

60. In making these amendments, Congress operated from the understanding that Section 9(a)(1)(B) "prohibits the taking of any endangered fish or wildlife, *including harm which may occur as a result of habitat modification*." S. Rep. No. 97–418, at 26 (1982) (emphasis added). Indeed, Congress expressly modeled the Section 7 and 10 permitting schemes after a situation involving incidental take in the form of habitat modification. *See id.* at 10; H.R. Conf. Rep. No. 97-835, at 30–32 (1982).

61. Consistent with that understanding, the permitting systems created under Sections 7 and 10 provide ways for commercial and industrial activities that will indirectly kill and harm endangered and threatened wildlife to lawfully proceed, but only once key safeguards are in place: both schemes require actors to adopt measures that minimize the incidental take and require the Services to ensure that the impact of the take on the listed species does not exceed a certain threshold.

62. In fulfilling Section 10's mandate, the Services have approved over 1,000 habitat conservation plans to address a spectrum of unintended yet foreseeable consequences of industry, from the harms of coastal development on threatened sea turtles that nest along Southern beaches to the impacts of logging on threatened red-cockaded woodpeckers that rely on iconic longleaf pine forests. Meanwhile, under Section 7, incidental take statements have ensured that any federally authorized activities, from, for example, oil and gas drilling and pipelines to transportation projects, incorporate clear and enforceable limits to avoid jeopardizing endangered

and threatened fish and wildlife. In this fashion, the Services have advanced the core goal of Congress's incidental take amendments: "to encourage creative partnerships between the public and private sectors and among governmental agencies in the interest of species and habitat conservation." H.R. Conf. Rep. No. 97-835, at 30 (1982).

IV. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*

63. The Supreme Court reviewed and upheld FWS's harm definition in 1995, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

64. In its analysis, the Court concluded that the express purposes of the ESA support an interpretation that includes habitat modification within the definition of "harm." The Court recognized in *TVA v. Hill*, and again in *Sweet Home*, that the Act is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Sweet Home*, 515 U.S. at 698 (quoting *Hill*, 437 U.S. at 180).

65. The Court specifically noted that among the central purposes of the Act is "provid[ing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." *Id.* (quoting 16 U.S.C. § 1531(b)). Reading "harm" to encompass habitat modification and degradation that actually kills or injures listed species, the Court reasoned, is thus consistent with Congress's intent in enacting the ESA. *Id.* at 699.

66. The Court further explained that the ordinary understanding of "harm" supported the definition. *Id*. at 697. Harm means to "cause hurt or damage to: injure." *Id.* (citation omitted). According to the Court, this clearly includes habitat modification that *actually kills or injures* wildlife. *Id.*

67. The Court also considered the Section 10 permitting scheme for incidental take. The Court reasoned that "[n]o one could seriously request an 'incidental' take permit to avert § 9

liability for direct, deliberate action against a member of a[] [listed] species." *Id.* at 700–01. Thus, Congress must have understood that even "activities not intended to harm an endangered species, such as habitat modification, may constitute unlawful takings under the ESA unless the Secretary permits them." *Id*. at 701.

68. Turning to legislative history, the Court noted that the Committee Reports "*make clear* that Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions." *Id.* at 704 (emphasis added). "The Senate Report stressed that '"take" is defined . . . *in the broadest possible manner to include every conceivable way in which a person can "take"* or attempt to "take" any fish or wildlife.'" *Id*. (emphasis added) (quoting S. Rep. No. 93-307, at 7 (1973)). Similarly, the House Report noted that "'the *broadest possible* terms' were used to define restrictions on takings." *Id*. (emphasis added) (quoting H.R. Rep. No. 93-412, at 15 (1973)).

69. Although the Court's analysis was conducted under the then-governing judicial standard, *Chevron* deference, under which federal courts deferred to reasonable agency interpretations of statutory language, *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), the Court nonetheless conducted a thorough investigation, utilizing traditional tools of statutory interpretation, to determine Congress's intent in enacting the Act.

70. Based on this thorough analysis of the Act, the *Sweet Home* Court reached two conclusions. First, the Court rejected the contention that the Act limits harm to direct, deliberate actions against endangered or threatened wildlife. *Sweet Home*, 515 U.S. at 701 n.15, 707. Second, the Court held that the text, structure, purpose, and legislative history of the Act supported including habitat modification and degradation in the definition of "harm."

71. Following the *Sweet Home* decision, the Services and the courts continued to apply the ESA's take prohibition to habitat destruction. The approach that began with the passage of the Act over twenty years prior thus remained unchanged for another thirty years.

V. The 2026 Rescission of the Harm Definition

a. The Proposed Rule

72. On April 17, 2025, the Services proposed to rescind their definitions of "harm" under the ESA, including the 1981 definition that the Supreme Court upheld.

73. The Services asserted that the Harm Definition ran "contrary to the best meaning of the statutory term 'take.'" *See* 90 Fed. Reg. at 16,102.

74. Without addressing the *Sweet Home* majority's analysis, the Services focused on the decision's application of *Chevron* deference, the operative standard of review at the time the Supreme Court upheld the Harm Definition. *See id.* at 16,103. The Services asserted that they were compelled to revisit the Harm Definition in light of the Supreme Court's recent overruling of *Chevron* in *Loper Bright Enterprises v. Raimondo*, which held that, rather than deferring to agency interpretation, the courts should determine the single "best" meaning of statutory language. 603 U.S. 369, 400, 412 (2024). However, the Supreme Court itself emphasized that *Loper Bright* does not "call into question prior cases that relied on the *Chevron* framework." *Id.* at 412. Rather, "[t]he holdings of [cases that applied *Chevron*] that specific agency actions are lawful," including *Sweet Home*'s upholding of the Harm Definition, "are still subject to statutory *stare decisis* despite [the Court's] change in interpretive methodology." *Id.*

75. Throughout the Proposed Rule, the Services repeatedly conveyed their unequivocal refusal to recognize habitat modification as "harm" under the ESA, a departure from their decades-old policy. However, they declined to promulgate a new definition. Instead, the

Services asserted that their new policy would "rest on the statutory definition of 'take.'" *Id.* at 16,103.

76. The Services discussed "take" solely in the context of the Harm Definition, focusing specifically on its inclusion of habitat modification. *Id.* at 16,102–03. The Proposed Rule made no reference to any other Service regulations that rely on the statutory definition of "take." *Id.*

77. Over 350,000 comments were submitted in response to the Proposed Rule. These included detailed comments from numerous states, scientists, small business owners, and environmental organizations, including Plaintiffs, opposing the proposed rescission of the Harm Definition.

b. The Final Rule

78. On July 14, 2026, the Services promulgated the Final Rule rescinding the Harm Definition under the ESA. *See* 91 Fed. Reg. 43,300; *see also* 90 Fed. Reg. 16,102.

79. The Services' final rulemaking action applied only to the Harm Definition.

80. The Services stated that their "rescission of the definition of 'harm' intends to align the implementation of the Act with the single, best reading of the statute by making clear that habitat modification or degradation does not qualify as 'take.'" 91 Fed. Reg. at 43,306.

81. As the basis for the Harm Rescission, the Final Rule explicitly relied on an interpretation that "harm" "should be construed to require an 'affirmative act[] . . . directed immediately and intentionally against a particular animal . . . ." 91 Fed. Reg. at 43,301. Echoing the Proposed Rule, the Harm Rescission's sole rationale was that the Harm Definition did not conform to the Services' new conception of "the single, best meaning of the statute" and was therefore "unlawful." *Id.* at 43,301.

82. Consistent with their approach in the Proposed Rule, in the Federal Register notice published with this Final Rule, the Services indicated that they will now be reinterpreting "harm" in a way that completely reverses their longstanding regulatory interpretation of the term and runs counter to fifty years of consistent agency implementation and Supreme Court precedent.

c. The Final Rule's Approach to NEPA.

83. The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et. seq.*, "declares a national policy of protecting and promoting environmental quality." *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996). Among other things, NEPA requires federal agencies to prepare a "detailed" Environmental Impact Statement that discusses the environmental effects of, and a range of reasonable alternatives to, any "major Federal action[] significantly affecting the quality of the human environment" before undertaking such an action. 42 U.S.C. § 4332(2)(C). The fundamental purpose of the statute is to ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken, and that public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. As a preliminary step, an agency may first prepare an Environmental Assessment to determine whether the effects of an action may be significant. *Id.* § 4336(b)(2).

84. In limited circumstances, a "categorical exclusion" to NEPA analysis may be invoked for certain "categor[ies] of actions that a Federal agency has determined normally do[] not significantly affect the quality of the human environment within the meaning of [NEPA]." *Id.* § 4336e(1); *see id.* § 4336(a)(2); 43 C.F.R. § 46.205. These categories must be listed by agencies

in their NEPA implementing regulations or procedures before they may be invoked. 42 U.S.C. §§ 4336(a)(2), 4336c.

85. The Harm Definition helped protect myriad endangered and threatened species from habitat loss and yielded environmental benefits that extended far beyond listed species. As such, the Services' Harm Rescission is a major federal action that will significantly affect the quality of the human environment under NEPA and requires environmental review. The Services, however, prepared no NEPA analysis for the Harm Rescission.

86. Instead, the Services erroneously claimed that the Harm Rescission was exempted from NEPA review because: (1) the agency action was excluded from review under the NEPA statute as "a nondiscretionary action with respect to which such 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); or (2) in the alternative, the action was categorically excluded from NEPA review under Department of the Interior and National Oceanic and Atmospheric Administration categorical exclusions for policies, directives, regulations, and guidelines that are "of an administrative, financial, legal, technical, or procedural nature" or for which the "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." 91 Fed. Reg. at 43,316; *see* 43 C.F.R. § 46.210(i); Nat'l Oceanic & Atmospheric Admin., *Policy & Procedures for Compliance with NEPA & Related Authorities* (2025) ("CM").

87. The Services failed to explain their assertion that the ESA "compelled" a change in the Harm Definition, despite the 1995 Supreme Court decision to the contrary.

88. As detailed above, the Harm Rescission is not a ministerial action with minimal environmental effects. To the contrary, the Harm Rescission will reverse decades of habitat

protections for numerous species and fundamentally alter the Services' implementation of Sections 7, 9, and 10 of the ESA. The Services offered no reason to believe that these impacts could not be meaningfully analyzed, and gave no indication that the impacts of the Harm Rescission would ever be subject to future NEPA analysis.

89. Additionally, the Services ignored extraordinary circumstances that, even if the Harm Rescission could otherwise be covered by a categorical exclusion, required the preparation of an Environmental Assessment or Environmental Impact Statement here. Before deciding whether a categorical exclusion is appropriate for an action, the Services are legally required to evaluate whether the action involves extraordinary circumstances such that it may have a significant environmental effect and require additional analysis. 43 C.F.R. § 46.205(c); CM 9. Extraordinary circumstances include significant impacts on endangered or threatened species or their critical habitats, as well as significant impacts on ecologically critical areas or unique environmental risks. *See* 43 C.F.R. § 46.215; CM 9.

90. Despite the obvious impacts of rescinding a regulation that has protected hundreds of listed species for decades, the Services refused to acknowledge the presence of extraordinary circumstances here.

91. Relying on the above, the Services did not analyze any of the environmental impacts of slashing the extent of habitat protection that endangered and threatened species receive under the ESA.

d. The Final Rule's Approach to ESA Section 7 Consultation.

92. In response to the Proposed Rule, commenters provided extensive evidence reflecting the value of the Harm Definition as a tool for conserving and recovering endangered and threatened species. Commenters explained that the Harm Rescission was likely to adversely

affect many listed species and their habitats and urged the Services to consult on these impacts under Section 7(a)(2) of the ESA, which requires "[e]ach Federal agency" to ensure that "any action" it carries out is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of their critical habitats. 16 U.S.C. § 1536(a)(2).

93. Yet the Services refused to conduct any Section 7 consultation. Instead of analyzing the Harm Rescission's effects on listed species, the Services asserted that, pursuant to agency practice, the Harm Rescission was exempt from the Section 7 consultation requirement as a "general regulation[] under the ESA." 91 Fed. Reg. at 43,316.

94. The Services failed to cite any documents establishing the existence of such a policy. On the contrary, the Services' regulations and guidance indicate that their own actions, including rulemakings, are subject to consultation. *See* 50 C.F.R. § 402.02; U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., *Endangered Species Consultation Handbook*, 1-5–1-6, E-6 (1998). Nor did the Services identify any specific text or provision of the ESA that would support such an exemption.

VI. The Take Directives

95. In promulgating the Harm Rescission, the Services consistently identified their rulemaking as a single agency action: "Rescinding the Definition of 'Harm' Under the [ESA]." 91 Fed. Reg. at 43,300; 90 Fed. Reg. at 16,102. Indeed, in their Proposed Rule, the Services explicitly declined to promulgate a new regulation in place of the Harm Definition. Instead, the Services declared their intent to rest on "the comprehensive statutory definition" of "take." 90 Fed. Reg. at 16,103.

96. But on September 14, 2026, the Harm Rescission's effective date, the Services took a dramatically different approach in two internal, substantively identical Take Directives,

each addressing the "Scope of the [ESA's] 'take' prohibition following the Harm Rule (91 Fed. Reg. 43300)."

97. The Take Directives do not rest on the statutory definition of "take;" they rewrite it.

98. In the Take Directives, the Services have "adopted" a reinterpretation of "take" that limits "take" to "only an affirmative act that is intentionally and purposefully directed at a particular animal." Ex. A at 1; Ex. B at 1. In doing so, the Services have expressly extended the same rationale used to rescind the Harm Definition to *all* nine other subcomponents of take.

99. This reinterpretation flies in the face of Congress's express provision of measures to regulate "incidental take" — i.e., take that is "incidental to, *and not the purpose of*, the carrying out of an otherwise lawful activity" — in Sections 7 and 10 of the ESA. 16 U.S.C. § 1539 (a)(1)(B) (emphasis added); *see id.* § 1536(b)(4), (o). Under the Take Directives, the Services explain that incidental take is no longer regulated unless a person has intent to kill a specific animal; for example "[f]elling a tree is not a take of the bats roosting in it unless the tree is felled for the purpose of killing or capturing them." Ex. A at 3; Ex. B at 3.

100. Furthermore, while the Take Directives unequivocally state that the Services have "adopted" this unprecedented and expansive reinterpretation of take, the Services have made no attempt to promulgate it via APA notice and comment. The Take Directives themselves were never subject to such notice and comment and are not even published on the Services' websites.[3]

[3] As explained above, nowhere in the Harm Rescission did the Services clearly adopt the kind of stand-alone, sweeping reinterpretation announced in the Take Directives.

101. Nor did the Services provide any discussion of how the reinterpretation in the Take Directives would conflict with their existing rules or how it would impact endangered and threatened species. For example, FWS's regulatory definition of "harass," another of the nine subcomponents of "take," expressly provides for take via "negligent act" or "omission." 50 C.F.R. § 17.3. More broadly, the Services have entirely failed to discuss the impacts of eliminating regulation of other non-habitat-based forms of incidental take.

102. The Services' Take Directives are a major federal action that will significantly affect the quality of the human environment under NEPA and requires environmental review. The Services, however, prepared no NEPA analysis for the Take Directives.

VII. The Administrative Procedure Act

103. The APA, 5 U.S.C. §§ 551 *et seq.*, "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

104. Under the APA, a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA directs reviewing courts to "hold unlawful and set aside" agency actions that are "without observance of procedure required by law" or are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A), (D).

105. "[A]n agency rule [is] arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of

agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

106. "One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

107. When agencies "change their existing policies," they must, at minimum, acknowledge the change, "provide a reasoned explanation," and "show that there are good reasons for the new policy." *Id.*; *see N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring) (policy changes "cannot be solely a matter of political winds and currents," but rather require "fidelity to law and legal process").

108. And when the agency's "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Failure to do so is arbitrary and capricious. *Id.*

109. The APA requires agencies to engage in public notice-and-comment rulemaking anytime they seek to adopt a new rule with the force and effect of law. 5 U.S.C. § 553(a)–(c); *Child.'s Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 619–20 (4th Cir. 2018). Under the APA, a "rule" includes any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). An agency cannot adopt a rule that "supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy"

without first subjecting the rule to public notice and comment. *Azar*, 896 F.3d at 620 (citation omitted).

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of the APA – The Harm Rescission Is an Arbitrary and Capricious Policy Reversal and Is Contrary to Law.

110. The allegations of the preceding paragraphs are incorporated here by reference.

111. With the Harm Rescission, the Services abruptly abandoned a policy that they had consistently implemented since the passage of the ESA more than fifty years ago, codified shortly thereafter, and successfully defended before the Supreme Court more than thirty years ago.

112. The Harm Rescission contradicts the text, structure, purpose, and legislative history of the ESA, all of which establish that prohibited take includes actually killing or injuring listed species via significant habitat modification or degradation.

113. In the Harm Rescission, the Services failed to address any of the factual underpinnings of the Harm Definition. In doing so, the Services ignored longstanding expert recognition of the harms of habitat destruction.

114. The Services also failed to take into account their over fifty years of experience administering the Act consistent with the Harm Definition. The Services did not identify any changes in facts or circumstances that would support deviating from the way they have implemented the Act for over five decades.

115. Furthermore, the Services entirely failed to consider an important aspect of the problem: how the Harm Rescission and new interpretation would severely compromise their ability to fulfill the ESA's mandate "to conserve endangered and threatened species" and "utilize

their authorities in furtherance of the [Act's] purposes," including "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b), (c)(1); *see id.* § 1532(3).

116. For example, the Services failed to consider how the endangered and threatened species they are charged with conserving would be affected by their decision to disregard an entire category of harm under the ESA. In doing so, the Services ignored extensive evidence in the record indicating that habitat destruction is the leading cause of extinction and a key factor in the listing and/or recovery of many endangered and threatened species.

117. The Services further ignored how restricting harm to acts "directed immediately and intentionally against a particular animal" would impact the ESA programs they administer that are premised on the concept of incidental take.

118. Such programs include incidental take permits and habitat conservation plans issued under Section 10, 16 U.S.C. § 1539(a)(1)(B); incidental take statements issued pursuant to Section 7 consultation, *id.* § 1536(b)(4); and conservation benefit agreements, including agreements formerly known as safe harbor agreements, also issued under Section 10*, id.* § 1539(a)(1)(A).

119. Without any meaningful attempt to address these underlying factual circumstances, reliance interests, and impacts on their ability to fulfill the ESA's conservation mandate, the Services simply declared, without a rational explanation, that their over fifty-year-old understanding of harm is "legally incorrect." The Services failed to meaningfully address the fact that the Supreme Court, in *Sweet Home*, already found the Harm Definition is legally correct as it is entirely consistent with and supported by the history, structure, and intent of the ESA.

120. The Services' attempt to excuse their arbitrary dismissal of the *Sweet Home* majority's thorough legal analysis with an appeal to *Loper Bright* only ignores the Supreme Court yet again: the *Loper Bright* Court explicitly emphasized that its decision did "not call into question prior cases that relied on the *Chevron* framework." 603 U.S. at 412.

121. Additionally, the Services arbitrarily dismissed how the Harm Rescission would harm reliance interests by disrupting a fifty-year-long, stable regulatory framework on which numerous entities and organizations rely.

122. Because the Harm Rescission "disregard[s] facts and circumstances that underlay" the Services' over fifty-year-old Harm Definition and the "serious reliance interests" it engendered, the APA required the Services to provide a "more detailed justification" for their policy reversal. *Fox*, 556 U.S. at 515–16. The APA also required the Services to consider important aspects of the problem, including how the change would undermine the conservation of the endangered and threatened species they are charged with conserving under the ESA. *See State Farm*, 463 U.S. at 43 ("[A]n agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem.").

123. Because the Services failed to demonstrate that their new policy is consistent with the governing statute, failed to provide the requisite "more detailed justification," and entirely ignored important aspects of the problem, the Harm Rescission is arbitrary and capricious and not in accordance with law, in violation of the APA. 5 U.S.C. § 706(2).

SECOND CLAIM FOR RELIEF

Violation of the APA – The Take Directives Are an Arbitrary and Capricious Policy Reversal and Are Contrary to Law

124. The allegations of the preceding paragraphs are incorporated here by reference.

125. The ESA plainly provides for the regulation of "incidental take," i.e. take that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B).

126. In flagrant defiance of the statute, the Services' Take Directives read "incidental take" out of the Act. The reinterpretation in the Take Directives unlawfully restricts *all* take to "only an affirmative act that is intentionally and purposefully directed at a particular animal." Ex. A at 1; Ex. B at 1.

127. The Take Directives contravene the clear intent of the Section 9 take prohibition, which was designed to cover take "whether intentional or not," H.R. Rep. No. 93-412, at 11 (1973), and the plain language of Sections 7 and 10, which explicitly establish mechanisms for the regulation of "incidental" take. 16 U.S.C. §§ 1536(b)(4)(i), 1539 (a)(1)(B).

128. Specifically, for federal actions, Congress established incidental take statements under Section 7 that authorize "incidental taking" pursuant to "reasonable and prudent" measures "necessary or appropriate to minimize such impact." *Id.* § 1536(b)(4). Likewise, for non-federal actions, Congress established an incidental take permitting scheme under Section 10, whereby actors must prepare a "conservation plan" to "minimize and mitigate" the impacts of incidental take and show that "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild" before incidental take can lawfully proceed. *Id.* § 1539(a)(2).

129. In doing so, these programs strike the balance Congress sought to achieve in passing the ESA, ensuring that industry is no longer "untempered by adequate concern and conservation" but instead held to a scheme of reasonable mitigation measures. By refusing to recognize non-purposeful killings, harms, and other incidental takes as "take," the Take Directives would render these statutory programs superfluous.

130. Furthermore, the Take Directives represent an arbitrary and capricious reversal of the Services' longstanding approach to incidental take under the ESA. The Services made no effort to discuss the consequences of restricting all take to only direct, purposeful acts, including the impacts to any associated reliance interests. The Services also entirely ignored important aspects of the problem, such as how this new interpretation conflicts with their own existing regulations as well as the Supreme Court's 1995 holding in *Sweet Home* and how the new interpretation would undermine their ability to fulfill the ESA's mandate to conserve and recover endangered and threatened species.

131. The Take Directives are not in accordance with law and are arbitrary and capricious, in violation of the APA. 5 U.S.C. § 706(2).

THIRD CLAIM FOR RELIEF

Violation of the APA – Failure to Engage in Notice-and-Comment Rulemaking

132. The allegations of the preceding paragraphs are incorporated here by reference.

133. Under the APA, a "rule" includes any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4).

134. When an agency seeks to adopt a new policy with the "force and effect of law," it must follow the "statutorily prescribed notice-and-comment process." *Azar*, 896 F.3d at 619–20 (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015)). A rule falls within that requirement "if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Id.* at 620 (quoting *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014)).

135. Here, the Services openly admit to having "adopted" a reinterpretation of "take" that will govern their application and administration of all forms of the "take" provision under the ESA. Ex. A at 1; Ex. B at 1. The Take Directives "adopt[] a new position inconsistent with existing regulations" and effect "a substantive change in existing law or policy." *Azar*, 896 F.3d at 620.

136. However, the Services have failed to conduct the APA notice and comment process required for this substantive policy reversal. The Services did not announce their reinterpretation of take in a proposed rule, nor did they give the public notice and the opportunity to comment on the Take Directives.

137. Because the APA forbids such a substantive regulatory reversal without notice and comment, the Take Directives are invalid and must be set aside. 5 U.S.C. § 706(2).

FOURTH CLAIM FOR RELIEF

Violation of NEPA – Failure to Analyze Environmental Impacts of the Harm Rescission

138. The allegations of the preceding paragraphs are incorporated here by reference.

139. The Services abandoned longstanding habitat protections for numerous endangered and threatened species without analyzing any of the environmental consequences.

140. Neither of the Services' proffered rationales excuse their failure to conduct NEPA analysis.

141. The Harm Rescission does not qualify for the categorical exclusions that the Services have invoked because it is not a ministerial action and will not be covered by further NEPA analysis. Furthermore, even if the Harm Rescission fell under the categorical exclusion, it presents extraordinary circumstances that require NEPA analysis, such as significant impacts to

endangered and threatened species, their critical habitats and ecologically critical areas as well as unique environmental risks. *See* 43 C.F.R. §§ 46.205(c)(1), 46.215; CM 9.

142. The Harm Rescission also does not qualify as a nondiscretionary action. The Supreme Court already upheld FWS's harm definition in 1995; the Services cannot reasonably claim they are legally obligated to change it.

143. Contrary to the Services' assertions, the Harm Rescission is a discretionary change in policy that will have significant environmental effects. It will deprive endangered and threatened species across the country of the protection that the ESA has provided against death and injury caused by habitat destruction, the leading driver of extinction, for over fifty years. The Harm Rescission will undermine the protective Section 10 habitat conservation plan framework and decrease the effectiveness of Section 7 incidental take statements. In doing so, it will fuel unmitigated habitat loss among endangered and threatened species and impose reverberating environmental consequences for co-occurring species and human communities. Thus, the Harm Rescission is a "major Federal action[] significantly affecting the quality of the human environment" that requires a full Environmental Impact Statement. 42 U.S.C. § 4332(2)(C).

144. By classifying the Harm Rescission as a nondiscretionary action and applying an inapposite categorical exclusion, the Services violated NEPA and their own implementing regulations and guidance, 42 U.S.C. § 4336; 43 C.F.R. § 46.215; CM 4–5, and they acted arbitrarily and capriciously under the APA, 5 U.S.C. § 706(2)(A). The Services' failure to prepare an Environmental Impact Statement is also arbitrary and capricious and in violation of NEPA, the FWS and NMFS regulations and guidelines implementing NEPA, and the APA, 5 U.S.C. § 706(2)(A); 42 U.S.C. § 4332; 43 C.F.R. §§ 46.205(c)(1), 46.215; CM 9.

FIFTH CLAIM FOR RELIEF

Violation of NEPA – Failure to Analyze Environmental Impacts of the Take Directives

145. The allegations of the preceding paragraphs are incorporated here by reference.

146. The Take Directives are a major federal action subject to NEPA. With the Take Directives, the Services abandoned longstanding protections against incidental and non-purposeful "take" for most endangered and threatened wildlife species.

147. But the Services undertook no NEPA review of the Take Directives and did not analyze any of the environmental consequences of this action.

148. The Services' failure to complete any NEPA analysis for the Take Directives is arbitrary and capricious and in violation of NEPA, the FWS and NMFS regulations and guidelines implementing NEPA, and the APA, 5 U.S.C. § 706(2)(A); 42 U.S.C. § 4332.

SIXTH CLAIM FOR RELIEF

Violation of ESA – Failure to Comply with Section 7(a)(2)

149. The allegations of the preceding paragraphs are incorporated here by reference.

150. Pursuant to the Harm Rescission, the Services refuse to recognize significant habitat modification or degradation as "harm." In reversing their longstanding policy, the Services have deprived all listed species of a core ESA protection and exposed them to greater risk of unmitigated habitat destruction, a primary threat to the vast majority of endangered and threatened species.

151. Despite these adverse effects, the Services refused to engage in consultation under Section 7 of the ESA to evaluate whether the Harm Rescission, a discretionary federal agency action, was likely to jeopardize the continued existence of listed species or adversely

modify their critical habitat. 16 U.S.C. § 1536(a)(2). Instead, the Services asserted that the Harm Rescission was not subject to the consultation requirement.

152. Section 7 admits no such exception. Its plain language extends to "[e]ach Federal agency" and "any action authorized funded, or carried out by such agency." *Id.* § 1536(a)(2). The Services' own regulations define "action" to include "the promulgation of regulations," 50 C.F.R. § 402.02, and the Services have long acknowledged that their own actions are subject to Section 7 consultation. U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., *Endangered Species Consultation Handbook* app. E (1998).

153. Because the Services have unjustifiably failed to engage in Section 7 consultation on the Harm Rescission, a rulemaking that will adversely affect numerous endangered and threatened species, the Services have violated the ESA's requirement to ensure that their action is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of their designated "critical habitat." 16 U.S.C. §§ 1536(a)(2), 1540(g)(1)(A).

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court:

(A) Declare that the Services acted arbitrarily and unlawfully, in violation of the ESA, APA, and NEPA, in promulgating the Harm Rescission and Take Directives;

(B) Vacate and set aside the Harm Rescission and Take Directives;

(C) Reinstate the 1981 FWS and 1999 NMFS harm definitions;

(D) Enjoin the Services from applying or otherwise relying on the Harm Rescission and Take Directives;

(E) Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, associated with this litigation; and

(F) Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 13th day of October 2026.

/s/ Catherine M. Wannamaker
Catherine M. Wannamaker
Fed. ID No. 12577
Southern Environmental Law Center
525 East Bay Street, Suite 200
Charleston, South Carolina 29403
Telephone: (843) 720-5270
cwannamaker@selc.org

Elizabeth Rasheed (*pro hac vice pending)*
N.C. Bar No. 55635
Allyson Gambardella (*pro hac vice pending)*
N.C. Bar No. 62371
Southern Environmental Law Center
135 E Rosemary Street, Suite 500
Chapel Hill, NC 27514
Telephone: (919) 967-1450
erasheed@selc.org
agambardella@selc.org

Attorneys for Plaintiffs

EXHIBIT A

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

CUI & Privileged – Attorney Client & Attorney Work Product – FOIA Exempt

September 14, 2026

MEMORANDUM FOR: Alaska Section
Enforcement Section
Fisheries and Protected Resources Section
Northeast Section
Northwest Section
Pacific Islands Section
Southeast Section
Southwest Section

FROM: John Luce
General Counsel

LUCE.JOHN.SEELY.1025670325
Digitally signed by LUCE.JOHN.SEELY.1025670325
Date: 2026.09.14 14:55:04 -04'00'

SUBJECT: Scope of the ESA's "take" prohibition following the Harm Rule (91 Fed. Reg. 43300)

I. Introduction.

The Harm Rule rescinded the Services' regulatory definitions of "harm," 50 C.F.R. §§ 17.3, 222.102, and adopted Justice Scalia's interpretation of "take" set out in the dissent in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995). See 91 Fed. Reg. 43300, 43302 (July 14, 2026) (effective Sept. 14, 2026).

Under Justice Scalia's interpretation, "take" reaches only an affirmative act that is intentionally and purposefully directed at a particular animal. The action thus reaches an animal without an intervening link, although the consequences of the act might arrive later (as with baiting or poisoning). The intentionality element describes the action itself and is separate from the ESA's mens rea, which arises only for criminal and enhanced civil penalties. 16 U.S.C. § 1540(a)(1), (b)(1). The ESA's mens rea attaches to the animal's biological identity.

II. Background—the Harm Rule's and Justice Scalia's Interpretation of "take."

The Harm Rule adopts Justice Scalia's construction of "take" as the best reading of the statute. 91 Fed. Reg. at 43302. "Take" is "a term of art deeply embedded in the statutory and common law concerning wildlife" and it "describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals)." 515 U.S. at 718. The ten verbs of § 1532(19) "are all affirmative acts . . . directed immediately and intentionally against a particular animal—not acts or omissions that indirectly and accidentally cause injury to a population of animals." *Id.* at 719–20; 91 Fed. Reg. at 43301, 43305. What they share "is

the sense of affirmative conduct intentionally directed against a particular animal or animals." 515 U.S. at 720. They are "verbs of purpose" that "denote action directed at animals," *id.* at 732, and "only action directed at living animals constitutes a 'take,'" *id*. at 735.

"Take" is therefore a term of art with a specialized common-law meaning. When Congress borrows a term carrying accumulated legal content, it "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); *accord Sekhar* v. *United States*, 570 U.S. 729, 733 (2013); *George* v. *McDonough*, 596 U.S. 740, 746, 753 (2022). Neither the 1973 ESA nor the legislative history preceding its enactment establishes a departure from the common-law "take" prohibition. While Congress expanded the common law definition slightly to include "harm," it did so without an expressed intent to displace the common-law meaning of "take." Congress's decision to list nine verbs, every one of which describes a person acting on an animal, thus confirms the borrowed common-law meaning; it does not displace it. *Yellen* v. *Confederated Tribes of the Chehalis Rsrv.*, 594 U.S. 338, 354–55 (2021) ("Ordinarily . . . this Court reads statutory language as a term of art only when the language was used in that way at the time of the statute's adoption.").

In sum, Justice Scalia's interpretation begins with one fundamental point: did the actor intend to act on the animal itself. This factor guides interpretation and application of the ESA's "take" prohibition.

Element	**What it requires**
Affirmative act	Conduct, not an omission. 515 U.S. at 716, 718.
Intentionally directed at an animal	The animal is the object of the act. The actor deliberately acts on an animal—either because the act is by nature one done to animals (shooting, netting, trapping, poisoning, harassing) or because he intends to "get at" the animal (felling the tree or draining the pond to get at particular animals). *Id.* at 720–22.
Directly and immediately	The act itself operates on the animal; the injury does not arrive through an intervening link or change in conditions. Delay in the consequence is not relevant (e.g., with poisoning or baiting). *Id.* at 715, 719, 732–33.
Particular animals	Living individuals—not populations, future occupants, or unoccupied habitat. *Id.* at 716, 735.

III. Discussion.

This section addresses specific aspects of Justice Scalia's interpretation. to inform the application and administration of the "take" provision following the Harm Rule.

A. "Intentionally" describes the object of the act.

"Take," including the word "harm" in the statutory definition, requires "affirmative conduct intentionally directed against a particular animal or animals." *Babbitt*, 515 U.S. at 720 (Scalia, J., dissenting). This means the person must intend to act on an animal and must do so for the purpose of affecting the animal. The "intent" consideration goes to an intent to act on the animal, not merely an intent to engage in the activity. The means employed to take, by contrast, are immaterial: conduct aimed at an animal is a take whether or not the actor lays hands on the animal or applies any force to it. As Justice Scalia explained, "[t]o feed an animal poison, to spray it with mace, to chop down the very tree in which it is nesting, or even to destroy its entire habitat in order to take it (as by draining a pond to get at a turtle), might neither wound nor kill, but would directly and intentionally harm." *Id*. at 721. What makes the felled tree or the drained pond a take in those examples is that the actor acted to reach the animal. When that purpose is absent, there is no take, however serious the resulting injury may be. A vessel that inadvertently strikes a whale has not taken it, because the vessel's course was not set against the whale. Felling a tree is not a take of the bats roosting in it unless the tree is felled for the purpose of killing or capturing them. In each instance the conduct is directed at the water or at the timber and reaches the animal only "indirectly and accidentally." *Id*. at 719–20.

B. "Directed immediately" is part of intentional direction, not a separate causation test.

The dissent's objection to the prior harm regulation was that it required "no more than the cause-in-fact of death or injury," reaching conduct "regardless of whether that result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury." 515 U.S. at 715. An act aimed at an animal that reaches the animal, by contrast, has no gap or causal chain to connect the act to the injury. Thus, under the dissent's interpretation, directness is not an independent limitation on "take"; it is a feature of an act directed at an animal.

One clarification—Justice Scalia's use of "immediately" refers to the absence of an intervening step (or cause), not a temporal limitation on "take." Setting out poison to kill a wolf constitutes a take when the poison is set, even though the wolf dies later, because the act of setting out poison is intentionally and purposefully directed at the wolf. *See id.* at 721 ("To feed an animal poison . . . might neither wound nor kill, but would directly and intentionally harm.").

C. "Against particular animals" means living individuals.

This element is a core part of intentional direction: an act must be directed at living individual animals not at populations of animals or animals that might have existed in the future. The dissent's "third and most important" objection to the harm regulation was that it reached "injury inflicted, not only upon individual animals, but upon populations." 515 U.S. at 716. "[O]nly action directed at living animals constitutes a 'take,'" so destroying habitat "essential . . . for the breeding, of butterflies, would not violate the Act, since it would not harm or kill any living butterfly." *Id.* at 735. Modification of unoccupied habitat is never a take, however certain its eventual effect on the species.

D. The Act's mens rea is a separate inquiry: it attaches to the animal's biological identity and matters only for criminal and enhanced civil penalties.

After identifying a take, the inquiry turns to the statutory mens rea. Section 1540(a)(1) imposes civil penalties on anyone who "otherwise violates" Section 9, that is, unknowingly. Strict liability removes the mental element. But "a defendant must still commit the act to be liable," *CITGO*, 801 F.3d at 488–89, and the act carries its intentional direction with it.

Section 1540(b)(1) criminalizes a "knowing[]" violation. Knowledge attaches to the facts that make the conduct unlawful, or "the crucial element separating legal innocence from wrongful conduct," *Elonis v. United States*, 575 U.S. 723, 737 (2015) (quoting *United States v. X-Citement Video, Inc*., 513 U.S. 64, 73 (1994)); *see also Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009); *McFadden v. United States*, 576 U.S. 186, 192–94 (2015). Under Section 9, the "crucial element" of the offense is the animal's biological identity. Acting on an animal is unlawful because the animal is one the ESA protects, so the "knowing" violator must know what the animal is.[1]

The *Sweet Home* dissent draws the same line: "it is quite possible to take protected wildlife purposefully without doing so knowingly." 515 U.S. at 722. The hunter who shoots an elk believing it a mule deer has "committed a purposeful taking"—an act directed at an animal. But the hunter has not committed a "knowing" violation, "not because he does not know that elk are legally protected . . . but because he does not know what sort of animal he is shooting." *Id.* In this context, *United States v. International Minerals & Chem. Corp*., 402 U.S. 558 (1971), is illustrative. The Court found that "knowingly" defeats a mistake-of-law defense but preserves a mistake-of-fact one, so the shipper who believed his acid was distilled water is not liable. *Id.* at 563–64. The mens rea questions arose only because he had intended to and did ship a liquid; once shipped, the question turned to whether he took the action "knowingly." Likewise, an actor must first have acted on an animal to establish a "take," after which the inquiry turns to whether the actor did so "knowingly."

[1] "Biological" identity in this context could have different meanings, from a general understanding (a dog versus a cat) to specific taxonomic distinctions (*e.g.*, distinctions between *Bison bison bison* versus *Bison bison athabascae*). We do not address or resolve this question here.

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EXHIBIT C

SOUTHERN ENVIRONMENTAL LAW CENTER

136 East Rosemary Street, Suite 500
Chapel Hill, NC 27514

Telephone 919-967-1450
Facsimile 919-929-9421

July 15, 2026

Via Email and Certified Mail, Return Receipt Requested

Doug Burgum
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
exsec_exsec@ios.doi.gov

Howard Lutnick
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue N.W.
Washington, D.C. 20230
thesec@doc.gov

Brian Nesvik
Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, D.C. 20240
brian_nesvik@fws.gov

Eugenio Piñeiro Soler
Assistant Administrator of Fisheries
National Marine Fisheries Service
1315 East West Highway, SSMC3
Silver Spring, MD 20910
eugenio.e.pineirosoler@noaa.gov

Re: Notice of Violations of the Endangered Species Act Regarding Rescission and Reinterpretation of the Regulatory Definition of "Harm"

Dear Secretaries Burgum and Lutnick:

This letter serves as a 60-day notice of intent on behalf of the National Wildlife Federation, South Carolina Wildlife Federation, Florida Wildlife Federation, North Carolina Wildlife Federation, Louisiana Wildlife Federation, Association of Northwest Steelheaders, and Conservation Council for Hawai'i to sue the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively, "the Services") for violations of the Endangered Species Act ("ESA" or "the Act") relating to the Services' decision to rescind and reinterpret the regulatory definition of "harm" under the ESA.[1]

The Services are violating Section 7(a)(2) of the ESA by engaging in this final rulemaking action without first completing consultation as required by the ESA. 16 U.S.C. § 1536(a)(2). Not only is consultation required under the Act because this rulemaking may affect ESA-listed species, *id.*; 50 C.F.R. § 402.14, but as further explained below, the Services' failure to consult is particularly egregious here because their reinterpretation of "harm" can be expected to adversely affect hundreds of listed species that are threatened by habitat loss. Furthermore, the Services' implementation of their new, substantially narrowed interpretation of "harm" without

[1] *See* Rescinding the Definition of "Harm" Under the Endangered Species Act, 91 Fed. Reg. 43,300 (July 14, 2026) (codified at 50 C.F.R. pts. 17, 222); *see also* Rescinding the Definition of "Harm" Under the Endangered Species Act, 90 Fed. Reg. 16,102 (proposed Apr. 17, 2025) (to be codified at 50 C.F.R. pts. 17, 222). Because the Services treat the FWS regulatory definition and the NMFS regulatory definition of "harm" as being "materially identical," 90 Fed. Reg. at 16,103, they are referred to throughout this notice letter as being a single operative interpretation of the meaning of "harm" under the Act.

first consulting on the impact of this reinterpretation on listed species additionally constitutes an "irretrievable commitment of resources" in violation of Section 7(d) of the Act. 16 U.S.C. § 1536(d).

Finally, the Service's reinterpretation of "harm" is contrary to the text and purpose of the ESA and is arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*. While notice of intent to sue is not required for claims arising under the APA, we notice these claims here under an abundance of caution as the Services' new interpretation of "harm" flies in the face of the ESA itself. By reinterpreting "harm" in a way that removes habitat degradation and destruction from regulation, the Services eviscerate the ESA's core purpose of "provid[ing] a means whereby *the ecosystems* upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b) (emphasis added).

I. Background

On July 14, 2026, the Services promulgated a final rule rescinding their regulatory definition of "harm" under the Endangered Species Act.[2] This rule is the culmination of an April 17, 2025 proposed rulemaking.[3] In the Federal Register notice published with this final rulemaking, the Services indicated that they will now be reinterpreting "harm" in a way that completely reverses their longstanding regulatory interpretation of the term and runs counter to fifty years of consistent agency implementation and Supreme Court precedent.[4]

Since the passage and earliest days of the ESA, the Services have properly understood that illegal "take" under Section 9 of the Act[5] includes "harm" from "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."[6] The U.S. Supreme Court subsequently upheld this understanding of "harm" in its 1995 decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). For the first time in over fifty years, however, the Services have now indicated that they are reversing that understanding and will henceforth consider all forms of "take" proscribed by the ESA, including "harm," to "require an 'affirmative act[] . . . directed immediately and intentionally against a particular animal—not [an] act[] or omission[] that indirectly and accidentally cause[s] injury to a population of animals.'"[7]

As discussed below, the Services' "harm" rule rescission and change in interpretation are an agency action that may adversely affect listed species and must undergo Section 7

[2] 91 Fed. Reg. at 43,300.

[3] 90 Fed. Reg. at 16,102.

[4] *See* 91 Fed. Reg. at 43,300–02.

[5] Section 9 of the Act prohibits the unpermitted "take" of listed fish or wildlife, 16 U.S.C. § 1538(a)(1), and the Act defines the verb to "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

[6] 50 C.F.R. § 222.102 (NMFS definition). FWS proposed and finalized its definition of "harm," which is materially the same, only eighteen months after the ESA was signed into law. *See* Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,413 (Sept. 26, 1975) (codified at 50 C.F.R. pt. 17).

[7] 91 Fed. Reg. at 43,306 (citation omitted).

consultation under the ESA. Despite the adverse impacts that this rescission is likely to have on hundreds of listed species that are threatened by habitat loss, however, the Services have declined to consult on it. The Services' complete failure to consider the effects of this massive change on hundreds of currently listed threatened and endangered species further underscores the mercurial, rash, and shortsighted nature of their decision and violates Section 7 of the ESA.

II. Legal Framework

Congress enacted the ESA in 1973 because species of wildlife and plants across the United States were being "rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). In response, the ESA aims "to provide a means whereby the *ecosystems* upon which endangered species and threatened species depend may be conserved," and "to provide a program for the conservation of such endangered species and threatened species." *Id.* § 1531(b) (emphasis added). The goal of the ESA is not just to ensure the continued survival of imperiled species, but rather to bring about their complete recovery to the point at which the conservation measures provided by the Act are no longer necessary. *Id*. §§ 1531(b), 1532(3). This purpose "is reflected in literally every section of the statute." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

In furtherance of that goal, Section 7(a)(2) of the ESA requires that

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

16 U.S.C. § 1536(a)(2). The substantive and procedural requirements of Section 7 apply equally to the Services as well as to other federal agencies, *see* 50 C.F.R. § 402.01(a), and this substantive duty to ensure against jeopardy to listed species is ongoing, *see Conner v. Burford*, 848 F.2d 1441, 1452 (9th Cir. 1988).

The Services' joint Section 7 implementing regulations and internal agency guidance additionally confirm that agency "actions" requiring Section 7 consultation include agency rulemaking actions such as "the promulgation of regulations." 50 C.F.R. § 402.02; *see also* U.S. FWS, ENDANGERED SPECIES CONSULTATION HANDBOOK app. E, E-6 (1998) (defining an "action" requiring intra-Service Section 7 consultation to include "the promulgation of regulations"); *W. Watersheds Project v. Kraayenbrink,* 632 F.3d 472, 496 (9th Cir. 2011) ("The minimum threshold for an agency action to trigger consultation with FWS is low, and we conclude that the regulatory amendments here—which affect 160 million acres of public land, home to hundreds of special status species—handily meet that threshold.").

Each federal agency, including FWS and NMFS, is required to "review its [proposed] actions at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). If an agency determines that an "action may affect listed species or critical habitat," *id.,* the agency must consult with FWS and/or NMFS to ensure that

its contemplated action "is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). If the proposed action is "likely to adversely affect" a listed species, formal consultation is required, and the appropriate Service must prepare a biological opinion, 50 C.F.R. § 402.14, that details "how the agency action [at issue] affects the species or its critical habitat" and determine whether the proposed action is likely to jeopardize the continued existence of any listed species. 16 U.S.C. § 1536(b)(3)(A). The Services must use the best available science in discharging their duties under Section 7, and must err on the side of protective caution for the endangered or threatened species when in doubt. *See* 16 U.S.C. § 1536(a)(2) ("In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."); *Tenn. Valley Auth.*, 437 U.S. at 194 (explaining that the Act represents "institutionalized caution").

III. The Services Violated Section 7 by Rescinding and Reinterpreting the Definition of "Harm" Without ESA Consultation

Here, the Services have finalized an agency rulemaking that will adopt and implement a new policy of no longer protecting wildlife from take as a result of significant habitat modification and destruction. This change will reverse a half century of longstanding interpretation and implementation of the ESA, relied on by numerous industries and organizations, under which the Services heretofore considered Section 9's "take" prohibition to extend to unpermitted habitat destruction and degradation that injures or kills threatened and endangered species.

Moreover, the change will have far reaching impacts on the environment and listed species—particularly species that are primarily threatened by habitat loss. The Services identify habitat loss or modification as a factor in the listing and/or recovery of 330, or 92%, of 358 species or subspecies of United States vertebrates currently listed as endangered or threatened.[8] This includes 32, or 94%, of amphibians; 34, or 100%, of reptiles; 129, or 94%, of fishes; 77, or 96%, of birds; and 58, or 81%, of mammals.[9] A small sampling of the variety of vertebrate species threatened by habitat loss and degradation include: the red-cockaded woodpecker, which relies on longleaf pine ecosystems, "among the most endangered systems on earth," and experienced a "precipitous decline . . . caused by an almost complete loss of habitat" due to detrimental silvicultural practices, fire suppression, and other human activities;[10] the loggerhead sea turtle, which has lost much of its nesting habitat in the Northwest Atlantic as a result of

[8] The Southern Environmental Law Center ("SELC") reviewed Service documents for 358 vertebrate animal species or subspecies currently listed as endangered or threatened in the United States to determine whether the relevant Service has identified habitat loss, degradation, or modification as a factor in listing the species or in its recovery. SELC presented the results of that review as Attachment 1 to its May 19, 2025 comment letter on the Services' proposed rulemaking. *See* Comments of the Southern Environmental Law Center on Rescinding the Definition of "Harm" Under the Endangered Species Act (May 19, 2025), Attachment 1, *available at* https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-223144.

[9] *See id.*

[10] U.S. FISH & WILDLIFE SERV., RECOVERY PLAN FOR THE RED-COCKADED WOODPECKER (*PICOIDES BOREALIS*) SECOND REVISION 1 (Jan. 27, 2003), https://ecos.fws.gov/docs/recovery_plan/030320_2.pdf.

coastal development;[11] the West Coast steelhead, or rainbow trout, which has "experienced declines in the past several decades as a result of forestry, agricultural, mining, and urbanization activities that have resulted in the loss, degradation, simplification, and fragmentation of habitat," including from water storage and withdrawal activities and the modification of flow regimes that have depleted flow necessary for essential life functions like migration and spawning;[12] the Florida scrub jay, which has lost much of the scrub habitat it exclusively inhabits to "clear[ing] for beachfront hotels, houses, and condominiums" on the coast and to development for "citrus groves and housing" inland;[13] the Red Hills salamander, which lost an estimated 69.5 to 86.1% of its original habitat due to logging and relies heavily on ESA protections to prevent further degradation of its habitat, much of which is owned by the timber industry;[14] and the Atlantic sturgeon, for which the Carolina and South Atlantic distinct population segments have been respectively reduced to less than 3 and 6 percent of their historic population sizes and are significantly threatened by habitat degradation and curtailment, including due to dams that block access to spawning grounds, dredging that adversely modifies habitat, and anthropogenic activities that impair water quality.[15]

The "harm" rule rescission and reinterpretation of "harm" will adversely impact these and other species in multiple ways. First, reinterpreting harm to no longer include significant habitat degradation or modification that kills or injures wildlife will undermine the Section 10 incidental take permitting scheme that Congress intentionally added when it amended the ESA more than forty years ago to better protect species' habitat while allowing regulatory flexibility for the permitting of otherwise lawful activities and land uses, *see* 16 U.S.C. § 1539(a)(1)(B),[16] and will thus harm species that otherwise would have been protected by the Section 10 permitting process. The incidental take permitting scheme protects species in multiple ways. At the outset, a permit applicant must assess the impacts of their proposed taking and submit to the Service a plan to minimize and mitigate those impacts, as well as an assessment of alternatives to the proposed taking. 16 U.S.C. § 1539(a)(2); *see also* 50 C.F.R. §§ 17.22, 17.32. The Secretary may *only* issue an incidental take permit if, after allowing for public comment, they find that, among other requirements, "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking" and "will ensure that adequate funding for the plan will be provided," and "the taking will not appreciably reduce the likelihood of the survival and

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[11] Endangered and Threatened Species; Determination of Nine Distinct Population Segments of Loggerhead Sea Turtles as Endangered or Threatened, 76 Fed. Reg. 58,868, 58,917 (Sept. 22, 2011) (codified at 50 C.F.R. pts. 17, 223, 224).

[12] Endangered and Threatened Species: Final Listing Determinations for 10 Distinct Population Segments of West Coast Steelhead, 71 Fed. Reg. 834, 856 (Jan. 5, 2006) (codified at 50 C.F.R. pts. 223, 224).

[13] Endangered and Threatened Wildlife and Plants; Threatened Status for the Florida Scrub Jay, 52 Fed. Reg. 20,715, 20,715 (June 3, 1987).

[14] U.S. FISH & WILDLIFE SERV., RED HILLS SALAMANDER (*PHAEOGNATHUS HUBRICHTI*) 5-YEAR REVIEW: SUMMARY AND EVALUATION 6, 10 (Feb. 2024), https://ecosphere-documents-production-public.s3.amazonaws.com/sams/public_docs/species_nonpublish/11991.pdf.

[15] Endangered and Threatened Wildlife and Plants; Final Listing Determinations for Two Distinct Population Segments of Atlantic Sturgeon (*Acipenser oxyrinchus oxyrinchus*) in the Southeast, 77 Fed. Reg.

5,914, 5,967–71, 5,978 (Feb. 6, 2012).

[16] *See also Sweet Home*, 515 U.S. at 700; H.R. Rep. No. 97–835, at 30–31 (1982) (Conf. Rep.).

recovery of the species in the wild." 16 U.S.C. § 1539(a)(2)(B); *see also* 50 C.F.R. §§ 17.22, 17.32.

If, however, private actors no longer need incidental take permits for activities that significantly modify habitat, as will be the case under the Services' new interpretation, then irreversible harm to species will proceed without any evaluation of whether these harms "appreciably reduce the likelihood of the [species'] survival and recovery." 16 U.S.C. § 1539(a)(2)(B)(iv). Additionally, private actors who already hold incidental take permits for ongoing habitat-destroying activities will no longer be incentivized to adhere to the terms and mitigation requirements of those permits if permit violations will no longer subject them to Section 9 take liability. Such permit-holders may include recipients of Section 10 incidental take permits who currently implement Habitat Conservation Plans, or participants currently enrolled in Safe Harbor Agreements or other Section 10 Conservation Agreements. Because Section 10 applies primarily to actions not covered by Section 7, these impacts will be felt most strongly by species on non-federal lands and can be expected to impact a variety of listed species. Two-thirds of federally listed species rely on habitat on non-federal lands for their continued survival and future recovery; approximately half of listed species have at least 80% of their current habitat on non-federal lands,[17] and 76 listed vertebrates and invertebrates occur solely on non-federal lands.[18] These species may all be severely impacted by this change.

Similarly, the Services' reinterpretation may also decrease the effectiveness of incidental take statements ("ITSs") issued for federally authorized projects under Section 7. *See* 16 U.S.C. §§ 1536(b)(4), (o)(2). In exchange for providing an exemption from Section 9 liability for a specified amount of incidental take, ITSs also impose requirements to monitor the extent of incidental take that occurs as a result of the authorized project and minimize the impacts of that take. *See id.* § 1536(b)(4); 50 C.F.R. § 402.14(i). The incidental take limit specified by the ITS further protects species by serving as "a 'trigger' that, when reached, results in an unacceptable level of incidental take" and "require[es] the parties to re-initiate consultation." *Ariz. Cattle Growers' Ass'n v. U.S. FWS*, 273 F.3d 1229, 1249 (9th Cir. 2001). This incidental take limit provides a critical check on a project's impacts and helps ensure the project does not cause more harm than expected to endangered and threatened species. The Service's new interpretation of "harm," however, will undermine the utility of the ITS's take limits because habitat destruction will no longer be a "take" that would otherwise be limited, monitored, and reported under an ITS (and thus excessive habitat destruction will never serve as a trigger for the reinitiation of consultation). This may adversely affect a multitude of species that would otherwise rely on the Section 7 consultation process to protect them from severe habitat destruction and degradation.

For all these reasons, the Services' rulemaking and policy change may adversely affect hundreds of endangered and threatened species in the United States and is likely to jeopardize the continued existence of many listed species. As such, the Services were required to consult on these effects under Section 7 of the ESA before finalizing this rulemaking. For endangered or threatened species that may be adversely affected by this rulemaking, the Services were required

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[17] *See* U.S. FWS, *Habitat Conservation Plans*, https://www.fws.gov/service/habitat-conservation-plans; U.S. FWS, *Our Endangered Species Program and How It Works with Landowners* (July 2009), https://perma.cc/9UGE-65Z5.

[18] U.S. GAO, ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 5 (Dec. 1994), https://perma.cc/8DCC-VUXV.

to prepare a biological opinion to determine whether the proposed change in their interpretation of "harm" and implementation of the ESA would jeopardize the continued existence of any of the species. The Services were required to undertake a species-by-species assessment of these adverse impacts.

The Services have thus violated the procedural and substantive requirements of Section 7 by failing to consult and ensure against jeopardy to listed species here. 16 U.S.C. § 1536(a)(2); *see, e.g.*, *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) ("If a project is allowed to proceed without substantial compliance with [ESA Section 7's] procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result."). Additionally, any actions that the Services take in reliance on the "harm" rescission and reinterpretation prior to the completion of consultation violate ESA Section 7(d)'s prohibition on the irreversible or irretrievable commitment of resources. 16 U.S.C. § 1536(d). Neither FWS nor NMFS may implement their reinterpretation of "harm" until they complete Section 7 consultation, using the best available science, and ensure this seismic change in their interpretation and implementation of the ESA will not jeopardize species or harm critical habitat.

IV. Conclusion

The Services' rescission of the harm definition and reinterpretation of harm to exclude take from habitat degradation can be expected to wreak havoc on ecosystems, upending current and anticipated protections for rare species and habitats across the country. At minimum, the Services were required under Section 7 of the Act to undertake a thorough scientific review of how this change would impact each species affected, and to ensure that their rule change would not jeopardize the continued existence of species or result in the adverse modification of their critical habitat. The Services' complete failure to do so here violates the ESA.

We request that the Services immediately rectify these violations by staying the effective date of the harm rule rescission until such time as they have completed consultation—and any necessary Biological Opinion—for all species affected by this change. We further request that the Services respond to this letter within 60 days. If you have any questions about the issues raised in this letter, please do not hesitate to contact us.

Sincerely,

Derb Carter
Senior Attorney

Catherine Wannamaker
Senior Attorney

Elizabeth Rasheed
Senior Attorney

Allyson Gambardella
Associate Attorney

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