Friends of the Clearwater

*Preserving, Protecting and Defending the Forests, Waterways and Wildlife in the wild heart of north central Idaho since 1987.*

May 7, 2025

**Re: Rescinding the Definition of "Harm" under the Endangered Species Act (Federal Register Vol. 90, No. 73 / April 17, 2025; 16102-16105)**

These are comments by Friends of the Clearwater (FOC). We are a science-based wildlands defense organization whose purpose is to protect and save the remaining wild nature of the Clearwater Basin and adjacent watersheds of north-central Idaho, including Wilderness, roadless areas, and habitat integrity and connectivity for large predators and other at-risk species on public lands and surrounding areas.

The proposed rule states, "The existing regulatory definition of 'harm,' which includes habitat modification, runs contrary to the best meaning of the statutory term 'take.' We are undertaking this change to adhere to the single, best meaning of the (Endangered Species Act)." We assert that the yardstick the Services are using to assign this "single, best meaning" of the Endangered Species Act (ESA) is distorted, misleading, inaccurate and biased. The proposed rule represents a full-scale rollback that would serve extractive industry interests while severely risking the persistence of ESA-listed species. Viewing a species as somehow separate from its habitat is the height of biological folly.

This regulatory change would remove habitat protections for listed species on both federal and non-federal land, as well as in marine areas and on the high seas subject to U.S. jurisdiction. This rule change would not be consistent with the plain language of the ESA and the conservation standards that Congress enshrined in it when it enacted the law in 1973 and later refined when lawmakers amended the statute in 1982. The ESA was enacted with overwhelming bipartisan support and continues to receive consistently strong public support.

In proposing to redefine "harm," the U.S. Fish & Wildlife Service and the National Marine Fisheries Service (Services) propose to remove a critical component from the foundation of the Endangered Species Act (ESA). This change would dismantle one of the ESA's expressed purposes, which is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." [16 U.S.C. § 1531(b)].

For more than 40 years, the existing definition of "harm" has helped safeguard species by clearly prohibiting acts that result in significant habitat modification or degradation which directly or indirectly leads to actual death or injury to listed species. Its regulatory definition has underpinned conservation of endangered species in multiple ways, e.g., in biological opinions and habitat conservation plans written by the Services, and in requiring reasonable measures and alternatives to avoid habitat destruction in exchange for incidental take permits. Rescinding the definition seeks to upend this sensible approach and undermine existing protections, which run counter to the law's conservation purpose.

Over those 40 years, courts and agencies have agreed that destroying habitat qualifies as "harm" under the ESA. This interpretation, upheld by the U.S. Supreme Court in *Babbitt v. Sweet Home* (1995), ensures that species can be protected before they are killed outright. But the trump administration now wants to rewrite the rules to serve those who profit from exploiting these ecosystems and habitats—stripping away the ESA's utility for stopping destructive projects before listed species' habitats are impacted.

In fact with the passing the ESA, Congress recognized habitat destruction as the primary cause of species' decline and thus a primary driver of extinction. The ESA itself recognizes that species are in peril due to "development untempered by adequate concern and conservation," and the statute's purposes include to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." Additionally, Congress recognized:

> Man can threaten the existence of species of plants and animals in any of a number of ways, by excessive use, by unrestricted trade, by pollution or by other destruction of their habitat or range. The most significant of those has proven also to be the most difficult to control: the destruction of critical habitat.

Looking beyond the species and their ecosystems, the long-term economic consequences of habitat destruction include declines in biodiversity and the loss of ecosystem services essential to the well-being of humans. Adopting the proposed rule would be a disservice to this country and our natural heritage. Upholding our nation's commitment to saving endangered species and the habitat they need to survive and recover is of paramount importance to our nation's future.

The ESA provides for the "conservation of the ecosystems upon which threatened and endangered species depend." And "conservation" means "the use of all methods and procedures which are necessary to bring any ... species to the point at which the measures provided pursuant to this chapter are no longer necessary."

The U.S. Court of Appeals for the Ninth Circuit holds that this regulatory language "admit[s] of no limitations" and that "there is little doubt that Congress intended to enact a broad definition of agency action in the ESA . . ." *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994).

By existing regulation the Services correctly define "harm" to include significant habitat modification that kills or injures species by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering. This is wholly consistent with the legislative intent of Congress. The ESA plainly states that it provides for the "conservation of the ecosystems upon which threatened and endangered species depend." This means destruction or adverse modification of those habitats violates the purposes of the ESA.

Thus, the fate of a threatened or endangered species cannot be separated from the habitat upon which it depends for its survival. The "harm" provision is part of the precautionary principle of the ESA and the considerations of habitat management of any listed or at-risk species. This has also been referred to as "institutionalized caution." *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). Habitat declines are certain to be followed by declines in population, distribution and viability, and thus risk survival of the species.

Federal agencies are required to consider the cumulative effects of the proposed action(s) and other federal and state actions in the vicinity. This requirement helps prevent considering adverse habitat modification one project at a time in isolation, until cumulative effects have led to population declines and fragmentation into non-viable units.

Without these protections for the habitats of threatened and endangered species, species status assessments based upon the best available scientific information will show increased risks of becoming endangered or extinct.

This proposal is entirely lacking in biological or legal basis. The Services are relying on the Chevron doctrine and the dissenting opinion in *Babbit v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995). As noted in the Proposed Rule, the Supreme Court of the United States struck down the "*Chevron*" doctrine and in a 6-3 ruling the Supreme Court agreed with the harm provision in its decision in *Sweet Home*, finding that the regulatory definition of "harm" aligned with the ESA's plain language. In the majority opinion, Justice O'Connor stated that significant habitat modification that interferes with "breeding, feeding, and sheltering" behaviors and leads to the injury or death of an animal protected by the Act qualifies as "harm." Justice O'Connor further discussed proximate causation regarding foreseeability. "Harm" applies to significant habitat modification, which foreseeably causes the actual injury or death to species protected by the Act.

In this case the Services are not entitled to unbridled deference for their distorted interpretation of the plain language of the ESA as a basis for unraveling decades of findings, rulings and practices that have prevented species from becoming extinct.

If adopted, this rule would:

- Allow industries to destroy endangered species habitat with no legal consequence unless an animal dies on the spot.
- Ignore decades of ecological science showing habitat loss is the top cause of extinction.
- Set a dangerous precedent by allowing executive agencies to erase statutory meaning by fiat.
- Evade National Environmental Policy Act review by falsely declaring the rule has no environmental impact.
- Relegate rare species to zoos for their existence to continue.

Upon closure of the public comment period, we urge the Services to remove this proposed rule.

Sincerely,

Jeff Juel, Forest Policy Director
Friends of the Clearwater
jeffjuel@wildrockies.org
https://www.friendsoftheclearwater.org/
(208) 882-9755