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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 222

[Docket No. FWS–HQ–ES–2025–0034; FXES11160900000–267–FF09E23000; Docket No. NMFS–250411–0064]

RIN 1018–BI38; 0648–BN93

Rescinding the Definition of "Harm" Under the Endangered Species Act

AGENCY: U.S. Fish and Wildlife Service, Interior; National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS; collectively referred to as the "Services") rescind the regulatory definition of "harm" in our Endangered Species Act (ESA or the Act) regulations. This rescission removes the regulatory definition of "harm" from the Code of Federal Regulations (CFR) in Title 50 parts 17 and 222.

DATES: This final rule is effective [**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER***].

ADDRESSES: Public comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available online at https://www.regulations.gov in Docket No. FWS–HQ–ES–2025–0034.

FOR FURTHER INFORMATION CONTACT: John Tirpak, Acting Assistant Director, Ecological Services, at 703–358–2171 or ADEcologicalServices@fws.gov with a subject line of "1018–BI38." Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act, as amended, (hereafter referred to as ESA or the Act; 16 U.S.C. 1531 et seq.) prohibits the "take" of endangered wildlife under section 9 (16 U.S.C. 1538). This is part of a detailed statutory scheme that lays different responsibilities, powers, and prohibitions on the federal government and private citizens, as part of an overall effort to protect endangered species. Section 7 of the ESA imposes on the federal government the responsibility to "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 which is determined by the Secretary … to be critical…." (16 U.S.C. 1536(a)(2)). Section 5 empowers the federal government to purchase private property "to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species" (16 U.S.C. 1534). And section 9 prohibits private citizens from "tak[ing]" animals that are members of an endangered species (16 U.S.C. 1538).

"Take" is a term with a traditional meaning, i.e., to kill or capture a wild animal. *See* Oxford English Dictionary (1933; third printing in February 1973). The Act provides its own definition in section 3, which expands that meaning slightly: "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). This definition "make[s] clear" that "take," as used in the statute, "include[s] not just a completed taking, but the process of taking, and all of the acts that are customarily identified with or accompany that process … so as to include attempts" (*Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 718 (1995) (Scalia, J., dissenting)). This is a slight, sensible, and "not unusual[]" expansion of the traditional definition of "take"; even so, the traditional meaning of "take" remains plainly the core of what is being defined (*Id.*). Thus, under the statutory scheme as enacted, the government would "insure" that its own actions did not "jeopardize the continued existence of any endangered species or threatened species" or "result in the destruction or adverse modification of" critical habitat (a statutory term that is different from the habitat, simpliciter, of the species). Meanwhile, where government action is *not* involved, the Act protects endangered species in two ways: by directly prohibiting citizens from killing, injuring, or capturing any member of those species (or attempting to do so), and by purchasing the land of private citizens to assist in conservation. To complete this regime, Section 10 then creates an incidental-take regime for when such take is nonetheless inevitable in the pursuit of some other activity, as when fishing for a non-endangered species of fish will, inadvertently but inevitably, lead to the catch of an endangered species of fish.

But starting in 1975, FWS promulgated regulatory definitions of "harm" that dramatically expanded the plain meaning of "take," to sweep in (and thus prohibit) actions that impair the habitat of protected species. That year, FWS published a final rule that defined "harm" as "...an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; *significant environmental modification or degradation* which has such effects is included within the meaning of 'harm' (40 FR 44412 at 44416, Sept. 26, 1975) (emphasis added)).[1] Indeed, the history of this regulation suggests that FWS's original goal was not to define "harm," but to prohibit habitat modification by private citizens,

[1] It is indicative that the end in mind was prohibiting habitat modification by private citizens, rather than construing the meaning of "harm," that the Service initially proposed this rule in a form that would have made a prohibition on habitat modification a part of the definition of a completely different word, "harass." See 40 FR 28712.

irrespective of means: When the Service first proposed the regulation, it incorporated a prohibition on habitat modification as part of the definition of a completely different word, “harass” (see 40 FR 28712). Only at the final-rule stage did FWS shift this prohibition into the definition of “harm,” with little to no explanation of why (see 40 FR 44413).[2]

In 1981, FWS drew back slightly, redefining “harm” in 1981 to “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering” (46 FR 54748 at 54750, Nov. 4, 1981). FWS explained its modification on the grounds that the previous definition could have been construed as prohibiting habitat modification even where there was no injury to the listed endangered or threatened wildlife, which would “go beyond the intent of Congress” (46 FR 54748, November 4, 1981). Nonetheless, the fundamental shift had already occurred, and the 1981 rulemaking did not undo it: FWS has transformed section 9 by the issuance of regulatory definitions from a prohibition on private citizens hunting, capturing, or otherwise attempting to kill or injure certain specifically protected *animals* into a sweeping *land-use* regulation. Against that backdrop, section 10’s “incidental take” regime became a land-use regime.

NMFS did not define “harm” in regulations until 1999 (see 64 FR 60731,Nov. 8, 1999). When it did so, it adopted a definition similar to FWS’s 1981 redefinition but included NMFS-specific modifiers: “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

[2] What little explanation the final rule provided for this change suggests that FWS was by that time focused on principles of intent and causation. The rule noted that FWS was modifying the definition of “harass” and that “[t]he concept of environmental damage being considered a ‘taking’ has been retained, but is now found in a new definition, of the word ‘harm’” (*Id*.). It then went on state that “‘[h]arm covers actions or omissions which actually, (as opposed to potentially), cause injury,” and that, “[i]n addition, the definition of ‘harass’ has been modified by restricting its application to acts or omissions which are done intentionally or negligently. In the proposal, ‘harass’ would have applied to any action, regardless of intent or negligence” (*Id*.). None of this explains why the Services suddenly had concluded that habitat modification was an intrinsic part of the word “harm,” or why it was no longer part of the word “harass.”

wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering" (*Id.*).

In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995; *Sweet Home*), the Supreme Court rejected a challenge to FWS's regulation by applying *Chevron* deference and determining that FWS's interpretation of the ESA was a "reasonable"—even if not the best—interpretation of the statute[3] (*Id.* at 697, 703). In a dissent that has literally become textbook,[4] Justice Scalia, joined by then-Chief Justice Rehnquist and Justice Thomas, explained why FWS's construction was not the best reading of the statute; indeed, Justice Scalia would have held that FWS's interpretation of "harm" was not even a permissible reading of the statute under *Chevron*, given its inconsistency with the structure and text of the ESA. As Justice Scalia observed, "[i]f 'take' were not elsewhere defined in the Act, none could dispute what it means, for the term is as old as the law itself. To 'take,' when applied to wild animals, means to reduce those animals, by killing or capturing, to human control" (515 U.S. at 717 (Scalia, J., dissenting)).[5] And here, under the *noscitur a sociis* canon, the term "harm," like the other nine

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[3] The Services are aware that at least one intermediate court has suggested that *Sweet Home* did not ground its ruling in *Chevron* deference. *See Cargill* v. *Garland*, 57 F.4th 447, 467 (5th Cir. 2023), *aff'd sub nom. Garland* v. *Cargill*, 602 U.S. 406 (2024). *But cf. Lubow* v. *U.S. Dep't of State*, 783 F.3d 877, 884 (D.C. Cir. 2015) (citing *Babbitt* for the proposition that a court can proceed directly to *Chevron* Step Two without a threshold determination of ambiguity). The Services do not agree that *Sweet Home* was not a *Chevron* case. The Court in *Sweet Home* explained explicitly that it "need not decide whether the statutory definition of 'take' compels the Secretary's interpretation of 'harm,' because [the Court's] conclusions that Congress did not unambiguously manifest its intent to adopt respondents' view and that the Secretary's interpretation is reasonable suffice[d] to decide th[e] case" (515 U.S. 687, 703 (1995) (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984))). The Court described its "conclusion that the Secretary's definition of 'harm'" as "rest[ing] on a *permissible* construction of the ESA" (515 U.S. at 704 (emphasis added); *see also id.* at 708 ("When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his. *See Chevron*, 467 U.S. at 865–66. In this case, that reluctance accords with our conclusion, based on the text, structure, and legislative history of the ESA, that the Secretary reasonably construed the intent of Congress when he defined 'harm' to include 'significant habitat modification or degradation that actually kills or injures wildlife.'")).

Furthermore, the *Sweet Home* Court explicitly refrained from "decid[ing] whether the statutory definition of 'take' compels the Secretary's interpretation of 'harm'" (*Id.* at 703). Thus, regardless of the doctrinal reasoning underlying that conclusion, *Sweet Home* does not bear the preclusive effect that some would ascribe to it.

[4] *See, e.g.*, Mikva, et al., *Legislative Process* 749 (5th ed. 2025); Manning & Stephenson, *Legislation and Regulation, Cases and Materials* 1201 (5th ed. 2025).

[5] *See, e.g.*, 11 Oxford English Dictionary (1933) (defining "take" as to kill or capture a wild animal); Webster's New International Dictionary of the English Language (2d ed. 1949) (take defined as "to catch or capture by trapping, snaring, etc., or as prey"); *Geer* v. *Connecticut,* 161 U.S. 519, 523 (1896) ("All the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them") (quoting

verbs in the definition of "take," should be construed 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 (515 U.S. at 719–720 (Scalia, J., dissenting); see also *id.* at 719 ("'Harm' is merely one of 10 prohibitory words in [the ESA's definition of "take"], and the other 9 fit the ordinary meaning of 'take' perfectly.")).

Justice Scalia also explained that FWS's definition of "harm" does not fit with the use of "take" throughout the Act, including where provisions like section 1538(a)(1)(D) which prohibits the possession, sale, and transport of "species taken in violation" of the Act "would apply to taking only in the ordinary sense, and are meaningless as applied to species injured by environmental modification" (*Id.* at 723). Nor does FWS's definition of "harm" work with the "broader structure of the Act," noting that "Congress's explicit prohibition of habitat modification in the [Section 7 of the ESA] would bar the inference of an implicit prohibition of habitat modification in [Section 9 of the ESA]" (*Id.* at 724; see also *id.* (stating that statutes should be read as far as possible to give independent effect to all their provisions)).[6]

The Supreme Court recently abrogated the doctrine of *Chevron* deference in *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024) (After *Loper Bright*), "the question that matters" in regulatory litigation is whether "the *statute* authorizes the challenged agency action" (603 U.S. at 406 (emphasis added)). In other words, does the agency's regulation match the single, best meaning of the statute?

We have concluded that the Services' existing regulations, which contain the definition of "harm" contested in *Sweet Home*, do not match the single, best meaning of the statute. As Justice Scalia's dissent in *Sweet Home* explains, the regulations' interpretation of the statutory language runs afoul of the *noscitur a sociis* canon and is inconsistent with the structure of the

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the Digest of Justinian); 2 W. Blackstone, Commentaries 411 (1766) ("Every man . . . has an equal right of pursuing and taking to his own use all such creatures as are *ferae naturae*").

[6] Although *Sweet Home* was focused on FWS's regulation at 50 CFR 17.3, NMFS's definition of "harm" at 50 CFR 222.102 is substantially the same.

ESA. We adopt Justice Scalia's rationale as articulated in *Sweet Home* and conclude that the Services' regulatory definitions are unlawful, notwithstanding the Court's prior upholding of the regulatory definition under *Chevron* deference.

We recognize that the Supreme Court held in *Loper Bright* that its "prior cases that relied on the *Chevron* framework … are still subject to statutory *stare decisis*" (603 U.S. at 412). But under the then-prevailing *Chevron* framework, *Sweet Home* held only that the existing regulation is a permissible reading of the ESA, not the only possible such reading. Indeed, even during the *Chevron* era, the Services would have been free to change their interpretation of the Act, even after a court had applied *Chevron* deference to uphold that earlier interpretation, as in *Sweet Home*. See generally *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967 (2005); see also *Sweet Home*, 515 U.S. at 714 (O'Connor, J., concurring) ("[N]othing the Court says today prevents the agency itself from narrowing the scope of its regulation at a later date."). That was because a *Chevron* deference-grounded precedent did not hold that an agency's "construction follow[ed] from the *unambiguous* terms of the statute and thus l[eft] no room for agency discretion"; rather, such a precedent only established that the agency's construction was only one of potentially multiple permissible interpretations of the statute (*Brand X*, 545 U.S. at 982 (emphasis added)). Though, in *Loper Bright*, the Court declared that statutory stare decisis would protect specific regulations upheld under *Chevron* from future litigation challenges, the Court left open the possibility that the executive branch could itself depart from regulations that do not match the single, best meaning of the statute—so long as the new regulations reflect that best meaning (see *Loper Bright*, 603 U.S. at 412). This makes particular sense given *Loper Bright*'s focus on the propriety of executing the laws as written by Congress and the Executive Branch's constitutional obligation to "take Care that the Laws be faithfully executed" (U.S. Const. art. II, section 3).

In light of their determination of illegality, the Services have determined that the best path forward is to rescind the regulatory definition entirely—instead of keeping part of it—and to refrain from implementing a replacement definition (see *Dep't of Homeland Security* v. *Regents*, 591 U.S. 1, 25 (2020)).[7] We have also concluded—after careful consideration of the alternatives—that no replacement definition is needed.

The Services understand that they are "not writing on a blank slate," and thus the Services have considered reliance interests—including those raised in public comments—in maintaining the existing definition or at least *some* definition (*Regents*, 591 U.S. at 33 (requiring such consideration when agency is "not writing on a blank slate")). Below, the Services' responses to public comments address these reliance interests. At the outset, however, the Services acknowledge that the existence of a regulatory definition, as such, has provided some certainty to regulated entities. Further, the Services acknowledge that, in at least some circumstances, "longstanding policies may have 'engendered serious reliance interests that must be taken into account'" (*Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) (quoting *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009))).

Having taken these interests into account, the Services have concluded that such interests do not outweigh the need for a full rescission. The ESA itself defines "take," which is the operative term prohibited under section 9 (16 U.S.C. 1532(19)). It is true that Justice Scalia's dissent in *Sweet Home* does not call into question the legality of the first sentence of the regulatory definition of "harm": "*Harm* in the definition of 'take' in the Act means an act which actually kills or injures wildlife." But the current regulations were promulgated and amended as a single, integrated interpretive framework. The first sentence has functioned as the introductory clause to the more-elaborate restrictions that follow, and the Services have determined that those restrictions are unlawful. Thus, the Services believe that retaining even part of the unlawful regulation here would risk creating uncertainty about which aspects of the prior agency interpretations remain operative and which do not. Moreover, maintaining the first sentence on

[7] To be sure, the Services note that both *Regents* and *State Farm* involved two-pronged policies. Here, the Services' rescission involves a single regulatory definition.

its own would not materially enhance regulatory clarity relative to the statutory text itself. In the Services' judgment, preserving that sentence as a standalone regulation therefore would provide limited independent guidance while risking confusion about the continuing legal significance of the rescinded portions of the regulation.

Nor do the Services choose to add a new regulatory definition for "harm." Given that "take" is defined in the statute, and that the role and meaning of the term "harm" within the larger definition of "take" was expertly explicated by Justice Scalia in his *Sweet Home* dissent—an interpretation which we have herein adopted—we find that maintaining a freestanding definition of "harm" is unnecessary. Moreover, at least in this situation and given the history detailed above, inserting a regulatory definition within a statutory definition that was otherwise clear appears to have been an attempt to arrogate to the Services authorities which Congress never granted. Returning to the statutory definition as the operative language is therefore especially appropriate.

Because our regulations that define "harm" do not accord with the single, best meaning of the statutory text, the Services published a proposed rule in the *Federal Register* to rescind the definitions of "harm" from title 50 CFR 17 and 222 (90 FR 16102, April 17, 2025). In that proposed rule, we provided background and rationale for rescinding the definitions of "harm." We solicited public comments on the proposed rule through May 19, 2025.

Following consideration of all public comments received in response to our proposed rule, and for the reasons outlined in our proposed rule and in this final rule, we are rescinding the regulatory definition of "harm." By finalizing the rescission of the regulatory definition of "harm," the Services are relying on the plain text of the statute as the standard going forward, but nothing in this final rule is intended to require that any prior permit or incidental take statement issued by the Services that relied on the prior definition of "harm" be reevaluated on the basis of this final regulation. Such incidental-take statements, and indeed the entire section 7 analysis, were but one input among many into the ultimate decision whether and how to authorize a given action (*Cf. Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colorado*, 605 U.S. 168, 180 (2025) (noting that an environmental impact statement issued under the National Environmental Policy Act is "only one input into an agency's decision," and that the ultimate locus of analysis, for purposes of administrative law, is "the agency's final decision")). Disturbing the finality of the overall permitting decision would be highly disruptive to settled expectations, as well as immensely time-consuming and difficult, in return for at most speculative gains. Therefore, permits or incidental take statements finalized prior to the effective date of this rule will not be required to be reevaluated under this final rule. (For the effective date of this rule, see **DATES**, above.)

Public Comments and Responses

By the close of the public comment period on May 19, 2025, we received approximately 358,000 public comments on the proposed rule to rescind the regulatory definition of "harm." Comments were received from a range of sources including individual members of the public, States, Tribes, industry organizations, legal foundations and firms, and environmental organizations. During the public comment period, we received multiple requests for public hearings. However, as public hearings are not required for this type of rulemaking, we elected not to hold them. We also received several requests for an extension of the 30-day public comment period. After consideration, we determined that 30 days provided sufficient time for the public to submit meaningful comments and therefore we did not extend the comment period.

Some commenters expressed support for the rule while other commenters requested that the proposed rule not be finalized. Among the submissions we received were multiple letters from organizations signed by individuals expressing general opposition to the proposed rule. Many of the individual comments we received were non-substantive in nature, expressing either general support for, or opposition to, the proposed rule with no supporting information or analysis. We also received many detailed substantive comments expressing support for, or opposition to, the proposed rule for specific reasons. All public comments were reviewed and considered prior to developing this final rule. Summaries of substantive comments and our responses are provided below. Similar comments are combined where appropriate. We did not, however, consider or respond to comments that are not relevant to or are beyond the scope of this particular rulemaking. For example, some commenters responded to unrelated *Federal Register* notices and proposed rulemakings (e.g., the U.S. Forest Service's Consent for Geothermal Leasing Project), congressional bills (e.g., H.R. 845 (Pet and Livestock Protection Act of 2025) and H.R. 1897 (ESA Amendments Act of 2025), or statutory provisions outside the ESA (e.g., Animal Welfare Act).

Comment 1: Some commenters stated that Congress did not intend for the ESA prohibition on "take" to include habitat modification as defined under the term "harm." They discussed that the legislative history show that "take" was meant to cover direct, affirmative actions against individual animals, not indirect, incidental, or unintentional impacts to species such as habitat modification or degradation. Several cited Justice Scalia's dissent in *Sweet Home* and the removal of habitat language from early drafts of the ESA as evidence that Congress deliberately chose to address habitat protection through other provisions, such as sections 5 and 7. Commenters stated that these sections were designed to address habitat conservation through land acquisition and Federal agency responsibilities, not through the "take" prohibition in section 9. Commenters also stated that the Services' current definition of "harm" unlawfully expands the scope of "take" beyond congressional intent and creates regulatory burdens that hinder land management and conservation practices. Other commenters disagreed, however, asserting that Congress intended "harm" to include habitat destruction or modification that indirectly or unintentionally results in injury or death to listed species. They pointed to the broad language of the ESA, its legislative history, and the statute's overarching goal stated in section 2 of the Act to conserve ecosystems upon which endangered and threatened species depend. Several commenters also stated that Congress deliberately included "harm" in the definition of "take" to broaden its scope beyond traditional notions of hunting or capturing, and that the Services' reinterpretation ignores this legislative intent.

Response: The Services acknowledge the divergent views expressed by commenters relying on congressional intent. The Services recognize that the legislative history contains references both to direct actions against wildlife in section 9 and separately to broader ecosystem conservation goals in section 2. "[L]egislative history," however, "is not the law" (*Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 523 (2018)).

Upon reevaluation and consideration of comments received, the Services have concluded that the regulatory definition of "harm" is not the single, best meaning of the text of the statute. As Justice Scalia's dissent in *Sweet Home* explains, the regulation's interpretation of the statutory language runs afoul of the *noscitur a sociis* canon, is inconsistent with the structure of the ESA, which provides distinct mechanisms for habitat protection under sections 5 and 7, and disregards the absence of habitat-related language in the definition of "take" in section 3 itself. For more discussion, see **Background**, above. We also affirm our stated position in the proposed rule that no replacement definition is needed. The ESA itself defines "take," and the regulatory elaboration of one subcomponent of that definition — "harm"— has had the effect of exceeding the proper bounds of the statute and asserting power that Congress never actually gave to the executive branch.

"Even if legislative history were a legitimate and reliable tool of interpretation," moreover, "[b]oth the Senate and House floor managers of the bill explained it in terms which leave no doubt that the problem of habitat destruction on private lands was to be solved principally by the land acquisition program of section 1534, while section 1538 solved a different problem altogether the problem of takings" (*Sweet Home*, 515 U.S. at 727-28 (Scalia, J., dissenting) (citing to relevant legislative history)). "Habitat modification and takings, in other words, were viewed as different problems, addressed by different provisions of the Act" (*Id.* at 728).

Accordingly, the Services conclude that rescinding the regulatory definition of "harm" is consistent with the single, best reading of the ESA and with the statute's overall framework, which clearly distinguishes between prohibitions on "take" and broader habitat conservation responsibilities.

Comment 2: Multiple commenters stated that the best reading of the ESA does not support the Services' proposed rule. Several commenters supported the rescission, citing the Supreme Court's decision in *Loper Bright*, which ended *Chevron* deference and emphasized that courts must apply the single, best reading of a statute. These commenters aligned with Justice Scalia's dissent in *Sweet Home*, asserting that "take" under the ESA refers only to direct, affirmative acts against individual animals themselves, not to indirect effects such as habitat modification. They opined that the current definition improperly extends liability to unintended consequences and lacks statutory grounding under section 9. Others, however, contended that the Services' proposal misreads the statute and ignores the ESA's structure, purpose, and legislative history. They asserted that habitat protection is central to the ESA, citing multiple statutory provisions and decades of judicial and agency interpretation affirming that "harm" includes habitat destruction that results in injury or death to wildlife. These commenters stated that the Services' reliance on *Sweet Home*'s dissent is misplaced, as the majority opinion upheld the current definition based on statutory text, purpose, and legislative history independent of *Chevron*. They also noted that Congress amended the ESA after *Sweet Home* without altering the definition of "take," implicitly endorsing the broader interpretation. Overall, the comments reflect a divergence of opinions over whether the best reading of the ESA supports or rejects the inclusion of habitat modification in a definition of "harm."

Response: After careful review of comments received, the Services have determined that the regulatory definition of "harm" runs contrary to the single, best reading of the ESA. As stated by Justice Scalia in his dissenting opinion in *Sweet Home*, the term "take," defined in section 3, applies to actions that result in actual injury or death to listed species. The Services find that considering habitat degradation or modification that kills or injures wildlife by significantly impairing improper essential behavioral patterns stretches the term "harm" beyond its natural meaning and creates overlap with other provisions of the ESA, such as sections 5 and 7, which are specifically designed to address habitat conservation.

For more discussion, see **Background**, above, and our response to Comment 1. We reject the majority's interpretation of the ESA as articulated in *Sweet Home*. The Services conclude that rescinding the definition of "harm" supports the single, best reading of the ESA.

Comment 3: Multiple commenters opined that the rescission of the definition of "harm" would weaken the effectiveness of section 7 consultations by excluding incidental take resulting solely from habitat modification or degradation. They expressed concern that this narrower interpretation would lead to incomplete jeopardy analyses and undermine the legal and scientific basis for "no jeopardy" determinations. Commenters asserted that section 7 requires ongoing oversight and reinitiation of consultation when new information or changes in actions affect listed species or their designated critical habitat. They highlighted that incidental take statements are a critical mechanism for monitoring and limiting "harm," and that these statements must include enforceable thresholds and measures to minimize impacts to species. Commenters also pointed to the legislative history of the ESA, asserting that Congress intended section 7 to encompass habitat-related impacts as a form of "take," and that this intent is reflected in the statute's structure and amendments. They contended that rescinding the definition of "harm" and not considering habitat modification or degradation as a form of "take" would contradict this intent and reduce the ability of Federal agencies to ensure that their actions do not jeopardize listed species.

Response: The rescission of the definition of "harm" does not alter the statutory requirement that Federal agencies ensure their actions are not likely to jeopardize the continued existence of listed species or "*result in the destruction or adverse modification of [critical] habitat of such species*" (16 U.S.C. 1536(a) (emphasis added)). "Destruction or adverse modification" is a separate regulatory consideration from "take." Thus, not only is the statutory prohibition in section 7 against habitat modification not affected at all by the deletion of the definition of "harm" (which itself defines, in part, "take"), but the presence of this separate and distinct provision in the statutory text regarding habitat modification reinforces the Services' conclusion that habitat modification is not properly part of the definition of "take," as such a construction would violate the canon against surplusage. The Services emphasize that section 7 remains fully applicable to Federal actions that may affect listed species or their designated critical habitat. This rulemaking also does not change any species classifications or critical habitat designations.

The rescission of the regulatory definition of "harm" does not limit the Services' ability to assess impacts to listed species and critical habitat from all components of the action agency's proposed action through the section 7 process. Yet, imposing the current incidental take regime on activities beyond those authorized by the statute is not an appropriate option that the Services believe~~s~~ they should avail themselves of (even if it were permissible under *Loper Bright*'s dicta regarding the statutory-stare-decisis value of prior cases), given the executive branch's duty to see that the laws are faithfully executed. What commenters are suggesting is, in short, that we continue to subject a swath of activities to the incidental-take regime, which otherwise would not be subject to this regime on the best reading of the statute, simply because that would allow the Services to better monitor and accomplish some other goal, i.e., monitoring and limiting true "harm." The Services reject this invitation as not being a proper implementation of the law, because it would impose burdens on the citizenry that are not authorized by statute.

Comment 4: Multiple commenters stated that the proposed rescission of the definition of "harm" would significantly reduce the incentive for landowners to voluntarily seek permits under section 10(a) and would weaken the functional basis of section 10 permitting. They emphasized that the current definition of "harm" is essential for implementing habitat conservation plans (HCPs) and the associated incidental take permits (ITPs), as well as conservation benefit agreements (CBAs) and their associated enhancement of survival (EOS) permits. These tools provide regulatory assurances for landowners and enable proactive, voluntary conservation. Commenters warned that removing the definition would reduce incentives to seek ITPs, increase unpermitted "take," and lead to greater habitat destruction. They also opined that the change would create legal uncertainty and diminish the effectiveness of conservation strategies, arguing that section 10(a) permitting depends on a regulatory framework that recognizes habitat modification or degradation as a form of "take."

Response: Commenters are correct that private parties seeking ITPs and EOS permits pursuant to section 10(a) of the ESA will no longer need to articulate the "impact" to species' habitat, explain how they will "minimize and mitigate" habitat modification or degradation, or consider alternatives in service of mitigating habitat modification or degradation in their conservation plans in order to obtain an incidental take permit. This rulemaking takes the position that the Services' requiring private parties to do so is unlawful, and thus impermissible for the agency to require.

Relatedly, in issuing an incidental take permit, the Secretary of the Interior will no longer consider the effects of a proposed action on the species' habitat, nor will the permit contain terms and conditions requiring permittees to take into account habitat modification and degradation when executing the permitted take. Because the Services believe that the Act's prohibition on "take" does not properly include habitat modification (and thus have removed the regulatory definition of "harm," which swept habitat modification into the statutory definition of "take"), it follows that permits for *incidental* take are no longer required to engage in such activities. The attempt of at least one Commenter to argue that, because "conservation plans" are mandated by section 10, therefore *habitat* conservation plans are mandated by statute (and, *mutatis mutandis*, ITPs and related instruments must account for habitat modification), gets the matter precisely backward (16 U.S.C. 1539(a)(1)(B) & (a)(2)(A)). The word "habitat" appears nowhere in section 10. Rather, section 10's incidental-take regime is symmetrical to what would otherwise be take prohibited as "take" under section 9. If habitat modification were banned as take, then an ITP, along with a conservation plan and all the other requirements of section 10, would be necessary to modify such habitat. But because the Act does *not* ban habitat modification as take in the first place, therefore no ITP, conservation plan, or other instrument, is required to engage in such activities.

The same Commenter also charged that the Services' regulations addressing HCPs are now "inconsistent" with the rescission. The Services are studying the extent to which its regulations governing such permits, *e.g.*, 50 CFR §§ 17.22, 17.32, may need to be updated to reflect this final rule and the best reading of the Act, though the Services note also that other parts of the Act affect habitat modification, as noted in this final rule. In all events, this has not altered the Services' conclusion as to the best meaning of the text of the Act, which is what has driven this final rule.

The rescission of the regulatory definition of "harm" does not eliminate the Services' ability to issue ITPs or EOS permits where there is an affirmative conduct intentionally directed against a particular animal or animals. Additionally, the Services will continue to work with applicants to ensure that HCPs and CBAs are developed and permitted to address species-specific impacts and that conservation and mitigation measures are commensurate with the ESA's definition of "take."

This rulemaking also does not prohibit willing landowners from implementing conservation plans and agreements that are more comprehensive than what sections 9 and 10 of the ESA require. Nor does this rulemaking prohibit entities (including state governments) from engaging in habitat-conservation efforts that could be supported by other provisions of the ESA.

Comment 5: Multiple commenters opined that rescinding the regulatory definition of "harm" would introduce significant regulatory uncertainty and inconsistency in ESA implementation. They emphasized that the long-standing definition has provided clarity and stability for decades, supporting conservation programs, permitting frameworks, and legal agreements across agencies and stakeholders. Removing it without a clear alternative would lead to confusion, delays, litigation, and weakened conservation outcomes. Some of these commenters further asserted that the reasoning of Justice Scalia's dissent compelled the retention of the first sentence of the regulations, which—in these commenters' view—would be consistent with the Trump Administration's policy priorities. In contrast, some commenters supported the proposed rule, asserting that the current definition imposes excessive regulatory burdens, particularly through its inclusion of habitat modification. These supporters argued that rescission would reduce red tape, alleviate economic impacts on land use sectors, and allow for more targeted, science-based conservation efforts.

Response: By rescinding the regulatory definition of "harm," the Services are aligning the definition of "take" with the single, best reading of the statute, consistent with *Loper Bright*. Although the current definition of "harm" has been in place for decades, its inclusion of habitat modification or degradation where it actually kills or injures wildlife "by significantly impairing essential behavioral patterns" as a form of "take" has led to interpretive challenges and regulatory uncertainty, particularly in determining when habitat modification rises to the level of "take." Although rescinding the definition of "harm" may reduce inconsistency and regulatory uncertainty by focusing on acts which actually kill or injure listed species, the Services are rescinding the definition of "harm" because it does not accord with the best meaning of the statute. The Services have also concluded that no replacement definition is needed. The ESA itself defines "take" (16 U.S.C. 1532(19)), and that definition is clear and robust.

By rescinding the definition of "harm," the Services are relying on the plain text of the statute as the standard going forward. But previously issued permits or incidental take statements will not be required to be reevaluated solely because of this final rule, nor does this final rule invalidate prior conservation agreements or other conservation or recovery efforts already in effect. Such incidental-take statements, and indeed the entire section 7 analysis, were but one input among many into the ultimate decision whether and how to authorize a given action (*Cf.*

Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colorado, 605 U.S. 168, 180 (2025) (noting that an environmental impact statement issued under the National Environmental Policy Act is "only one input into an agency's decision," and that the ultimate locus of analysis, for purposes of administrative law, is "the agency's final decision")). Disturbing the finality of the overall permitting decision would be highly disruptive to settled expectations, as well as immensely time-consuming and difficult, in return for at most speculative gains. Moreover, the regulations governing HCPs include assurances to permittees in case of changed or unforeseen circumstances (see 50 CFR §§ 17.22(b)(5), 17.32(b)(5)). The Services have considered that these regulations reassure permittees that the Services would not impose additional requirements,[8] whereas rescinding the definition of harm might in some situations lessen existing burdens (e.g., if the permittee is mitigating only for habitat impacts that were considered prohibited as take when their permit was issued, the permittee may choose to return their permit in order to not have to continue expending resources to mitigate). Nonetheless, such situations are speculative, while the central offer of these regulations to permittees is repose and certainty. These values counsel very strongly—and decisively—against not disturbing previously issued permits.

Comment 6: Multiple commenters requested that if the Services finalize the proposed rule, they must issue clear guidance on how "harm" and "take" will be interpreted and applied. Commenters emphasized that without a regulatory definition, the regulated community faces uncertainty about what actions may constitute "take" under section 9 and when particular requirements will need to be met, especially in section 7 consultations and permitting under section 10(a). Commenters requested examples and clarification to ensure consistent implementation and avoid delays or inconsistent decisions. They also urged the Services to

[8] *E.g.*, 50 CFR § 17.22(b)(5)(iii)(A) ("In negotiating a response to unforeseen circumstances, the Director will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee.").

confirm how the rule applies to pending consultations and to update existing guidance documents or include clarifications in the final rule's preamble.

Response: The definition of "take" in section 3 of the Act remains unchanged and will stand on its own as the best reading of the Act. In addition, under the *noscitur a sociis* canon, the term "harm," like the other nine verbs in the definition of "take," should be construed 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" (515 U.S. at 719–720).

The Services intend to review each specific situation and species' response to a proposed action to determine whether it may or may not constitute "harm" to a species. As stated above, this rule is setting prospective standards only; previously issued permits or incidental take statements will not be required to be reevaluated solely because of this final rule. Such incidental-take statements, and indeed the entire section 7 analysis, were but one input among many into the ultimate decision whether and how to authorize a given action (*Cf. Seven Cnty. Infrastructure Coal.* v. *Eagle Cnty., Colorado*, 605 U.S. 168, 180 (2025)). Disturbing the finality of the overall permitting decision would be highly disruptive to settled expectations, as well as immensely time-consuming and difficult, in return for at most speculative gains. For more on this rule's impact on future section 10(a) permits, see the Services' responses to Comments 5 and 20. For a description of the ways in which this rule does not impact future section 7 consultations, see the Services response to Comment 4.

The Services also acknowledge that reliance interests have built up around this regulatory definition. Rescinding the regulatory definition—without a replacement at this time—promotes the lawful operation of executive branch regulatory programs, and the Services believe that this core value outweighs the reliance interests that have built up around the continued maintenance of an unlawful regulatory definition, even if such were possible. For further responses to reliance interests, see Comments 13, 16, 18, 20, and 21.

Comment 7: Multiple commenters stated that removing habitat modification from the definition of "take" would severely weaken the Act's ability to protect imperiled species. They emphasized that significant habitat modification or degradation often results in injury or death to wildlife by impairing essential behaviors such as feeding, breeding, and sheltering. Without recognizing these indirect but biologically consequential impacts as "take," the Services would be unable to regulate many of the most common and damaging threats to species survival. Commenters stated that habitat loss is the leading driver of species decline and extinction and excluding it from the definition of "take" would eliminate a critical legal mechanism for preventing such outcomes. They wrote that by narrowing the scope of what qualifies as "take," the Services would be forced to ignore the ecological realities that species cannot survive without intact, functional habitats. Commenters stated that this shift would not only violate the purpose of the ESA but also increase the likelihood of extinction for many species by allowing habitat destruction to proceed without consequence.

Response: The Services emphasize that the rescission of the regulatory definition of "harm" does not diminish the importance of habitat loss or degradation as a significant threat to many species listed under the ESA. Habitat protection and conservation play a critical role in species conservation and recovery efforts. Rather, this rule clarifies that "take" applies only to 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" (515 U.S. at 719–20 (Scalia, J., dissenting)). Habitat-related impacts are considered and addressed under other provisions of the ESA, including section 7 consultations section 5 land acquisition, and cooperation with willing landowners through voluntary conservation programs. The Services will continue to use these tools to address threats to species and to help chart the path to recovery and delisting. The 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."

Comment 8: Multiple commenters opined that the proposed rule's basis for rescinding the definition of "harm" directly undermines the purpose and function of critical habitat designations under the ESA. They emphasized that critical habitat is essential for species survival and recovery, and rescinding the definition of "harm" would lead to increased degradation of these areas, pushing species closer to extinction. Commenters also contended that the rule would violate the agencies' statutory duties to designate and protect critical habitat. They disagreed with the reliance on a narrow legal interpretation that disregards the legislative history and structure of the ESA, particularly the 1982 amendments that clarified the importance of habitat in incidental take authorizations. These amendments, they stated, affirm that impacts to habitat can constitute "take" and that section 7 requires Federal agencies to avoid actions that would destroy or adversely modify critical habitat. Commenters maintained that without a regulatory definition of "harm" that includes habitat modification or degradation, the Services would not be able to minimize effects to critical habitat.

Response: The Services recognize the importance of critical habitat designations in promoting the conservation and recovery of listed species. The definition of critical habitat in section 3(5)(A) and the process and requirements of designating critical habitat in section 4(b)(2) of the Act will remain separate and distinct from the definition of "take" in section 3. [9] The rescission of the regulatory definition of "harm" does not alter the statutory obligations for the Services to use the best scientific data available to designate critical habitat under section 4(b)(2) of the Act.

The Services maintain that habitat protection remains a central component of the ESA's conservation framework. This rescission has no impact on the requirements of Federal agencies under section 7(a)(2) to avoid the destruction or adverse modification of designated critical

[9] Indeed, the presence of these separate and distinct provisions in the statutory text regarding habitat modification reinforces the Services' conclusion that habitat modification is not properly part of the definition of "harm" and, thus, of "take," as such a construction would violate the canon against surplusage.

habitat. We will continue to analyze effects to the physical or biological features of designated critical habitat.

The Services conclude that “take” applies only to 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” (515 U.S. at 719–20 (Scalia, J., dissenting)). We do not find persuasive the argument that the 1982 amendments to the ESA, which allowed the Secretary of the Interior to issue incidental take permits, suggests that Congress understood section 9 to prohibit indirect as well as deliberate takings. Habitat modification is not the only activity that might incidentally cause a prohibited taking. For example, fishing for unprotected salmon may inadvertently but unavoidably cause take~~s~~ of an endangered species of salmon (515 U.S. at 729).

Comment 9: Commenters contended that the Services misinterpreted *Loper Bright* as exempting interpretive rulemakings from the National Environmental Protection Act (NEPA; 42 U.S.C. 4321 et seq.). They stated that the decision addressed judicial review, not agency obligations, and that the Services remain bound by prior precedent, including *Sweet Home*, until overturned by the courts.

Response: Loper Bright did not alter or exempt agencies from their responsibilities under NEPA. The Services do not rely on *Loper Bright* to justify the use of a categorical exclusion in this rulemaking. Rather, the Services have independently evaluated the applicability of NEPA and determined that the rule qualifies for a categorical exclusion under 43 CFR 46.210(i) and the U.S. Department of the Interior Handbook of National Environmental Policy Act Implementing Procedures, appendix 2. As the Services noted in the proposed version of this rule, two recent proposed and final rulemakings addressing a regulatory definition of “habitat” under the Endangered Species Act found that these categorical exclusions applied. See Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 87 FR 37757, June 24, 2022; Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 86 FR 59353, October 27, 2021; Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 FR 81411, December 16, 2020; Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 FR 47333, August 5, 2020.

The Services have also concluded that, because this rescission is compelled by the best reading of the statutory text, "the proposed agency action is 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); see *Dep't of Transp.* v. *Pub. Citizen,* 541 U.S. 752, 766–70 (2004)).

Our rescission of the regulation definition of "harm" on the ground that it does not reflect the best reading of the statutory text effectuates the Executive Branch's obligation to "take Care that the Laws be faithfully executed," U.S. Const. art. II, section 3, and is consistent with *Loper Bright* and *Sweet Home.* At bottom, the Services are engaged in legal interpretation, and the Services have determined that the bottom-line policy here (the rescission of the regulations) is nondiscretionary in light of the regulations' unlawfulness, even if the interstitial particulars of effectuating that policy (e.g., whether to rescind the whole regulation and whether to implement a new definition, regardless of what it would say) require an exercise of discretion that has nothing to do with environmental factors.

Comment 10: Several commenters challenged the Services' use of a categorical exclusion, asserting that the proposed rule is not merely procedural and will have significant environmental effects. They opined that the Services failed to justify the categorical exclusion and did not evaluate whether extraordinary circumstances apply.

Response: The Services considered whether the proposed rule qualifies for a categorical exclusion and whether any extraordinary circumstances exist that would preclude its use. The

Services determined that the proposed agency action is non-discretionary, and in the alternative, that the proposed regulation changes themselves will not have a significant individual or cumulative effect on the quality of the human environment for purposes of NEPA—notwithstanding potential indirect follow-on economic impacts or impacts on small entities (*Cf. Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 148, 183 (2025) ("A reviewing court may not 'substitute its judgment for that of the agency as to the environmental consequences of its actions.'" (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)))). The Services have applied a categorical exclusion to comply with the NEPA. As the Services noted in the proposed rulemaking and above, two recent proposed and final rulemakings addressing a regulatory definition of "habitat" under the Endangered Species Act found that the exact same categorical exclusions invoked in this rulemaking applied. See Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 87 FR 37757, June 24, 2022; Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 86 FR 59353, October 27, 2021; Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 FR 81411, December 16, 2020; Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 FR 47333, August 5, 2020. The Services have determined that extraordinary circumstances do not apply. For a detailed discussion of the Services' NEPA analysis see *National Environmental Policy Act* in the **Required Determinations** section, below, and the environmental action statement and supporting categorical exclusion documentation available at https://www.regulations.gov in Docket No. FWS–HQ–ES–2025–0034.

Comment 11: One commenter stated that the Services' failure to prepare an EIS violates NEPA, citing *Sierra Club* v. *Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987), as precedent. They emphasized that the proposed rule would significantly affect the human environment by weakening habitat protections for endangered species, which–in their view–meets the threshold for requiring an EIS. Commenters noted that *Sierra Club* v. *Marsh* established that agencies must assess environmental impacts before making irreversible commitments, and that deferring such analysis undermines NEPA’s core purpose. They asserted that the Services’ reliance on categorical exclusions or claims of nondiscretionary action does not meet the legal standard set by this case.

Response: The Services respectfully disagree with the assertion that the proposed rule constitutes an irreversible commitment of resources or a major Federal action with significant environmental effects. This rule does not, by itself, authorize any specific activity or project. It does not alter the statutory requirements of the ESA, including the obligation of Federal agencies to consult under section 7 and to avoid jeopardizing listed species or adversely modifying critical habitat. The Services have determined that the rule qualifies for a categorical exclusion and that no extraordinary circumstances exist that would warrant preparation of an EIS.

Comment 12: Multiple commenters contended that the Services are exercising discretion in proposing to rescind the definition of “harm,” and therefore cannot claim the action is nondiscretionary to avoid NEPA review. They emphasized that interpreting statutory language involves judgment, and that NEPA applies to discretionary actions with potential environmental impacts.

Response: The Services acknowledge the comments asserting that the proposed rule is a discretionary action. As the Services stated in the proposed rule, we are undertaking this recission because we believe it is compelled by the best reading of the statutory text. Accordingly, we believe that “the proposed agency action is 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); see *Dep't of Transp.* v. *Pub. Citizen,* 541 U.S. 752, 766–70 (2004)).

Moreover, commenters have cited no case, and the Services are aware of none, standing for the proposition that NEPA review applies to questions of pure legal interpretation. This would be a novel interpretation that would dramatically expand the scope of NEPA—e.g., does it cover briefing in pending cases—and the Services will not, without more, adopt this new proposition.

In the alternative, the Services applied a categorical exclusion to comply with NEPA. The Services have determined that the rule qualifies for a categorical exclusion because it is "of an administrative, financial, legal, technical or procedural nature" (43 CFR 46.210(i)). The Services have also evaluated whether any extraordinary circumstances apply and have concluded that none are present. Accordingly, the use of a categorical exclusion is appropriate and consistent with NEPA and applicable agency regulations and procedures. As the Supreme Court recently held in *Seven County Infrastructure Coal. v. Eagle County, Colorado*, "NEPA is a purely procedural statute," "not a substantive roadblock," and is an area where "substantial deference" is due to "agency choices so long as they fall within a broad zone of reasonableness" (605 U.S. 168, 173, 183 (2025); see *id.* at 182–83 ("When assessing significant environmental effects and feasible alternatives for purposes of NEPA, an agency will invariably make a series of fact-dependent, context-specific, and policy-laden choices about the depth and breadth of its inquiry…. Courts should afford substantial deference and should not micromanage those agency choices so long as they fall within a broad zone of reasonableness.")). To the extent NEPA applies at all to this question, the Services believe it is readily satisfied by the existing categorical exclusion, which has, moreover, been repeatedly applied, under the administrations of Presidents of both major political parties, to rulemakings in this exact area, see responses to Comments 9 and 10.

Comment 13: Multiple commenters stated that the Services' rescission of the regulatory definition of "harm" is arbitrary and capricious under the APA. Commenters asserted that the Services did not provide a detailed justification for this reversal, nor did they address the serious reliance interests built around the existing definition. Commenters opined that rescinding the current definition of “harm” switches course on decades of regulatory and judicial interpretation, including the Supreme Court’s majority opinion in *Sweet Home.* Commenters asserted that the proposal appears to be driven by political motivations rather than sound reasoning or legal necessity, and that it lacks the transparency and consistency required by the APA.

Response: The Services disagree with the characterization of this rule as arbitrary and capricious under the APA. The rule is based on a reevaluation of the statutory text of the ESA. The Services’ rescission of the regulatory definition of “harm” on the ground that it does not reflect the best reading of the statutory text effectuates the Executive Branch’s obligation to “take Care that the Laws be faithfully executed” (U.S. Const. art. II, section 3).

In proposing to rescind our regulatory definition of “harm,” the Services noted that they were “considering whether there are legitimate reliance interests on the regulations under reexamination,” but that “because it is the President’s duty to see that the laws are faithfully executed, in all but the most unusual cases, we believe that reliance interests likely will be outweighed by the constitutional interest in repealing regulations that do not reflect the best reading of the statute.” 90 FR 16102, at 16104, (*citing Dep’t of Homeland Sec.* v. *Regents of the Univ. of California*, 591 U.S. 1, 30-32 (2020; *Regents*)). We asked for comment on reliance interests specifically (*Id.*). After reviewing comments we received on reliance interests, the Services affirm that reliance interests are outweighed by the constitutional interest in repealing regulations that do not reflect the best reading of the statute.

Commenters raised four principal arguments regarding reliance interests. The first is the reliance interests of those who provide services related to mitigation. Commenters noted that if habitat modification is no longer regulated under section 9 of the ESA, then conservation-financing, species-mitigation, and habitat-restoration markets, participation in which was once necessary to obtain an incidental take permit under section 10 of the ESA, will be eliminated. The appetite for these services among permittees will disappear, leaving existing and pending offsets as essentially stranded investments without a market. Commenters estimated approximately $483 million has been spent to date on species habitat and that the proposed rescission alone has chilled an additional $300 million in planned investments. Additionally, commenters stated the broader economic impact of habitat-restoration activities is estimated to approach $10 billion overall and supports more than 53,000 jobs.

The Services recognize that a restoration and mitigation industry has developed under the prior regulatory framework. Commenters are correct that changes in the regulatory system may influence market demand for certain mitigation efforts focused on habitat conservation that were once necessary to obtain an incidental take permit under section 10 of the ESA. As noted in the preamble, the magnitude of such impacts is uncertain and not amenable to reliable quantification. What is more, however, is that the services sold in these markets are essentially regulatory rents. Where there is no justification in law for imposing the relevant regulation, imposing such costs is inherently illegitimate—and pleas to keep them, though cast in the form of reliance interests, are essentially rent-seeking. The Services therefore, in accord with *Regents*, has decided that "reliance interests in benefits [i.e., regulatory rents] that it views as unlawful are entitled to no or diminished weight" (591 U.S. at 32). This reliance interest is addressed further at Comment 21.

The second, and closely related, class of reliance interests articulated by comments is that of those who sell services related to voluntary conservation programs, multi-year HCPs (including the investment in planning for an HCP, the investment in implementing the HCP, and land management practices, including voluntary conservation measures. Commenters noted that, if habitat modification is no longer regulated as "take" under section 9, then such services will no longer be needed to obtain an incidental take permit under section 10, and, as a result, their market will dry up.

The Services recognize that these industries had developed under the prior regulatory framework. Commenters are correct that changes in the regulatory system may influence market demand for certain mitigation efforts focused on habitat conservation that were once necessary to obtain an incidental take permit under section 10 of the ESA. This revision is prospective only and does not affect permits that have been granted as of the date this rule becomes final. That is, no conservation agreement or habitat management plan that is in effect as of the date of this rule becomes final will be affected by it. Going forward, the Services intend to review each specific situation and species' response to a proposed action to determine whether it may or may not constitute "harm" to a species pursuant to section 3 of the ESA. The Services will continue to work with applicants to ensure that HCPs and CBAs are developed and permitted to address species-specific impacts and that conservation and mitigation measures are commensurate with the ESA's definition of "take." This rulemaking does not prohibit willing landowners from implementing conservation plans and agreements that are more comprehensive than what sections 9 and 10 of the ESA require. However, yet again, beyond situations in which private persons *voluntarily* wish to purchase such mitigation services or need to purchase them to satisfy other provisions of law, the market for such services under sections 9 and 10 is a creation of regulations that, in the view of the Services, are not authorized by law—and that, as such, the services sold in these markets are essentially regulatory rents. Where there is no justification in law for imposing the relevant regulation, imposing such costs is inherently illegitimate—and pleas to keep them, though cast in the form of reliance interests, are essentially rent-seeking. The Services therefore, in accord with *Regents*, has decided that "reliance interests in benefits [i.e., regulatory rents] that it views as unlawful are entitled to no or diminished weight" (591 U.S. at 32). This reliance interest is addressed further at Comment 18.

The third main class of reliance interests articulated by commenters is that of persons interested in the protection of wildlife and habitats. Commenters noted that habitat protections were important to ecological stability, ecosystem services, pollination, and clean water; that aesthetic and recreational interests would be injured; that the wildlife-watching industry would be damaged; and that the sport-fishing industry would suffer.

The Services emphasize that the rescission of the regulatory definition of "harm" does not diminish the importance of habitat loss or degradation as a significant threat to many species listed under the ESA. Habitat protection and conservation play a critical role in species conservation and recovery efforts. Rather, this rule clarifies that "take" applies only to actions that cause actual injury or death to listed species. Habitat-related impacts are considered and addressed under other provisions of the ESA, including section 7 consultations, critical habitat designations, section 5 land acquisition authorities, and cooperation with willing landowners through voluntary programs. The Services will continue to use these tools to address threats to species and to help chart the path to recovery and delisting. The rescission of the definition of "harm" intends to align the implementation of the Act with the single, best reading of the statute by removing habitat modification or degradation as a form of prohibited "take." This rulemaking does not prohibit willing landowners from implementing conservation plans and agreements that are more comprehensive than what sections 9 and 10 of the ESA require. Beyond these responses, the Services note that much of what such Commenters are casting as reliance interests are really policy disagreements: Commenters wish that Congress had, or the Administration would continue to, set the balance between habitat preservation and the rights of landowners differently than, in the Service's view, the Act in fact does. The Services are determined, by contrast, to adhere to what is in their view the best reading of the law.[10] These comments are addressed further at Comments 18 and 20.

The fourth main class of reliance interests articulated by comments is that of State reliance interests: States wrote to claim that the existing definition of harm bolsters state laws, or that states rely on Federal definition of harm when state does not have a law on point, and that in

[10] One commenter also argued that animal rescue programs would be increasingly burdened, because without habitat modification being included in the definition of "harm," more animals would be hurt and need rescue. As for effects to Animal Rescue Programs, rescinding the regulatory definition of "harm" will not negate the fact that actions that directly result in injury or death to listed wildlife still constitutes "take" under the ESA. This rule would not result in the large-scale habitat changes that the commenter asserts would result in higher instances of animal injury. As stated above, habitat-related impacts will be addressed under other provisions of the ESA.

any event, the existence of the current federal definition of harm has ensured consistency across state lines.

The Services respond that the rescission of the definition of “harm” in the Act does not alter the ability of States to implement their own conservation programs or to regulate habitat impacts under State law. Federal law and regulations create a legal floor (or minimum standard). Congress preserved the authority of any state to enact and enforce laws or regulations that provide species protections more stringent than federal protections while maintaining the ESA’s preemption over any state law that would permit what is prohibited under the ESA or prohibit what is authorized under the ESA (16 U.S.C. 1535(f)). Nor does this final rule affect the Services’ commitment to cooperative federalism and coordination with State agencies, which takes place pursuant to section 6 cooperative agreements, section 10(a) permits, and section 7 consultations, not through the implementation of section 9 take prohibitions. For example, section 6 of the ESA permits the Secretary of the Interior to “enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species” (16 U.S.C. 1535(b)). The Secretary of the Interior may also enter into agreements with States, that “establish[] and maintain[] an adequate and active program for the conservation of endangered species and threatened species” and plants (*Id.* at 1535(c)).[11] This rule does not change any species or critical habitat designations. The Services will continue to work with States to support species recovery and habitat protection through section 6 cooperative agreements, section 7 consultations, and other collaborative mechanisms. Beyond these responses, though, the Services note that much of what these state commenters are casting as reliance interests are really policy disagreements: These states wish that Congress had, or the Administration would continue to, set the federal floor differently than, in the Service’s view, the Act in fact does. The Services are determined, by contrast, to adhere to what is in their

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[11] The Services note, again, that the explicit provisions for habitat protection in so many other parts of the ESA reinforces their conviction that the portion of section 9 forbidding “take” was not meant to address habitat modification.

view the best reading of the law. Indeed, in this particular context, federalism concerns counsel heavily in favor of rejecting these states' purported reliance interests, for if the federal government were to maintain the elevated federal floor these states request (and which is not authorized by the best reading of the statute), other states would not have any freedom to try other approaches. These comments are addressed further at Comment 16.

To return to the commenters' overall point, the Services hold that reliance on an unlawful regulatory definition is unjustified because the regulatory certainty provided by an unlawful definition is illegitimate. Thus, the Services do not believe that these reliance interests overcome the executive branch's important interest in maintaining and enforcing only lawful regulations. The Services believe that a full rescission, without the implementation of a replacement definition at this time, best achieves this interest. The Services understand that at least one court has stated that "an agency must always consider serious reliance interests, even when it concludes an earlier policy was unlawful," but that the agency may determine that such reliance interests "are entitled to no or diminished weight" because of the unlawfulness of the earlier policy (*A.C.R.* v. *Noem*, 809 F. Supp. 3d 103, 122 (E.D.N.Y. 2025)). The Services have considered the reliance interests and determined that they are entitled to no or diminished weight.

The Services further acknowledge the well-established principle that when an agency changes position, "provid[ing] reasoned explanation" has required that the agency "display awareness that it *is* changing position" and "show that there are good reasons for the new policy" (*FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). We have satisfied that requirement in making this final decision. In the Services' proposed rule, the Services included a discussion of the statutory framework, *Sweet Home*, and our rationale for concluding that the definition of "harm" does not support the best meaning of the Act, the specific proposed regulation change, and asked for public comment. We have now reviewed the public comments and in this final rule have provided responses to unique, substantive comments. Thus, the process that we used to promulgate this rule complied with the applicable requirements of the APA.

Comment 14: Multiple commenters asserted that the Services' proposal lacks the reasoned analysis required by the APA, as articulated in *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29 (1983; *State Farm*). They assert that the Services failed to examine relevant information or provide a satisfactory explanation for abandoning the longstanding definition of "harm." Commenters stated that the Services did not assess the impacts of the change on species conservation, habitat protection, or regulatory programs such as ITPs and HCPs. Instead, they assert that proposal relies on a narrow legal rationale and a misreading of recent case law, without addressing the statutory purpose of the ESA or the practical consequences of the change. Commenters concluded that this failure to consider important aspects of the problem and to offer a rational connection between the facts found and the choice made renders the proposal legally deficient under *State Farm*.

Response: The Services respectfully disagree that the proposed rule lacks the reasoned analysis required under the APA. To begin, commenters appear to misapprehend the nature of the arbitrary-and-capricious standard. That standard simply "requires that agency action be reasonable and reasonably explained" (*FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021)). "Judicial review under that standard is deferential": "A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision" (*Id.*). In accordance with *State Farm*, the Services have provided a reasoned explanation for the proposed rescission of the regulatory definition of "harm." The Services explained that they were rescinding the regulatory definition of "harm" because it does not reflect the best reading of the ESA. This includes a detailed analysis of the statutory text, structure, and purpose of the ESA, as well as the legal implications of the Supreme Court's decision in *Loper Bright*. That is a complete explanation that satisfies *State Farm*. The Services have also now considered public comments received. This rule reflects the agency's view of the best interpretation of the ESA, which does not permit agencies to factor in habitat modification or degradation in the context of section 9 prohibited take. The Services have addressed reliance interests, including reliance interests of those involved in regulatory programs such as ITPs and HCPs, throughout responses to comments, including the Services' responses to Comments 5, 13, 20, and 23. The Services have satisfied their obligations under the arbitrary-and-capricious standard and *State Farm*.

Comment 15: Multiple commenters contended that the Services must conduct intraservice consultation under section 7 of the ESA before finalizing the proposed rescission of the definition of "harm." They asserted that the action is not exempt from consultation requirements and may adversely affect numerous listed species, particularly those species where the primary threat is habitat loss. Commenters cited the Endangered Species Consultation Handbook and joint regulations, which require consultation for agency actions, including rulemakings, that may affect listed species or critical habitat. They asserted that the Services must prepare a biological opinion evaluating species-specific impacts and ensure the action does not jeopardize species' continued existence.

Response: As stated in the **Required Determinations** section, below, the Services are acting in their unique statutory role as administrators of the Act and are engaged in a legal exercise of interpreting the standards of the Act. The Services' administration of the Act is not in itself subject to the Act's provisions, including section 7(a)(2). The Services have a historical practice of issuing their general regulations under the ESA without undertaking section 7 consultation (see *Endangered Species Act* in the **Required Determinations** section below). This practice accords with the plain language, structure, and purposes of the ESA, which does not place a consultation obligation on the Services' administration of the Act. Furthermore, from a pragmatic point of view, the proposed consultation requirement would be impracticably elaborate, even nonsensical. Were commenters correct, the Services would be required to conduct an analysis as to every single endangered species on the list and speculate as to how the new legal definition would produce different consequences as to each—as section 7 still mandated habitat protection through an entirely different regime that this rule does not touch, see the Services' response to Comment 3. Little wonder, then, that such a recursive and reticulated procedure was not undertaken when this rule was promulgated in 1975 and has *never* been the Services' practice when it comes to changes to the ESA implementing regulations themselves.

Comment 16: Multiple commenters asserted that the proposed rule would create significant inconsistencies with existing State regulations and undermine State-led conservation efforts. Many states, such as New Mexico and Oregon, have developed their own definitions of "take" or "harm" that include habitat modification as a key component. Commenters opined that the recission would weaken State protections, disrupt established conservation frameworks, and jeopardize long-standing agreements. Commenters emphasized that this change would introduce regulatory uncertainty, delay conservation planning, and reduce the effectiveness of State investments in species conservation and habitat protection.

Response: The rescission of the definition of "harm" in the Act does not alter the ability of States to implement their own conservation programs or to regulate habitat impacts under State law. Federal law and regulations create a legal floor (or minimum standards); States may legislate and regulate over and above what Federal law or regulations permit.

Under the ESA's section 6 "conflict between Federal and State laws" clause, Congress preserved the authority of any state to enact and enforce laws or regulations that provide species protections more stringent than federal protections while maintaining the ESA's preemption over any state law that would permit what is prohibited under the ESA or prohibit what is authorized under the ESA (16 U.S.C. 1535(f)). Where a state lists a species or designates habitat protections under a state endangered species law, such as California's Endangered Species Act, the state protections will apply to those state listed species as long as the state laws do not conflict with the ESA. Consequently, species listed under state laws will retain full protections under those laws and will remain unaffected by the removal of an unnecessary federal regulatory layer of protections. For state and local governments, businesses, organizations, and individuals, the ESA's cooperative federalism structure provides durable legal security for long-term reliance interests that will not be upset by the removal of an unnecessary federal ESA regulation. For example, habitat mitigation instruments developed to satisfy both federal ESA requirements and state law mitigation standards create layered contractual and real estate obligations that persist regardless of federal ESA regulation. Conservation obligations that run with the land or are attached to mitigation instruments will remain enforceable against subsequent landowners, thereby preventing disruption to markets and organizations that have an interest in ESA protections.

Nor does this final rule affect the Services' commitment to cooperative federalism and coordination with State agencies, which takes place pursuant to section 6 cooperative agreements, section 10(a) permits, and section 7 consultations, not through the implementation of section 9 take prohibitions. For example, section 6 of the ESA permits the Secretary of the Interior to "enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species" (16 U.S.C. 1535(b)). The Secretary of the Interior may also enter into agreements with States, that "establish[] and maintain[] an adequate and active program for the conservation of endangered species and threatened species" and plants (*Id.* at 1535(c)). [12] This rule does not change any species or critical habitat designations. The Services will continue to work with States to support species recovery and habitat protection through section 6 cooperative agreements, section 7 consultations, and other collaborative mechanisms. Moreover, other provisions of the ESA such as sections 5 and 7 are specifically designed to address habitat conservation will remain unchanged.

The Services acknowledge that the States have asserted that this rulemaking will result in an increased financial and administrative burden. However, States continuing to implement laws and policies that go beyond that which is required by the ESA is not germane to this rulemaking.

[12] The Services note, again, that the explicit provisions for habitat protection in so many other parts of the ESA reinforces its conviction that the portion of Section 7 forbidding "take" was not meant to address habitat modification.

States may make a policy decision to discontinue implementing more stringent species protections in order to relieve themselves of this additional burden. Alternatively, states may choose to bear the increased costs that go along with their preferred policy preferences. The Services, however, reject the invitation to ignore the best meaning of the federal statute passed by Congress (and to impose increased costs and burdens on other states and individual citizens), in order to accommodate the policy preferences of this minority of states.

Comment 17: Commenters emphasize that the rule fails to account for impacts to ecosystem services (tangible benefits of natural habitats to human communities), existence values (intangible value placed on knowing a species or habitat exists), option values (retaining ability to use a resource in the future), and the cost of recovery (monetary cost of recovering species or habitats). They also state that habitat degradation would lead to lost ecosystem services such as pollination, water filtration, carbon sequestration, and flood prevention. They state that healthy habitats increase recreational opportunities, thereby supporting local economies. The commenters argue that these effects should be included in the analysis.

Response: The Services emphasize that the rescission of the regulatory definition of "harm" does not diminish the importance of habitat conservation under the ESA. Habitat-related impacts will be addressed under other provisions of the ESA—as was intended—including through section 7 consultations and critical habitat designations. The Services will continue to use these tools to conserve habitat for listed species and as such will continue to address the importance of ecosystem services, and other issues raised by the commenters. The Services have fulfilled their requirements under *State Farm*, *Department of Homeland Security* v. *Regents*, and all other applicable law (see the Services' Responses to Comments 13, 15 and 16).

Comment 18: Some commenters stated that significant public investments—Federal, State, local, and Tribal—have been made in conservation agreements and habitat management plans that are based the long-standing interpretation of "harm" under the ESA, which includes habitat modification or degradation. A change in this interpretation threatens to invalidate or delay these efforts, putting at risk financial resources, staff positions, and political commitments. The resulting regulatory uncertainty could lead to the discontinuation of landowner support programs and a reduction in service levels, undermining the current and anticipated infrastructure built to support species recovery.

Commenters stated these investments were designed to meet the needs of permittees operating under the current ESA framework. If habitat modification is no longer regulated, the market for conservation offsets collapses, leaving existing and pending investments stranded. This shift would not only jeopardize ongoing recovery efforts critical to delisting species and supporting industries like commercial fisheries, but it would also erode the economic and environmental resilience built through decades of coordinated public and private restoration work. The proposed policy change represents a sudden and destabilizing departure from decades of consistent ESA implementation. Commenters state this change could potentially lead to increased habitat destruction, jeopardizing both Tribal and commercial use of natural resources. The resulting confusion and regulatory gaps would place additional economic burdens on communities that depend on sustainable natural resources.

Response: This comment is incorrect in asserting that habitat modification is no longer regulated. This rulemaking does not change any species classifications or critical habitat designations. The Services will continue to work with States to support species recovery and habitat protection through section 6 cooperative agreements, section 7 consultations, and other collaborative mechanisms.

As stated in the response to comment 5, the rescission of the regulatory definition of “harm” does not eliminate the Services’ ability to issue ITPs or EOS permits where there is an affirmative conduct intentionally directed against a particular animal or animals. Additionally, the Services will continue to work with applicants to ensure that HCPs and CBAs are developed and permitted to address species-specific impacts and that the conservation and mitigation measures are commensurate with the ESA’s definition of “take.”

This revision is prospective only and does not affect permits that have been granted as of the date this rule becomes final. That is, no conservation agreements and habitat management plans that are in effect as of the date of this rule becomes final are affected. As noted above, such agreements and plans were but one input among many into the ultimate decision whether and how to authorize a given action (*Cf. Seven Cnty. Infrastructure Coal.* v. *Eagle Cnty., Colorado*, 605 U.S. 168, 180 (2025)). Disturbing the finality of the overall permitting decision would be highly disruptive to settled expectations, as well as immensely time-consuming and difficult, in return for at most speculative gains. It would also contradict the assurance of repose given to permittees in regulations governing HCPs (see 50 CFR §§ 17.22(b)(5), 17.32(b)(5); response to Comment 5, above). Going forward, the Services intend to review each specific situation and species response to the action to determine whether it may or may not constitute "harm" to a species pursuant to section 3 of the ESA. The Services will continue to work with applicants to ensure that HCPs and CBAs are developed and permitted to address species-specific impacts and that conservation and mitigation measures are commensurate with the ESA's definition of "take." This rulemaking does not prohibit willing landowners from implementing conservation plans and agreements that are more comprehensive than what sections 9 and 10 of the ESA require.

However, beyond situations in which private persons *voluntarily* wish to purchase such mitigation services or need to purchase them in order to comply with other provisions of law, the market for such services under ESA sections 9 and 10 is a creation of regulations that, in the view of the Services, are not authorized by the Act. Where there is no justification in law for imposing the relevant regulation, imposing such costs is inherently illegitimate—and pleas to keep them, though cast in the form of reliance interests, are essentially regulatory rent-seeking. The Services therefore, in accord with *Regents*, has decided that "reliance interests in benefits [i.e., regulatory rents] that it views as unlawful are entitled to no or diminished weight" (591 U.S. at 32).

Comment 19: Several commenters stated that Tribal activities associated with the environment and natural resources are not merely economic activities but are a deeply rooted cultural, spiritual, and subsistence practice. For example, treaty fishing rights are essential to preserving their way of life, with nearly every household participating in the fish harvest. Communities rely on salmon and other species for food, income, and cultural continuity. Any weakening of ESA protections—particularly the definition of "harm"—would significantly threaten Tribal abilities to maintain these practices, leading to widespread negative impacts on their economy and social fabric.

Response: The Services acknowledge the sovereign status of Tribal Nations and recognize that Tribal stewardship of natural resources is deeply rooted in cultural, spiritual, and subsistence traditions that are integral to Tribal identity and self-determination. The Services also reaffirm their commitment to honoring tribal treaty rights in full. However, the requirements imposed by the ESA are separate and distinct from treaty rights. When it comes to the ESA, the Services acknowledge the significance of the policy interests articulated by the tribes, but emphasize that this final rule is a legal correction to align the regulatory definition of "harm" with the single, best reading of the ESA's statutory text. This action does not change any species classifications or critical habitat designations and ensures that the Services' regulations are legally sound and align with the best reading of the ESA. The ESA, properly understood, addresses habitat-related impacts through other provisions of the ESA, including section 7 consultations and section 5 land acquisition authorities. The Services remain committed to meaningful coordination and consultation with Tribal Nations to ensure that their voices, knowledge, and sovereignty are respected in the conservation and recovery of endangered and threatened species.

Comment 20: Several commenters highlighted the substantial economic value of healthy habitats and native species, particularly for outdoor recreation, tourism, and biodiversity-dependent industries. They warned that weakening protections—such as redefining "harm" under the Endangered Species Act—could lead to wildlife declines, increased extinction risks, and economic losses for communities reliant on natural resources. Commenters also criticized the proposed rule as misleading, arguing it overlooks the effects to small businesses that benefit from strong wildlife protections, such as eco-tourism businesses, Tribal communities, research institutions, and conservation organizations. They called for a thorough economic impact analysis that includes all affected stakeholders, not just development interests.

Response: The Services disagree that the entities mentioned by the commenters should be included in an economic impact analysis because they are not directly regulated entities for the purpose of the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq.). The businesses listed by the commenters are not subject to the requirements of the rule and are only indirectly affected. Only directly regulated entities are required to be considered under the RFA. The extent to which any impacts assessed are not limited to development interests as the commenters suggest.

The Services emphasize that the rescission of the regulatory definition of "harm" does not diminish the importance of habitat loss or degradation as a significant threat to many species listed under the ESA. Habitat protection and conservation play a critical role in species conservation and recovery efforts. Rather, this rule clarifies that "take" applies only to actions that cause actual injury or death to listed species. Habitat-related impacts are considered and addressed under other provisions of the ESA, including section 7 consultations, critical habitat designations, section 5 land acquisition authorities, and cooperation with willing landowners through voluntary programs. The Services will continue to use these tools to address threats to species and to help chart the path to recovery and delisting. The rescission of the definition of "harm" intends to align the implementation of the Act with the single, best reading of the statute by removing habitat modification or degradation as a form of prohibited "take." This rulemaking does not prohibit willing landowners from implementing conservation plans and agreements that are more comprehensive than what sections 9 and 10 of the ESA require. The Services have fulfilled their requirements under *State Farm*, *Department of Homeland Security* v. *Regents*, and all other applicable law. See the Services' Responses to Comments 13, 15, and 16.

Comment 21: Commenters emphasized that the existing definition of "harm" has supported the growth of a multi-billion-dollar mitigation and restoration industry. They cited investments in ecological restoration services, mitigation banking, and conservation offsets, warning that rescinding the definition could strand existing investments, reduce demand for offsets, and diminish compliance options. They argued that such changes would stall new projects, eliminate markets built around habitat-based regulation, and weaken both environmental outcomes and related economic activity.

Response: The Services recognize that a restoration and mitigation industry has developed under the prior regulatory framework. Commenters are correct that changes in regulatory drivers may influence market demand for certain mitigation efforts focused on habitat conservation that were once necessary to obtain an incidental take permit under section 10 of the ESA. As noted in the preamble, the magnitude of such impacts is uncertain and not amenable to reliable quantification. Also, as noted above in response to Comment 16, state-law regimes remain in place, and, where applicable, will still support this industry. This partially mitigates the impact of this rule change on the reliance interests addressed by these commenters. However, such markets are essentially regulatory rents. The best reading of sections 9 and 10 of the Act provide no justification for imposing these costs. As such, imposing them is inherently illegitimate—and pleas to keep them, though cast in the form of reliance interests, are essentially rent-seeking. The Services therefore, in accord with *Regents*, has decided that "reliance interests in benefits [i.e., regulatory rents] that it views as unlawful are entitled to no or diminished weight" (591 U.S. at 32).

The Services note again that this rulemaking does not change the regulatory regimes for species recovery and habitat protection through section 4 critical habitat designations, section 5 land acquisition authorities, section 6 cooperative agreements, section 7 consultations, and other collaborative mechanisms.

In other words, conservation outcomes will continue through other legally appropriate mechanisms. Additionally, this rulemaking does not prohibit willing landowners from implementing conservation plans and agreements that are more comprehensive than what sections 9 and 10 of the ESA require.

This revision is prospective only and does not affect permits that have been granted as of the date this rule becomes final. That is, no conservation agreements and habitat management plans that are in effect as of the date of this rule becomes final are affected.

By rescinding the regulatory definition of “harm,” the Services are restoring clarity to the statutory framework by aligning the definition of “take” with the single, best reading of the statute. The Services are not taking this action on the basis of any potential economic impacts. The Services have fulfilled their requirements under *State Farm*, *Department of Homeland Security v. Regents*, and all other applicable law. See the Services’ Responses to Comments 15 and 16.

Comment 22: Several commenters stated that reducing habitat protections now could increase long-term costs to government and taxpayers. They stressed that preventive measures—such as conserving intact habitat—are generally more cost-effective than emergency interventions or species recovery programs after populations have declined. In their view, the proposed rule shifts costs into the future by lowering preventive protections today.

Response: The Services acknowledge the general economic principle that preventive action often reduces the need for more expensive recovery measures later. Maintaining habitat quality typically requires fewer resources than restoring degraded ecosystems or supporting species once they are at risk of extinction. While the Services are not the sole implementers of habitat protection, we work closely with Federal, State, Tribal, local, and private partners to support proactive conservation efforts that reduce long-term risks and costs, and we remain committed to leveraging these partnerships to achieve shared conservation outcomes under the ESA.

The Services are restoring clarity to the statutory framework by aligning the definition of "take" with the single, best reading of the statute. The Services note that other statutory tools, such as section 5 land acquisition and section 7 consultations, remain in place to support preventive conservation.

Comment 23: Commenters stated that the proposed rule lacks any quantitative economic analysis. They emphasized that no cost-benefit assessment is presented, nor are there empirical estimates of compliance savings, industry impacts, or foregone ecological and social benefits. They argued that this absence undermines transparency and hinders evaluation of trade-offs.

Response: The Services acknowledge that the proposed rule did not include a formal quantitative cost-benefit analysis. The magnitude of many potential effects—such as reliance investments and ecological outcomes—is unknown and not amenable to reliable monetization with current data. Rescinding the definition of "harm" is expected to reduce certain regulatory burdens, and the scale of those savings was determined to be economically significant. A Regulatory Impact Analysis was conducted, and the Services estimated annualized quantified cost savings of $361.3 million at a 3 percent discount rate and $521.0 million at a 7 percent discount rate, reflecting reduced planning, negotiation, mitigation, and implementation costs for HCPs. A regulatory flexibility analysis is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. After conducting both an initial regulatory flexibility analysis and a final regulatory flexibility analysis, the Services certify that this rule will not have a significant economic effect on a substantial number of small entities.

Comment 24: Multiple commenters argued that the proposed rescission of the regulatory definition of "harm" raises constitutional concerns related to the separation of powers and the faithful execution of laws. They emphasized that under Article I of the U.S. Constitution, Congress holds the authority to enact statutes such as the ESA, while Article II obligates the executive branch to faithfully execute those laws. Commenters asserted that removing the definition of “harm” does not relieve the Services of their duty to enforce the ESA as written by Congress, including its provisions for protecting both species and their habitats. They expressed concern that the proposed rule appears to disregard longstanding statutory interpretations and judicial precedent, potentially undermining the legislative intent behind the ESA. Some commenters argued that eliminating the definition of “harm” could weaken key regulatory mechanisms, such as HCPs and section 7 consultations, thereby reducing the effectiveness of the ESA and violating the executive branch’s constitutional responsibility. Others suggested that the rule may overstep the authority granted to agencies under Article II by attempting to reinterpret or narrow statutory terms that Congress has already defined. Overall, commenters maintained that the Services must uphold their constitutional obligation to implement the ESA in a manner consistent with congressional intent and judicial interpretation, and that the proposed rule risks disrupting this balance of powers.

Response: The Services’ current regulatory definition of harm does not accord with the single, best meaning of the text. Implementing the text as written by Congress is exactly how the executive branch should be respecting separation of powers in this instance. Nothing in *Loper Bright* prohibits the executive branch from reevaluating prior statutory interpretations to ensure compliance with the statute’s text, and, given the opinion’s insistence on applying the best meaning of the text of a law, it would be shocking if it did so. This rule rescinds the regulatory definition of “harm” on the grounds that it does not reflect the best reading of the statutory text, thereby effectuating the executive branch’s obligation to “take Care that the Laws be faithfully executed” (U.S. Const. art. II, section 3.). This recission is fully consistent with Congress’s definition of “take” in section 3 and with the dissent in *Sweet Home*. We are executing the law as written by Congress by addressing habitat-related impacts through other provisions of the ESA, including section 7 consultations and section 5 land acquisition authorities. See our response to Comment 20 for the Services' discussion on potential impacts to HCPs.

Comment 25: Several commenters opposed the rescission of the regulatory definition of "harm" and cited a series of judicial decisions— *Palila* v. *Hawaii Dep't of Land & Nat. Res.*, 471 F. Supp. 985 (D. Haw. 1979); *Palila* v. *Hawaii*, 639 F.2d 495 (9th Cir. 1981; *Palila*), *Sierra Club* v. *Yeutter*, 926 F.2d 429 (5th Cir. 1991; *Yeutter*), *Cascadia Wildlands* v. *Scott Timber Co.*, 618 F. Supp. 3d 1038 (D. Or. 2022), aff'd, 105 F.4th 1144 (9th Cir. 2024; *Cascadia Wildlands*), *Pacific Rivers Council* v. *Thomas*, 30 F.3d 1050 (9th Cir. 1994; *Pacific Rivers Council*), and *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978; *TVA v. Hill*)—as evidence that the ESA has long been interpreted to prohibit habitat destruction that impairs essential behavioral patterns of listed species. These commenters stated that the courts in these cases recognized that habitat modification can constitute a prohibited "take" under the ESA, and that rescinding the regulatory definition of "harm" would be inconsistent with this precedent and undermine the ESA's conservation mandate.

Response: We acknowledge the cited decisions. However, these cases do not require the continued use of the regulatory definition of "harm".

To begin, two of these cases do not even address the statutory-construction question at the heart of this rulemaking. *Yeutter* mentions the word "harm" only in the facts section, see 926 F.2d at 433 & n.2, while the word "harm" does not appear in *Pacific Rivers Council* at all. Three other decisions appear only to apply the regulatory definition of "harm," not to answer the question of whether that regulatory definition is a correct construction of the statutory text. See *Cascadia Wildlands*, 618 F. Supp. 3d. at 1067 (reciting the statutory and regulatory definitions, noting the holding of *Sweet Home*, and applying those definitions); 105 F.4th at 1156-57 (similar); *Palila*, 471 F. Supp. at 995. To the extent the remaining decision—the Ninth Circuit's *Palila* decision—does address the question of whether the statutory "take" (via "harm") correctly includes habitat destruction, the analysis is extremely cursory and uses outdated modes of analysis: It addresses the merits of this question in one, spare, four-sentence paragraph, which relied primarily on "legislative history" (639 F.2d at 497–98).[13] The bottom line is that the Services do not find these decisions persuasive.

Turning to the two Supreme Court cases cited, *TVA* v. *Hill* is not on point. Its reflections on legislative history and Congressional purpose are interesting, and taken by the Services for what they are worth. But *Hill* does not address or answer the statutory-interpretation question at answer in this rulemaking. The case that does is *Sweet Home*. The majority's holding in that case, applying *Chevron*, is that the construction then proffered by the Services was "reasonable." For the reasons explained pervasively in this final rule and in the proposed rule, the Services are persuaded instead by Justice Scalia's analysis as to what the *correct* construction of the statutory text is.

We recognize that the Supreme Court held in *Loper Bright* that its "prior cases that relied on the *Chevron* framework … are still subject to statutory *stare decisis*" (603 U.S. at 412). But under the then-prevailing *Chevron* framework, *Sweet Home* held only that the existing regulation is a permissible reading of the ESA, not the only possible such reading. Our rescission of the regulatory definition on the grounds that it does not reflect the best reading of the statutory text thus is fully consistent with *Sweet Home*.

Accordingly, while these decisions illustrate how the prior regulatory definition of "harm" was applied in specific factual contexts, they did not determine that the regulatory definition of harm constituted the single best reading of the ESA and thus do not preclude the Services from rescinding that definition in favor of a reading that better aligns with the statutory text.

Comment 26: Some commenters cited *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944; *Skidmore*), and *Kimble* v. *Marvel Entertainment, LLC*, 576 U.S. 446 (2015; *Kimble*), to argue

[13] That the named plaintiff in *Palila* is a species of bird also indicates to the Services that its mode of jurisprudence would not accord with best modern practices.

that the Services should retain the regulatory definition of “harm” out of respect for longstanding agency interpretations and the principle of *stare decisis*. These commenters contended that even if *Chevron* deference no longer applies, the Services’ decades-long interpretation of “harm” should still be afforded weight under *Skidmore*, and that the principle of *stare decisis*, as reaffirmed in *Kimble*, counsels against rescinding a settled regulatory interpretation absent a compelling justification.

Response: The Services recognize the importance of consistency and stability in interpretation of the ESA; however, neither case compels the retention of the regulatory definition of “harm,” which runs contrary to the text and structure of the ESA.

Under *Skidmore*, agency interpretations may be entitled to respect *by courts* to the extent they have the “power to persuade.” It is true, furthermore, that courts have opined that “respect” has been “especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time” (*Loper Bright*, 603 U.S. at 386). “‘Respect,’ though, was just that” (*Id.*). A court should never afford respect to an agency interpretation - under *Skidmore* or any other precedent—when that interpretation runs contrary to the text and structure of the statutory language, as Justice Scalia’s *Sweet Home* dissent observed. In this rulemaking, the Services have determined that the prior regulatory definition of “harm” does not reflect the best meaning of the statutory text. Moreover, the Services are, to begin, not a court, and thus *Skidmore* deference is arguably inapposite.

As for *Kimble*, it is inapt, because it addresses the considerations that *courts* must consider when repudiating their own prior precedents regarding how to interpret a statute, i.e., what the *best* reading of the statute is. By contrast, the idea of applying *stare decisis* to agency action is inconsistent with a core tenet of administrative law: agencies may change positions. See, *e.g., FDA v. Wages & White Lion Investments, L.L.C.*, 604 U.S. 542, 569–70 (2025). In other words, there is no such thing as stare decisis for agency interpretation. Agencies are permitted to revise or rescind prior interpretations when warranted by changes in law, policy, or interpretive standards.

Accordingly, while the Services respect the values of consistency and institutional experience, those values do not override the obligation to interpret the ESA in accordance with its best reading.

Required Determinations

Regulatory Planning and Review–Executive Orders 12866 and 13563

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this final rule in a manner consistent with these requirements.

Unleashing Prosperity through Deregulation —E.O. 14192

This final rule is an E.O. 14192 deregulatory action.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; title II of Pub. L. 104–121, March 29, 1996), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or that person's designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certify that this rule will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

This final rule is deregulatory and is generally expected to benefit small entities regulated by the ESA, primarily those entities that voluntarily seek and are subsequently issued section 10(a) permits. To the extent that fewer future ESA section 10(a) permits are issued, lower administrative and recordkeeping costs are likely. Additionally, to the extent that future permits are not issued or are issued in a more limited capacity, some portion of otherwise-affected small entities would benefit by avoiding implementation costs. Furthermore, dependent on the extent to which a reduced number of section 10(a) permits are issued, a reduction in activities on the part of entities engaged in restoration and habitat protection activities could result. However, we do not expect this potential effect to rise to the level of a significant economic effect nor affect a substantial number of small entities. Therefore, we certify that this rule will not have a significant economic effect on a substantial number of small entities.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.):

(a) On the basis of information presented under *Regulatory Flexibility Act*, above, this rule will not "significantly or uniquely" affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act that this final rule will not impose a cost of $100 million or more in any given year on local or State governments or private entities. A small government agency plan is not required. As explained above, small governments will not be affected because the final rule will not place additional requirements on any city, county, or other local municipalities.

(b) This rule will not produce a Federal mandate on State, local, or Tribal governments or the private sector of $100 million or greater in any year; that is, this final rule is not a "significant regulatory action" under the Unfunded Mandates Reform Act. This final rule will impose no obligations on State, local, or Tribal governments.

Takings—E.O. 12630

In accordance with E.O. 12630, this rule will not have significant takings implications. This rule does not pertain to "taking" of private property interests, nor will it directly affect private property. A takings implication assessment is not required because this final rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This rule substantially advances a legitimate government interest (eliminating regulatory definitions that do not align with the best meaning of the ESA) and will not present a barrier to all reasonable and expected beneficial use of private property.

Federalism—E.O. 13132

In accordance with E.O. 13132, we have considered whether this rule will have significant federalism effects and have determined that a federalism summary impact statement is not required. This rule rescinds the regulatory definition of "harm" and will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform—E.O. 12988

This final rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This final rule rescinds the regulatory definition of "harm".

Government-to-Government Relationship with Tribes —E.O. 13175

In accordance with the President's memorandum of April 29, 1994 ("Government-to-Government Relations With Native American Tribal Governments;" 59 FR 22951, May 4, 1994), E.O. 13175 ("Consultation and Coordination with Indian Tribal Governments"), the President's memorandum of November 30, 2022 ("Uniform Standards for Tribal Consultation;" 87 FR 74479, December 5, 2022), and the Department of the Interior's manual at 512 DM 2, and the National Oceanic and Atmospheric Administration (NOAA) Administrative Order (NAO) 218-8 (April 2012), we considered the possible effects of this rule on federally recognized Tribes. After the opening of the public comment period, we received multiple requests for coordination or Government-to-Government consultation from multiple Tribes: Cheyenne River Sioux Tribe, Great Lakes Indian Fish and Wildlife Commission, Pueblo of San Felipe, Fond du Lac Band of Lake Superior Chippewa, Swinomish Indian Tribal Community, Fallon Paiute Shoshone Tribe, Lower Elwha Klallam Tribe, Quinault Indian Nation, Confederated Tribes and Bands of the Yakama Nation, Cowlitz Indian Tribe, and Bishop Paiute Tribe.

The Service concludes that this rule is general in nature and does not directly affect any specific Tribal lands, treaty rights, or Tribal trust resources. This regulation, which removes the definition of "harm" from 50 CFR 17 and 222, does not have direct, substantial effects on one or more Indian Tribes, as the Services issue permits to Indian Tribes on a very limited basis, but rather consult and coordinate with Tribes on a case-by-case basis. This rule is general in nature and does not directly affect any specific species, Tribal lands, treaty rights, or Tribal trust resources. Therefore, we conclude that this regulation does not have "tribal implications" under section 1(a) of E.O. 13175 and formal government-to-government consultation is not required by E.O. 13175 and related policies of the Department of the Interior and the Department of Commerce. We will continue to collaborate with Tribes on issues related to federally listed species and work with them as we implement the provisions of the Act. See Joint Secretary's

Order 3206 (“American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,” June 5, 1997).

Paperwork Reduction Act (44 U.S.C. 3501 et seq.)

This final rule does not contain any new collection of information that requires approval by the OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have analyzed this rule in accordance with the National Environmental Policy Act (NEPA, 42 U.S.C. 4321 et seq.), the Department of the Interior National Environmental Policy Act implementing regulations at 43 CFR part 46, the Department of the Interior Handbook of National Environmental Policy Act Implementing Procedures (516 DM 1), the NOAA Administrative Order 216-6A, and the NOAA Companion Manual (CM), “Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities” (effective June 30, 2025).

The Services have determined that the “proposed agency action is 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); *see Dep't of Transp.* v. *Pub. Citizen,* 541 U.S. 752, 766-70 (2004)).

The Services have also determined, in the alternative, that there will be no significant individual or cumulative effect on the quality of the human environment with the rescission of the definition of “harm” in 50 CFR part 17.3 and have applied a categorical exclusion to comply with the NEPA, specifically, the Department of the Interior categorical exclusion for “Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case” (43 CFR 46.210(i)), which NOAA has adopted, consistent with NOAA’s NEPA procedures (NOAA CM V(F)). We have also determined the extraordinary circumstances listed in 43 CFR 46.215 do not apply to the direct effects of the proposed action.

We completed an environmental action statement for the categorical exclusion for the rescission of the definition of “harm” in 50 CFR part 17.3. The environmental action statement and supporting categorical exclusion documentation is available at https://www.regulations.gov in Docket No. FWS–HQ–ES–2025–0034.

Energy Supply, Distribution or Use—E.O. 13211

E.O. 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects “to the extent permitted by law” when undertaking actions identified as significant energy actions (66 FR 28355; May 22, 2001). E.O. 13211 defines a “significant energy action” as an action that (i) is a significant regulatory action under E.O. 12866 (or any successor order); and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy. This final rule is not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and there is no requirement to prepare a statement of energy effects for this action.

Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.)

In finalizing this rule, the Services are acting in their unique statutory role as administrators of the Act and are engaged in a legal exercise of interpreting the standards of the Act. The Services’ administration of the Act is not in itself subject to the Act’s provisions, including section 7(a)(2). The Services have a historical practice of issuing their general regulations under the ESA without undertaking section 7 consultation. This practice accords with the plain language, structure, and purposes of the ESA, which does not place a consultation obligation on the Services’ administration of the Act. Although the Services consult on actions through intra-agency consultations where appropriate (e.g., issuance of permits under section 10(a) and actions under statutory authorities other than the ESA), the Services in those instances are acting principally as an “action agency” carrying out provisions of the Act or other statutes. Here, by contrast, the Services are acting solely in their role as administrators of the ESA; we are also not administering the Act to propose or take a specific action. The Services are carrying out the most fundamental exercise of our role as administrators of the ESA, and the Act cannot reasonably be construed as requiring the Services to “consult” with themselves under section 7(a)(2) in such cases.

Authority

We issue this final rule under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 et seq.).

List of Subjects

50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

50 CFR Part 222

Administrative practice and procedure, Endangered and threatened species, Exports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

For the reasons set out in the preamble, we hereby amend part 17 of chapter I and part 222 of chapter II, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

Subpart A—Introduction and General Provisions

§ 17.3 [Amended]

2. Amend § 17.3 by removing the definition for “Harm”.

PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES

3. The authority citation for part 222 continues to read as follows:

Authority: 16 U.S.C. 1531 et seq.; 16 U.S.C. 742a et seq. Section 222.403 also issued under 16 U.S.C. 1361 et seq.

Subpart A—Introduction and General Provisions

§ 222.102 [Amended]

4. Amend § 222.102 by removing the definition for "Harm".

Kevin Lilly,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks,

Exercising the Delegated Authority of the Assistant Secretary for Fish and Wildlife and Parks.

Timothy R. Petty,

Assistant Secretary of Commerce for Oceans and Atmosphere and Deputy NOAA Administrator,

Department of Commerce.

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