May 19, 2025

VIA ELECTRONIC DELIVERY: www.regulations.gov

Ms. Gina Shultz
Acting Assistant Director for Ecological Services
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Agency Proposed Rule Rescinding the Definition of "Harm" Under the ESA
Docket ID: FWS-HQ-ES-2025-0034

Dear Acting Assistant Director Shultz:

The undersigned organizations and their members appreciate the opportunity to provide comments regarding the U.S. Fish and Wildlife Service's and National Oceanic and Atmospheric Administration's ("the Services") proposed rule rescinding the regulatory definition of "harm" in current Endangered Species Act (ESA) Code of Federal Regulations.

In short, we strongly support this proposed rule to restore common sense and bring federal executive branch implementation of the ESA more in line with the law and congressional intent. In administering sections 9, 10 and 7(b)(4) the ESA, the Services (and courts) should be required to clearly identify *actual* harm to species where they are found, not some vague, attenuated potential impact, or overall change in ecological condition. The Services should make clear that "harm" requires a showing of objectively discernible, negative physical impact to one or more identified members of a species.

We represent thousands of farmers and ranchers who produce the food our nation relies upon, and the water providers, businesses and communities who are critical in that work, as well as many of the local and regional public water agencies that supply municipal water to millions of Western urban, suburban and rural residents.

Our organizations know firsthand the negative economic and social impacts caused by federal implementation of the ESA. Multiple federal agencies' ESA consultations, biological opinions and (often-conflicting) mitigation mandates, as well as endless ESA litigation, drive up costs, increase uncertainty, and slow or even block important agriculture-related activities and federal water projects and water management activities. Our organizations have a strong affinity for our national environmental heritage and have an understanding for - and when - some costs and burdens of ESA decision-making are linked with concrete outcomes and protections to species.

According to the Services, there are currently 1,519 species on the U.S. ESA list,[1] and over 107 million acres and tens of thousands of river miles have been designated as critical habitat.[2] As enacted, the ESA makes it "unlawful for any person…to take any…[endangered species of fish or wildlife listed] within the United States."[3] "Take" is further defined under the ESA to include almost any direct activity that results in measurable harm or injury to a member of a listed species.[4]

The current regulation, 50 C.F.R. §17.3, defines "harm" as encompassing actions including "habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[5] This overbroad definition has been used by the Services in the decades since ESA's passage to slow, halt, or block countless activities that are critical to sustain the economic livelihoods of private landowners, farmers, ranchers, water users, rural communities and all others affected by the sometimes arbitrary and overly precautionary decisions of federal regulators. It also has contributed to ESA-related lawsuits that can bring increased risks and costs to targeted defendants. These lawsuits are initiated by environmental plaintiffs that seek taxpayer-funded attorney fees award rather than contribute to solutions that could help ecosystems.

The current ESA "harm" definition has also led to increased threats of federal enforcement against activities which the Services deem have indirectly modified species habitat, unless a permit is obtained. Routinely, the Services have used the current, expansive definition of "harm" to impose regulatory burdens based on subjective preferences for the ecosystem rather than known consequences to individual members of a species.

For example, irrigation water users in the Klamath Project, a federal reclamation project, are hundreds of miles away from the ocean. Yet through incidental take statements in biological opinions, they are regulated based on purported take of the Southern Resident killer whale. This attenuated logic consists of regulation of flows for Klamath River Chinook salmon, a non-listed fish species, which, during some days in a year, make up a small percentage of the diet of the Southern Resident killer whale. Food producers in California and Oregon are assumed to "harm" whales, and, on that basis, the terms and conditions of incidental take statements place strict constraints on their water use.

Under the ESA, the definition of "harm" is directly related to the extent of critical habitat that can be proposed for a given species, which can in turn subject vast expanses of land and water to potential regulation under the ESA. For example, the initial October 2013 proposed Rule for Threatened Status for the Western Distinct Population Segment of the Yellow-billed Cuckoo included 546,335 acres of critical habitat west of the crest of the Rocky Mountains. Our experience with critical habitat for listed species is that the implications for affected activities extend far beyond just government-owned lands

[1] https://ecos.fws.gov/ecp0/reports/ad-hoc-species-report?kingdom=V&kingdom=I&status=E&status=T&status=EmE&status=EmT&status=EXPE&status=EXPN&status=SAE&status=SAT&mapstatus=3&fcrithab=on&fstatus=on&fspecrule=on&finvpop=on&fgroup=on&header=Listed+Animals (last accessed April 23, 2025)
[2] https://ecos.fws.gov/ecp/report/table/critical-habitat.html (last accessed April 23, 2025)
[3] 16 U.S.C. §1538(a)(1)(B).
[4] 16 U.S.C. §1532(19), defining "take" as meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."
[5] Id.

to private property owners and business, as well. Layers of regulatory requirements and permitting hurdles make project delivery far more costly and time-consuming. Ironically, this goes as much for infrastructure and operations as for environmentally beneficial restoration and conservation-oriented projects. This directly and indirectly impacts our constituencies.

The Services' current interpretation of "harm" has resulted in significant increased costs, delays and uncertainty to those who must obtain federal take permits to avoid federal enforcement. Landowners seeking permits have often been forced to pay thousands of dollars and wait months or years for permits or pay additional costly mitigation mandated by the Services. Such requirements often make important activities cost-prohibitive, yet with no empirical measure of how the mitigation measures help or hurt. Perversely, even some activities that would actually help endangered and threatened species—such as thinning forests and reducing fuels buildup to prevent catastrophic wildfires are blocked by extreme litigious groups on the grounds that these actions would modify the habitat of a listed species and thereby constitute "take".

For example, one thinning project on the Klamath National Forest in Northern California was held up for more than a decade by activists who claimed they wanted to protect endangered spotted owls. In the meantime, a wildfire burned the owl habitat to the ground in 2021. A few years earlier, a similar story played out on the Helena-Lewis and Clark National Forest in Montana, when wildlife habitat went up in flames after a forest treatment project spent seven years bound up in litigation and agency red tape.

Instead of imposing costly and sometimes burdensome regulatory mandates, the Services should be focusing taxpayers' dollars on actions proven to actually protect and restore species - and which follow the law.

The rule also is consistent with recent important emergency Executive Orders signed by the President to encourage water delivery, energy exploration, and to review impediments created by the ESA.[6] To ensure that food can continue to be safely and affordably produced in the West, and that communities, large and small, continue to have access to the water critical to their economies and their health, our organizations wholeheartedly support the proposed rule to rescind both of the Services' regulations defining "harm" under the ESA. In administering sections 9, 10 and 7(b)(4) the ESA, the Services (and courts) should be required to clearly identify *actual* harm to species where they are found, not some vague, attenuated potential impact, or overall change in ecological condition. The Services should make clear that "harm" requires a showing of objectively discernible, negative physical impact to one or more identified members of a species.

The regulatory implementation of the 50+ year-old ESA has created challenges for the industries we represent, and there are other aspects of ESA administration that we continue to have concerns with. However, by focusing the definition of "harm" we believe that tenuous and speculative regulatory oversight and related litigation would be reduced or eliminated. This would bring some relief to farmers, ranchers, water managers, energy producers, Western communities and many more. The

[6] See E.O. 14156 "Declaring a National Energy Emergency," and E.O. 14181 "Emergency Measures to Provide Water Resources in California and Improve Disaster Response in Certain Areas."

proposed rule will also bring improved consistency and certainty to ESA consultations and focus more scarce resources towards actions that will more effectively protect and restore species while also protecting people. To be clear, we live and work in the West, and we embrace our natural heritage. However, species recovery and economic prosperity do not have to be mutually exclusive.

Thank you for this opportunity to comment on this proposed rule. If you have any questions about this letter, please do not hesitate to contact Dan Keppen at (541)- 892-6244.

Sincerely,

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