

July 15, 2026

Via Email and Certified Mail, Return Receipt Requested

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

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

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

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

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

Dear Secretaries Burgum and Lutnick:

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

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

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

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

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

I. Background

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

Since the passage and earliest days of the ESA, the Services have properly understood that illegal “take” under Section 9 of the Act⁵ includes “harm” from “significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.”⁶ The U.S. Supreme Court subsequently upheld this understanding of “harm” in its 1995 decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). For the first time in over fifty years, however, the Services have now indicated that they are reversing that understanding and will henceforth consider all forms of “take” proscribed by the ESA, including “harm,” to “require an ‘affirmative act[] . . . directed immediately and intentionally against a particular animal—not [an] act[] or omission[] that indirectly and accidentally cause[s] injury to a population of animals.’”⁷

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

² 91 Fed. Reg. at 43,300.

³ 90 Fed. Reg. at 16,102.

⁴ *See* 91 Fed. Reg. at 43,300–02.

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

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

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

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

II. Legal Framework

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

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

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

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

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

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

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

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

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

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

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

⁹ *See id.*

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

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

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

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

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

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

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

¹⁵ Endangered and Threatened Wildlife and Plants; Final Listing Determinations for Two Distinct Population Segments of Atlantic Sturgeon (*Acipenser oxyrinchus oxyrinchus*) in the Southeast, 77 Fed. Reg. 5,914, 5,967–71, 5,978 (Feb. 6, 2012).

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

Sincerely,



Derb Carter
Senior Attorney



Catherine Wannamaker
Senior Attorney



Elizabeth Rasheed
Senior Attorney



Allyson Gambardella
Associate Attorney