Comments on Rescinding the Definition of "Harm" Under the Endangered Species Act, U.S. Fish and Wildlife Service [Docket Number FWS-HQ-ES-2025-0034]
19 May 2025

The Wildlife Society (TWS) recommends suspending this rulemaking process in favor of further legislative clarity on the meaning of "harm" under the Endangered Species Act (ESA). The notice invokes a selective account of cited case law, resulting in a flawed statutory interpretation of ESA and improper rulemaking. If the rulemaking continues, the language must indicate that the interpretation of "harm" under ESA remains unchanged due to guiding Supreme Court precedent.

Implications for Species Recovery and Wildlife Conservation

The Wildlife Society has long recognized the critical role of ESA in the conservation of biological diversity in the U.S. and beyond. We also recognize that habitat loss is a primary driver in the listing of threatened and endangered species and a core challenge in the recovery of those species.

By rescinding the regulatory definition of "harm" and implying that habitat modification is no longer considered a component of "take," the proposed rule would significantly weaken protections against habitat loss. The new rule would likely:

- Reduce ESA's effectiveness in recovering listed species;
- Impede efforts to prevent extinctions and potentially increase the need for future ESA listings;
- Accelerate wildlife population declines, and;
- Create uncertainty for wildlife professionals implementing recovery plans.

As stated in our position on The U.S. Endangered Species Act, TWS advocates for transparent processes to restore, enhance, manage, and protect occupied and unoccupied habitats and supports consistent interpretation of statutory provisions to prevent extinctions and recover species. The Wildlife Society remains open and willing to contribute our expertise to meaningful ESA modifications that enhance the effectiveness of the law in recovering imperiled species.

However, we cannot support a regulatory action that removes habitat protections from ESA under false pretext, while not considering the impacts of the change on the implementation of the law. Any narrowing of the protections afforded under ESA could have significant detrimental impacts on listed species and attempts to recover and delist them.

Misinterpretation of Supreme Court Precedent

In proposing this rulemaking, the Services point to the Supreme Court case of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024), which overturned the Chevron deference as justification for exploring whether the text of ESA authorizes the Services' definition of "harm." However, such an approach fundamentally contradicts the logic of the Supreme Court in overruling Chevron. While *Loper Bright* overturned the Chevron deference, it emphasized legal stability and did "not call into question prior cases that relied on the Chevron framework."

The Services' proposed rulemaking, however, disregards the controlling precedent established in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), which affirms that habitat modification can constitute "harm" under the ESA. When assessing the Services' definition of "harm," the Supreme Court stated that the definition "accords with [the Court's] conclusion, based on the text, structure, and legislative history of the ESA." By rescinding the regulatory definition while casting doubt on the validity of Supreme Court precedent, the Services are inserting unnecessary ambiguity into ESA's interpretation and thus injecting uncertainty into a question of law that has already undergone judicial scrutiny at the highest court.

Such an approach creates unwarranted instability in the law. If this rulemaking moves forward, it will mire the implementation of ESA in the same "eternal fog of uncertainty" that the ruling in *Loper Bright* sought to avoid.

Ensuring Lawful and Effective Governance

Taking a proactive approach to identify and address regulations that may exceed their statutory authority under *Loper Bright* can mitigate conflict by addressing statutory ambiguity in advance. Such an approach, though, only works in close coordination with Congress, which can clarify legislative intent and provide amendments to laws requiring more specific implementing language.

The Wildlife Society believes that any effort to repeal regulations must follow a well-reasoned process, serve lawful purposes, support long-term stability, and respect the separation of powers identified in the U.S. Constitution. As written, the Services' proposed rule ignores Supreme Court precedent and bypasses Congress to establish a new statutory interpretation of "harm." This approach would almost certainly result in heightened scrutiny by Congress and the public, leading to unnecessary legal challenges and changes that would in turn contribute to industry instability, financial waste and environmental harm.

If the Services continue rulemaking to rescind the definition of "harm" under ESA, the text of the rule must indicate that the interpretation of "harm" remains unchanged due to guiding Supreme Court precedent. That would remedy the underlying question regarding

the statutory authority of the Services to issue regulatory definitions under ESA while preserving the integrity of the Supreme Court's ruling in *Sweet Home*. If the Services seek further modifications to the text of ESA to meet the priorities of the President's agenda, such changes must go through Congress as the most appropriate and accountable body for ensuring that questions and ambiguities around ESA are adequately considered and addressed.