



Via Regulations.gov

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U.S. Fish and Wildlife Service
MS: PRB/3W,
5275 Leesburg Pike
Falls Church, VA 22041-3803

National Marine Fisheries Service, Office of Protected Resources
1315 East-West Highway
Silver Spring, Maryland 20910

Re: The American Exploration and Production Council's Comments on Proposed Changes to Endangered Species Act Regulations (90 Fed. Reg. 16,102) (FWS-HQ-ES-2025-0034).

Dear Sir/Madam:

The American Exploration & Production Council ("AXPC") appreciates the opportunity to comment on the U.S. Fish and Wildlife Service's ("FWS's") and National Marine Fisheries Service ("NMFS's") (collectively, "the Services") proposal for Rescinding the Definition of Harm under the Endangered Species Act ("ESA" or "the Act") ("Proposed Rescission").¹

AXPC shares the Services' interest in lawfully interpreting the ESA and reducing unnecessary regulatory burdens associated with implementation of the Act, and we agree that the Services' current regulatory definition of "harm" does not reflect the best meaning of the term as it is used in the Act. AXPC further agrees with the Services' interpretation in the preamble to the Proposed Rescission that "harm" under the ESA refers to a "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."²

AXPC is concerned, however, that rescinding rather than replacing the Services' regulatory definition of "harm" will increase the likelihood of divergent interpretations that could needlessly create confusion and uncertainty. As such, while we support the Services' proposed elimination of regulatory text that does not reflect the single best meaning of the ESA, we urge the Services to consider promulgating a revised regulatory definition of "harm" based on the interpretation described in the preamble to the Proposed Rescission. We believe that doing so will help ensure

¹ Rescinding the Definition of "Harm" Under the Endangered Species Act, 90 Fed. Reg. 16,102 (Apr. 17, 2025).

² 90 Fed. Reg. at 16,103.

that the Services' continue to interpret this important statutory term in a manner that closely adheres to the Act while also helping to prevent ambitious judicial interpretations of the ESA.

I. AXPC's Interests

AXPC is a national trade association representing 31 leading independent oil and natural gas exploration and production companies in the United States. AXPC companies support millions of Americans in high-paying jobs and invest a wealth of resources in our communities. Dedicated to safety, stewardship, and technological advancement, our members strive to deliver affordable, reliable energy to consumers while positively impacting the economy and the communities in which we live and operate. Our association works with regulators and policymakers to help them understand our operations so that they will be able to create sound, fact-based public policies that result in the safe and responsible exploration and production of America's vast oil and natural gas resources. Our goal is to provide technical and regulatory knowledge, making AXPC a rich repository of resources on the industry and the science behind our operations.

AXPC's members are uniquely positioned to provide comments on the proposed rule and how the proposal may affect the development of projects that are vital to revitalizing the American energy industry. Unlike downstream oil and natural gas entities with permanent, stationary, refineries and other sites, AXPC's members explore for and develop essential energy resources on federal, state, and private natural gas and oil leases across the nation. Responsibly developing these resources and safely transporting them to consumers requires the construction and operation of pads, pipelines, utility lines, offshore platforms, and other infrastructure. These and other actions can often occur in proximity to threatened and endangered species or their habitat.

Under the Services' current and unlawfully expansive regulatory definition of "harm," even AXPC members' responsibly conducted and otherwise lawful activities can potentially subject them to liability for the incidental take of listed species. Companies often attempt to mitigate incidental take liability risks by seeking out and obtaining various permits and authorizations that are often redundant and unnecessary but nonetheless costly and time-consuming to obtain and implement. AXPC's members' ability to responsibly explore for, develop, and transport critical natural gas and oil resources is therefore directly impacted by the Service's Proposed Rescission.

However, regardless of how or whether the Services define "harm," our industry employs a wide variety of protective and/or beneficial practices and technologies during all phases of our operations to enable the safe and responsible development of the nation's oil and natural gas resources while reducing and/or mitigating potential impacts to species, habitats, land, water, and other natural resources. For instance, companies often conduct pre-construction habitat evaluations to help identify and potentially avoid protected species habitat. AXPC members routinely help protect and conserve species by scheduling construction activities to minimize or significantly abate any potential adverse impacts their operations may have on species during their most vulnerable life stages. These conservation measures and technologies have helped our industry minimize its impacts on wildlife and the environment while still providing much-needed resources to the American public.

AXPC members also routinely employ a variety of advanced technologies that can significantly reduce surface disturbances and minimize the impacts of our operations on wildlife and habitat. The following technological advances benefit numerous listed and unlisted species and represent just one part of a continuously improving evolution of industry's capability to operate in proximity to species and their supporting habitats:

- Horizontal and Directional Drilling: Through technological advancements like horizontal and directional drilling, our industry has taken significant steps to minimize its impacts on wildlife and the environment while still providing much-needed resources to the American public. The shift to horizontal drilling has changed modern oil and gas development's disturbance, fragmentation, and activity profiles. It provides for a 70 percent reduction in the surface footprint associated with our member's operations.³
- Use of Closed-Loop Drilling Fluid Systems: To further minimize our operations' potential adverse impacts on protected species and habitat, the oil and natural gas industry has adopted closed-loop drilling fluid systems that recycle drilling fluids, thereby decreasing water consumption and the risk of contamination to nearby water sources.
- Advanced Well Control Systems: The oil and natural gas industry's development of advanced well control systems, including automated shutdown mechanisms and real-time monitoring, has significantly reduced the risk of spills and blowouts in the upstream sector. These systems protect habitat areas around drilling sites by allowing operators to promptly identify and address any anomalies in real-time to make our drilling operations safer and more protective of ecological resource

Importantly, country is now seeing the positive outcomes arising from AXPC's members' safe and responsible resource development practices that continue to be critical to the Great American Comeback. In addition to AXPC members' best practices and technical advancements, implementation of the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act have improved the protection of our waters and dramatically improved air quality in the United States. According to EPA, in the United States, from 2005 to 2022, total energy-related CO₂ emissions fell by 20 percent while the United States became the number one energy producer in the world.⁴ And, since 1990, American natural gas production has increased from approximately 128,000 million cubic feet ("MCF") per day to nearly 41,425,000 MCF per day.⁵ At the same time, United States Geological Survey data shows that CO₂ and methane emissions from the extraction of oil and natural gas are likewise continuing to significantly decrease.⁶

³ D. Applegate & N. Owens, *Oil and Gas Impacts on Wyoming's Sage grouse: Summarizing the Past and Predicting the Foreseeable Future*, HUMAN-WILDLIFE INTERACTIONS, Vol. 8, Iss. 2, Article 15 (2014).

⁴ [HTTPS://AXPC.ORG/WP-CONTENT/UPLOADS/2025/03/AXPC-EE-DECK_1.2025.PDF#PAGE=31](https://axpc.org/wp-content/uploads/2025/03/AXPC-EE-DECK_1.2025.pdf#page=31).

⁵ See U.S. ENERGY INFORMATION ADMIN., U.S. Natural Gas Marketed Production, updated monthly at <https://www.eia.gov/dnav/ng/hist/n9050us2a.htm>.

⁶ See generally, U.S. GEOLOGICAL SURVEY, Federal Lands Greenhouse Gas Emissions and Sequestration in the United States (2024), <https://pubs.usgs.gov/sir/2024/5103/sir20245103.pdf>.

In light of these promising trends both in terms of improved environmental protection and increased production, AXPC welcomes this Administration's efforts to streamline and remove unnecessary roadblocks to safely and responsibly achieving domestic energy dominance.⁷ In addition to being legally necessary, the Services' Proposed Rescission of the current regulatory definition of the statutory term "harm" fully accords with these streamlining and reform efforts. Although AXPC believes that the Services could make implementation of the ESA clearer and more consistent by replacing the current regulatory definition of "harm" with a more legally sound interpretation of the statutory term, we appreciate and support the Services' recognition of the manner in which the current expansive interpretation of "harm" needlessly constrains a wide range of responsibly conducted and economically beneficial activities.

II. The Services' Current Regulatory Definition of "Harm" Does Not Reflect the Best Reading of the ESA

Section 9 of the ESA prohibits a number of different types of actions, including import, export, delivery, possession, receipt, sale, offer for sale, transport, as relevant here, the "take" or "attempt to take" of any listed species under the Act.⁸ The term "take" under the Act "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."⁹ None of the ten actions listed in the ESA's definition of "take" are defined by the Act, but, as explained below, their meanings can be discerned using the structure of and context for the legislative text.

At issue here, is the meaning of the term "harm" within the ESA's definition of "take." Because the Act did not define harm, the Services adopted their own definition through rulemaking.¹⁰ According to the Services' regulatory definition, "harm" means:

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.¹¹

As stated in the Proposed Rescission, this far-reaching definition of "harm" greatly expanded the scope of the ESA's "take" prohibitions beyond the best reading of the statute, to include circumstances beyond the actual affirmative physical harming of wildlife.¹² And as a result of this expansive regulatory interpretations, countless landowners and other citizens have been exposed to potential ESA "Take" liability for incredibly common, necessary, and otherwise lawful land uses and land disturbing activities simply because those activities may have the potential to

⁷ See Executive Order 14154 on Unleashing American Energy (90 Fed. Reg. 8,353 (Jan. 29, 2025)).

⁸ 16 U.S.C. § 1538(a)(1)(B).

⁹ 16 U.S.C. § 1532(19).

¹⁰ 50 C.F.R. § 17.3. The NMFS definition is materially identical. See 50 C.F.R. § 222.102.

¹¹ 50 C.F.R. § 17.3.

¹² 90 Fed. Reg. at 16,103.

directly, or through a long chain of causal factors, indirectly kill or injure listed species or adversely impact protected species populations as a whole.¹³

30 years ago, litigants challenged this regulatory definition of “harm” as facially invalid, in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt* (“*Sweet Home*”).¹⁴ Though the challenge did not succeed, notably, the majority did not uphold the Services’ regulatory definition of “harm” based on a view that it represented the best meaning of the ESA. Rather, the majority determined that the “proper interpretation of a term such as ‘harm’ involves a complex policy choice,” for which “we are especially reluctant to substitute our views of wise policy,”¹⁵ and therefore broadly deferred to the Services’ interpretation under the *Chevron* doctrine.¹⁶

For their part, the three dissenting justices viewed the Services’ interpretation of “harm” as so manifestly inconsistent with the plain meaning of the Act, they would have invalidated the regulatory definition even under the excessively deferential *Chevron* doctrine.¹⁷ Now, 30 years after the *Sweet Home* decision, it no longer matters whether a majority of the Supreme Court viewed the Service’s interpretation of “harm” as sufficiently reasonable to be afforded deference because “*Chevron* is overruled.”¹⁸

By overturning *Chevron* doctrine, the Supreme Court’s *Loper Bright* decision makes clear that courts may no longer uphold agency regulations simply because they are based on interpretations that are not unreasonable or expressly precluded by the statute. All statutes “no matter how impenetrable, do—in fact, must—have a single, best meaning [that] is fixed at the time of enactment.”¹⁹ And therefore, in order to be upheld as lawful, every agency regulation must reflect the “single, best meaning of the statute” it purports to interpret.

The Services are correct that the current regulatory definition of “harm,” while permissible under *Chevron*, does not reflect the “single, best meaning” of the ESA, and is therefore impermissible under *Loper Bright*.²⁰ The Services are also correct to look to the dissenting opinion in *Sweet Home* for guidance as to the single best meaning of the scope of “take” prohibited under Section 9 of the ESA.

According to the dissent, the term “harm” in the ESA’s definition of “take” “has no legal force of its own. An indictment or civil complaint that charged the defendant with ‘harming’ an animal protected under the Act would be dismissed as defective, for the only *operative* term in the statute is to ‘take.’”²¹ “To ‘take,’ when applied to wild animals, means to reduce those animals, by killing

¹³ See Elinor Colbourn & Jill Birchell, *Home, Sweet Home: Prosecuting Endangered Species Act Habitat Modification Cases*, 63 US ATT’YS BULL. 2 (Sep. 2015).

¹⁴ 515 U.S. 687 (1995).

¹⁵ 515 U.S. at 708.

¹⁶ 515 U.S. at 705 (citing *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

¹⁷ *Sweet Home*, 515 U.S. at 715.

¹⁸ *Loper Bright Enterprises v. Raimondo* (“*Loper Bright*”), 603 U.S. 369, 144 S.Ct. 2244, 2273 (2024).

¹⁹ *Loper Bright*, 144 S.Ct. at 2273 (internal quotations omitted).

²⁰ 90 Fed. Reg. at 16,103.

²¹ *Sweet Home*, 515 U.S. at 717.

or capturing, to human control.”²² Thus, “the single, best meaning” of the ESA that was “fixed at the time of [the Act’s] enactment”²³ is that:

[t]he taking prohibition . . . is only part of the regulatory plan of § 1538(a)(1), which covers all the stages of the process by which protected wildlife is reduced to man's dominion and made the object of profit. It is obvious that ‘take’ in this sense—a term of art deeply embedded in the statutory and common law concerning wildlife—describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).²⁴

Any definition of “harm” must therefore reflect, and not expand upon, the more limited scope of Section 9 prohibitions required by this meaning of “take.” The Services’ regulatory definition does not accord with this single, best meaning at the time of the ESA’s enactment because it expands the scope of prohibited “take” beyond direct and purposeful actions intended to kill or control species to include habitat modifying activities that may only incidentally or accidentally impact listed species. The Services’ are therefore correct in proposing to rescind the current definition.

In addition to establishing “the single, best meaning” of “take” that was “fixed at the time of [the Act’s] enactment,”²⁵ the dissent in *Sweet Home* also identified the single best meaning of “harm” by applying the canon of *noscitur a sociis* (Latin “it is known by its associates”).²⁶ Under this cannon of interpretation, “[t]he fact that ‘several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.’”²⁷

As applied to “take,” the dissent found that “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. To ‘harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect’ are all affirmative acts (the provision itself describes them as ‘conduct,’ see § 1532(19)) which are directed immediately and intentionally against a particular animal—not acts or omissions that indirectly and accidentally cause injury to a population of animals.”²⁸

Based on this, the dissenting justices in *Sweet Home* determined that the plain meaning of the word “take” requires affirmative action on the part of the individual—knowing causation.²⁹ Otherwise, the Act would impose liability for impairment of “essential behavior patterns” via habitat

²² *Sweet Home*, 515 U.S. at 717.

²³ *Loper Bright*, 144 S.Ct. at 2273 (internal quotations omitted).

²⁴ *Sweet Home*, 515 U.S. at 718.

²⁵ *Loper Bright*, 144 S.Ct. at 2273 (internal quotations omitted).

²⁶ *Sweet Home*, 515 U.S. at 720.

²⁷ *Sweet Home*, 515 U.S. at 720-721 (internal quotations omitted).

²⁸ *Sweet Home*, 515 U.S. at 720.

²⁹ *Id.* at 719–20; see also *Noscitur a Sociis*, *Black’s Law Dictionary* (11th ed. 2019).

modification “no matter how long the chain of causality between modification and injury.”³⁰ The ESA defines the scope of the term “take” by listing a number of actions, each of which require affirmative conduct that is “likely to injure or kill *individual wildlife*.”³¹ As such, “the term ‘harm’ should be interpreted to only include those actions that are directed against, and likely to injure or kill, individual wildlife.”³² Adopting this definition of harm would mirror the affirmative nature of the other words laid out in the Act, such as “harass,” “pursue,” “wound,” and “kill.”

The dissent further concluded that interpreting the word “take” to include habitat modification and instruction did not comport with the other uses of the word “take” throughout the Act. For example, Section 1530(e)(4)(B) of the Act provides for “the forfeiture of ‘[a]ll guns, traps, nets, and other equipment... used to aid the taking, possessing, selling [etc.]’ of protected animals.”³³ As the dissent noted, if “taking” were to include habitat modification, this section should and would have included “plows, bulldozers, and backhoes.”³⁴ While the dissent in *Sweet Home* raised this issue to highlight the error in interpreting expansively “harm,” it reflects a real and practical concern that AXPC members and other land use industries have had to deal with for decades.

While this excerpt provides an exaggerated example, it illustrates the seemingly unbounded liability risks associated with the Services’ expansive regulatory definition of “harm.” AXPC therefore supports the Proposed Recission of the current definition of “harm,” but as explained below, rather than simply remove the impermissible definition, we believe that the Services should consider replacing it with a definition that reflects the single, best meaning of the ESA at the time of its enactment.

III. The Services should Revise the Definition of Harm to Ensure a Lawful Interpretation

AXPC urges the Services to consider revising the rulemaking to modify, as opposed to rescind, the regulatory definition of “harm” at the center of this proposal, in order to ensure the best reading of the statute remains the interpretation in practice. If the definition as a whole were rescinded as is proposed, and the term “harm” would be wholly undefined, which may invite challenges by litigious groups intent on using the ESA as a tool for constraining industry operations, rather than a tool for conservation. While one would hope that courts would arrive at the same single best meaning of the Act identified by the dissent in *Sweet Home*, the reality is that there are many courts and judges that are inclined toward expansive and overreaching interpretations of regulatory requirements. And the activist groups that litigate under the ESA most frequently know all too well which courts are likely to be most sympathetic to their claims.

³⁰ *Id.* at 715–16 (citing *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106, 1108-1109 (9th Cir. 1988) (sheep grazing constituted “taking” of palila birds, since although sheep do not destroy full-grown mamane trees, they do destroy mamane seedlings, which will not grow to full-grown trees, on which the palila feeds and nests) (parenthetical in original)).

³¹ *Id.* at 720 (emphasis in original).

³² *Id.*

³³ *Id.* at 723.

³⁴ *Id.*

While the Services cannot fully eliminate these litigation risks, we believe that they can mitigate them more fully by replacing the current regulatory definition of “harm” with a new definition that embodies the single best meaning of the ESA at the time it was enacted, as illustrated by the dissent in *Sweet Home*, and restated by the Services in the preamble to the Proposed Rescission. That is that “harm” under the ESA refers to a “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.”³⁵

IV. Protecting and Conserving Listed Species Does Not Require the Services to Expansively Interpret “Harm”

While AXPC recognizes that the Services are proposing to rescind their regulatory definition of “harm” because the definition is inconsistent with the best meaning of the statutory term “take,” we believe it is important to also recognize that expansively interpreting “harm” is not necessary in order to protect and conserve endangered and threatened species or the habitat on which they rely. Regardless whether the Services fully rescind the regulatory definition of “harm” or replace it with a narrower definition focused on affirmative acts directed against species, the ESA will remain a powerful tool for species conservation.

In the subsections that follow, AXPC describes the expansive Section 9 “take” prohibitions that would not be affected by the Services’ Proposed Rescission and would remain in force for the protection of endangered and threatened species. We also explain how the Act’s Section 9 “take” prohibitions are just one part of the ESA’s larger and more comprehensive framework for protecting and conserving listed species. And finally, AXPC illustrates how many environmental and conservation statutes and regulations operate at each level of government to protect species and their habitats, and will continue to do so regardless of how “harm” is interpreted under the ESA.

a. The ESA Provides a Comprehensive Framework for Species Conservation

Congress enacted the ESA to provide “a program for the conservation” of endangered and threatened species, to conserve “ecosystems upon which [they] depend,” and “to take such steps as may be appropriate” to achieve those goals.³⁶ The terms “conserve,” “conserving,” and “conservation” were defined to mean “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.”³⁷ According to the statutory definition:

[s]uch methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and

³⁵ 90 Fed. Reg. at 16,103.

³⁶ 16 U.S.C. § 1531(b).

³⁷ 16 U.S.C. § 1532(3).

transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.³⁸

As this excerpt illustrates, the ESA equips the Services with a wide variety of tools to protect and conserve species, only a subset of which involves prohibiting or restricting activities undertaken by the public. The majority of the “methods and procedures” Congress expected would be used for listed species conservation involved actions and measures, such as “research, census,” “habitat acquisition and maintenance, propagation, live trapping, and transplantation,” that the Services would themselves undertake for the benefit of the species.

These “methods and procedures” are so central and important to the ESA’s design that Congress expressly identified them as the means by which the Act’s conservation purpose would be achieved. And none of these conservation “methods and procedures” are impeded by the Proposed Recission or in any way diminished by the way the Services define “harm.”

To be sure, Congress provided other mechanisms for the conservation of species as well. Section 4 of the ESA requires the Services to identify species at risk of extinction or likely to become so, “promulgate regulations listing those species” determined to be “‘threatened’ or ‘endangered’ . . . and . . . designate their ‘critical habitat.’”³⁹ The listing of a species triggers a wide range of statutorily required regulatory actions and prohibitions, including: (1) the Services’ duty develop and implement recovery plans;⁴⁰ (2) federal agencies’ obligation to initiate Section 7 consultation;⁴¹ (3) the Services’ duty to designate critical habitat “to the maximum extent prudent and determinable;”⁴² and, (4) the Section 9 prohibition on the import, export, delivery, possession, receipt, sale, offer for sale, transport, and of course, “take” of the species.⁴³

As previously noted, “take” “means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁴⁴ Thus, while AXPC understands that the Services’ regulatory definition of “harm” has informed the Services’ approach to conservation for many years, several individuals and entities that have already commented on this action have ascribed the regulatory definition undue weight within the ESA’s overall conservation framework. Context matters; the Services are proposing to leave undefined just one of ten different words used to describe actions prohibited under the term “take,” which is itself just one of several activities prohibited under Section 9.

Context is not only critical to undertaking the limited significance of the regulatory definition of “harm” within the larger list of actions prohibited as “take,” and the even larger list of activities prohibited under Section 9, it is also essential to understanding the limited significance of Section 9 to the ESA’s overall approach to species conservation. As noted above, Section 9 prohibitions

³⁸ 16 U.S.C. § 1532(3).

³⁹ *Bennett v. Spear*, 520 U.S. 154, 157-58 (1997) (“*Bennett*”).

⁴⁰ 16 U.S.C. § 1533(f).

⁴¹ 16 U.S.C. § 1536(a)(2).

⁴² 16 U.S.C. § 1533(a)(3)(A)(i).

⁴³ 16 U.S.C. §§ 1538(a), 1533(d).

⁴⁴ 16 U.S.C. § 1532(19).

are just one of several conservation mechanisms that are triggered when a species is listed under Section. Congress provided multiple other conservation mechanisms in the ESA, including, but not limited to the following:

- Critical Habitat Designations and Protections: The Services are required to designate critical habitat concurrently with the listing of a species “to the maximum extent prudent and determinable.”⁴⁵ “A critical-habitat designation does not directly limit the rights of private landowners. It instead places conditions on the Federal Government's authority to effect any physical changes to the designated area, whether through activities of its own or by facilitating private development.”⁴⁶ It does so primarily through Section 7 of the Act.⁴⁷
- Section 7 Consultation Requirements: Under Section 7, once habitat is designated as “critical,” federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in “the destruction or adverse modification” of that critical habitat without receiving a special exemption.⁴⁸ If a federal agency believes that its proposed action may adversely affect critical habitat, “it must engage in formal consultation with [the Services],” which “provide the agency with a written statement”⁴⁹ explaining “how the agency action affects the species or its critical habitat,⁵⁰ and outlining “any ‘reasonable and prudent alternatives’ to ‘avoid that consequence.’”⁵¹ The agency must then “either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee.”⁵²

At bottom, this means that under ESA Section 7, regardless of whether it involves public or private land, agencies must “ensure that none of their activities, including the granting of licenses and permits,” adversely modifies or destroys critical habitat.⁵³ As the Supreme Court has observed, this requirement “cover[s], in effect, almost anything that an agency might do.”⁵⁴

- Recovery Plans: The ESA also requires the Services to develop and implement recovery plans for listed species,⁵⁵ that describe the “site-specific management actions” necessary to conserve the species.⁵⁶ Although recovery plans do not impose mandatory obligations, they are demonstrably effective in protecting and conserving listed species. A 2011 study examined different types of resource allocations that are most effective in conserving listed

⁴⁵ 16 U.S.C. § 1533(a)(3)(A)(i).

⁴⁶ *Weyerhaeuser*, 139 S. Ct. at 365-66.

⁴⁷ 16 U.S.C. § 1536(a)(2).

⁴⁸ 16 U.S.C. § 1536(a)(2).

⁴⁹ *Bennett*, 520 U.S. at 158.

⁵⁰ 16 U.S.C. § 1536(a)(3), (b)(3)-(4).

⁵¹ *Bennett*, 520 U.S. at 158.

⁵² *NAHB*, 551 U.S. at 652.

⁵³ *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 692 (1995).

⁵⁴ *NAHB*, 551 U.S. at 664.

⁵⁵ 16 U.S.C. § 1533(f)(1).

⁵⁶ 16 U.S.C. § 1533(f)(1)(B)(i).

species and identified a relationship between conservation benefits and recovery planning/implementation of recovery plans.⁵⁷ This relationship between recovery planning and conservation was based in large part on the ESA Section 4(f) requirement that recovery plans describe any habitat-specific management actions necessary to conserve the species.⁵⁸ The identification of specific management action and metrics for success is not just important for the Services in planning and allocating resources, it is also a valuable tool in coordinating the efforts of the Services' conservation partners.

- **Cooperative Federalism:** As noted above, Congress never expected that the Services would fulfill their conservation mandates by acting alone. That is why Congress provided authority under ESA Section 6 for:

[E]ncouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.⁵⁹

This provision authorizes the Services to "provide financial assistance to any State" with a "conservation progra[m]" and enter "cooperative agreement[s]" that fund up to 90% of states' conservation efforts.⁶⁰ Section 6 also allows the Services to enter agreements with states to "administ[er] and manag[e]" "area[s] established for the conservation" of species.⁶¹ When the House of Representatives first drafted ESA Section 6, it believed that these provisions would account for 29% of the ESA's costs. This means that Congress believed that the largest single expense that the Services would incur in implementing the Act would be for federal acquisitions and State grants.⁶²

These varied conservation mechanisms that Congress provided through the ESA show that it is simply not the case that the greatest conservation benefits can only be achieved through the most expansive interpretations of the scope of activities prohibited under Section 9. Indeed, while Section 9 is one of the conservation mechanisms with which the ESA is most frequently identified, it is neither the ESA's sole conservation tool, nor its most effective tool.

Meeting the ESA's conservation mandate plainly requires the Services to succeed in protecting species and habitat on private land. Section 9 prohibitions on private land, however, are difficult

⁵⁷ Madeleine C. Bottrill et al., *Does Recovery Planning Improve the Status of Threatened Species?*, 144 *BIOLOGICAL CONSERVATION* 1595 (2011).

⁵⁸ 16 U.S.C. § 1533(f)(1)(B).

⁵⁹ *Id.* § 1531(a)(5).

⁶⁰ 16 U.S.C. § 1535(d).

⁶¹ 16 U.S.C. § 1535(b).

⁶² H.R. Rep. No. 93-412, at 20, *LEG. HIST.* 159.

to enforce and only successful if landowners perceive a credible threat of enforcement.⁶³ “Whatever successes the ESA has had in other contexts... the regulatory model has failed on private land. As *Science* reported in 2005, ‘it’s become clear over three decades that its regulatory hammer isn’t enough.’”⁶⁴

The ESA gives the Services’ little jurisdiction over private lands because they generally cannot require private landowners to undertake particular conservation action; even applying their expansive regulatory definition of “harm,” the Services are only able to prohibit the “taking” of species. To be sure, the Services’ expansive regulatory definition of “harm,” private parties’ consequent concern over potential “take” liability from otherwise lawful activities on their land have certainly directly and indirectly constrained the use and enjoyment of private lands. But the extent of conservation measures that the Services may be able to leverage based on landowners’ concerns over “take” liability for otherwise lawful, routine, and/or necessary actions pales in comparison to the level of voluntary conservation the Services can facilitate by working cooperatively with landowners without the specter of incidental take liability.

An expansive definition of “harm,” and the equally expansive “take” liability that the definition allows are not only ineffective means of protecting and conserving species on private land, they have often led to perverse incentives and poor conservation outcomes. Under the Services’ current regulatory definition of “harm,” if a landowner discovers that their property holds species that are facing increasing threats, and that may potentially be listed under the ESA in the future, the landowner has a greater incentive to rid his land of the species and of its habitat before the Service can take listing action and impose regulation, as opposed to the landowner taking active measures to conserve the species. Concerns about expansively interpreted “take” liability and land use restrictions have also likely incited some landowners to prevent the development of habitat on their land before they are straddled with conservation restrictions.

For example, in the 1980s, landowner Ben Cone in North Carolina was arrested and threatened with fines and criminal charges for cutting down old-growth pine trees present on his property because the pine trees could potentially provide habitat for an endangered bird species.⁶⁵ Though Cone settled out of court with the federal government, his case caused other landowners with younger trees to pre-emptively cut those trees before they became old growth to avoid playing host to potential habitat.⁶⁶ While those landowners were not going so far as to shoot and kill the birds, it is doubtless that their actions harmed the species.⁶⁷

⁶³ Ferrero P.; McIntosh C. & Ospina M., *The Effectiveness of the U.S. Endangered Species Act: An Econometric Analysis Using Matching Methods*, J. ENVTL. ECON. & MGMT., Vol. 54, Iss. 3 at 256 (2007).

⁶⁴ Adler J., *The Leaky Ark*, AMERICAN ENTERPRISE INSTITUTE (2011) (quoting Stokstad E., *What’s Wrong with the Endangered Species Act*, SCIENCE, Vol. 309, Iss. 5, 744 at 2,152 (2005)).

⁶⁵ Alavalapati, J.R.R., et al., *Longleaf Pine Restoration* (published in Jose, S., et al., *The Longleaf Pine Ecosystem*, Springer Series in Environmental Management. Springer, New York, pp. 403–412 (2006)).

⁶⁶ See Anderson at 28.

⁶⁷ See Anderson at 28.

Voluntary conservation succeeds where Section 9 prohibitions fail because it can leverage the funding and resources that FWS cannot provide and because it incentivizes landowners to protect and improve habitat on private land. Voluntary conservation plans often provide a level of species conservation is not only orders of magnitude larger than what the Services could be expected to provide with their limited resources; it also facilitates habitat protections and enhancements that are well beyond what the Services have the jurisdiction or resources to implement or impose.

Therefore, while the Proposed Recission is intended to ensure that Services' regulations comport with the ESA, it is also the case that expansively interpreting "harm" is not necessary for, and may often undermine, the Services' conservation of endangered and threatened species. Section 9 prohibitions represent just one of several conservation tools Congress provided in the ESA, and it is not remotely the most effective. And as discussed in the subsection that follows, the ESA itself represents just one of multiple environmental and conservation statutes that help protect species and their habitats, and will continue to do so regardless of how "harm" is interpreted under the ESA.

b. The ESA is Only One of Many Environmental and Conservation Laws that Help Protect and Conserve Species and Their Habitats

While the ESA has proven immensely important to species conservation, it is but one of several environmental and conservation laws that help species by protecting and improving habitat and other resources used by protected species. For instance, Congress enacted species-specific conservation laws such as the Migratory Bird Treaty Act of 1918, which prohibits the take, possession, and trade of over 1,000 bird species, and the Bald and Golden Eagle Protection Act ("BGEPA"), which made it a federal crime, punishable through fines or imprisonment, to take or sell bald or golden eagles without permission.⁶⁸ Congress also enacted the Fish and Wildlife Conservation Act of 1980 ("FWCA"), which created a financial and technical assistance program to help states in the development, revision, and implementation of conservation plans and programs for nongame fish and wildlife.⁶⁹ Additionally, the Wild Bird Conservation Act ("WBCA") of 1992 "promoted the conservation of exotic birds," by prohibiting through criminal and civil sanctions, the import certain bird species.⁷⁰

Indeed, throughout the 1960s and 1970s, Congress enacted a series of statutes that completely transformed federal environmental and conservation law. In addition to the ESA, Congress in 1969 passed National Environmental Policy Act ("NEPA"), which, for the first time, required the federal government to consider the impacts of federal actions on the environment, including species and their habitat. In this same era, Congress also undertook the first significant efforts to reduce air emissions ("Clean Air Act" ("CAA")), which has drastically reduced emissions of air toxics and criteria pollutants such as particulate, while meaningfully addressing acid rain and its

⁶⁸ See Migratory Bird Conservation Act, Pub. L. No. 70-770, Ch. 257, 45 Stat. 1222, 1225 (1929) (codified as amended at 16 U.S.C. § 715

⁶⁹ 16 U.S.C. 2901-2911; 94 Stat. 1322.

⁷⁰ Wild Bird Conservation Act of 1992, Pub. L. No. 102-440, 106 Stat. 2225 § 103 (1992).

impacts on waterbodies, forests, and other ecosystems important to many different protected species.

Congress also enacted the Resource Conservation and Recovery Act (“RCRA”) to federally regulate solid and hazardous waste from cradle to grave. RCRA not only helped facilitate the remediation of solid waste and hazardous waste sites, it continues to help ensure that measures are in place to ensure that resources utilized by listed and unlisted species are not adversely impacted by improperly managed and discarded wastes.

Congress also enacted and the Clean Water Act (“CWA”) to protect and improve waters of the United States. Indeed, the CWA alone demonstrates how the ESA is but one source of statutory authority for protecting species and their habitats. The 1972 CWA amendments for the first time established a national commitment to restore and maintain the chemical, physical, and biological integrity of the nation's waters. And through a permit system that utilizes technological and water quality-based limits on direct and indirect discharges to navigable waters, the CWA has been instrumental in improving the health of rivers, lakes, and coastal waters. It has stopped billions of pounds of pollution from entering navigable waters, and throughout the United States, has dramatically improved the quality of thousands of waterbodies that are home to many different types of aquatic species and are utilized by birds and other terrestrial species. Additionally, the CWA and other statutes, like the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA” or “Superfund”) and the Oil Pollution Act have allowed the federal government to require violators to provide compensation for the natural resource damages they caused.

Congress’s 1972 enactment of Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), represents another important milestone in federal species protection. While FIFRA’s impact on conservation is less obvious than that of the ESA, it is no less profound. Indeed, it was authority conferred to EPA through FIFRA that allowed EPA to ban the use of DDT (Dichloro-diphenyl-trichloroethane) as a pesticide⁷¹ DDT’s impact on egg shells had led to an alarming decline in populations of bald eagles and other birds-of-prey, and EPA’s prohibition on the use of DDT is widely considered a critical factor in these species’ resurgence.⁷²

In addition to those statutes that broadly protect listed and unlisted species by addressing and federally regulating adverse human impacts to the ecosystems on which those species rely, in many instances, the natural gas and oil industry can be subject to further requirements for the protection of migratory birds and their habitat through various statutes governing federal approvals, permitting, and planning. In addition to NEPA, which we summarized above, these additional obligations frequently arise under the Federal Land Policy and Management Act (“FLPMA”), and the Mineral Leasing Act (“MLA”). While FLPMA and its various incorporated resource management statutes (like the MLA) are intended to provide and facilitate the productive use of public lands, within FLPMA and in multiple additional statutes, Congress also precisely accounted

⁷¹ <https://archive.epa.gov/epa/aboutepa/ddt-regulatory-history-brief-survey-1975.html>.

⁷² <https://www.epa.gov/caddis-voll/case-ddt-revisiting-impairment>.

for the conservation measures that apply on federal land and more generally. We briefly identify just a handful of these authorities below.

Congress already accounted for public lands conservation within FLPMA:

- Withdrawals under FLPMA allow the Secretary of the Interior to close public lands to location and entry under resource extraction laws, subject to valid existing rights.⁷³ New mining claims cannot be located within withdrawn areas. The Secretary may withdraw land “in order to maintain other public values in the area or reserving the area for a particular public purpose or program...”⁷⁴
- BLM may prohibit one or more “principal or major uses” in certain areas using “exclusion” authority that circumscribes BLM’s authority and tailors its procedural requirements depending on the size and duration of the exclusion area.⁷⁵
- Congress granted BLM authority to designate Areas of Critical Environmental Concern, which are areas within public lands where special management attention is required to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resource or other natural systems or processes, or to protect life and safety from natural hazards.⁷⁶
- Finally, Resource Management Plans (“RMPs”) provide the primary mechanism for BLM to dictate which portions of its jurisdictional lands can be made available for leasing and development. RMPs are developed and managed in accordance with the BLM’s multiple-use and sustained yield mission, which incorporates conservation considerations.⁷⁷

Congress also provided other authorities specifically to protect public lands and habitats therein. These include:

- The Wilderness Act of 1964⁷⁸ (“Wilderness Act”) created a legal definition of “wilderness” and protected 9.1 million acres of federal land through the creation and regulation of the extensive National Wilderness Preservation System. Lands protected under the Wilderness Act were designated by Congress based on recommendations from BLM and the Department of Agriculture.
- The National Park Service Organic Act (“NPSOA”)⁷⁹ enacted in 1916, created the National Park Service and National Park System. National Parks are designated by Congress or by the President pursuant to the Antiquities Act of 1906. The NPSOA was passed specifically with the “purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic

⁷³ 43 U.S.C. § 1714.

⁷⁴ 43 U.S.C. § 1702(j).

⁷⁵ 43 U.S.C. § 1712(e)(1)-(2).

⁷⁶ 43 U.S.C. § 1702(a).

⁷⁷ 43 U.S.C. § 1732.

⁷⁸ 16 U.S.C. § Ch. 23.

⁷⁹ See Title 54 U.S.C.

objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”⁸⁰

- The Omnibus Public Land Management Act of 2009 amended Titles 5, 36, and 40 of the United States Code to designate millions of acres in the U.S. as protected, and established the National Landscape Conservation System⁸¹ to “conserve, protect, and restore nationally significant landscapes with outstanding cultural, ecological, and scientific values.”⁸²

The above list of statutory authorities that collectively operate to protect and improve species and their habitat, while lengthy, is merely a subset of the protections and authorities that will continue to benefit listed and unlisted species irrespective of how or whether the Services define “harm” under the ESA. Along with the federal authorities noted above, AXPC members are frequently also subject to similar, and often more extensive, protections at the tribal, state, and local level. Therefore, in addition to being lawful and necessary, the Proposed Recission is warranted because its modest proposed definitional change will in no way upset the comprehensive environmental and ecological protections Congress provided for in multiple statutes.

V. Conclusion

AXPC appreciates the Services’ efforts to reduce the regulatory burden and overreach of the ESA, and bring the Act’s implementation in line with the intent of Congress. We further appreciate the opportunity to provide these comments and recommendations. If you have any questions or would like to discuss these comments, please feel free to contact Wendy Kirchoff at 281-386-7324 or wendy.kirchoff@axpc.org.

Respectfully submitted,



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⁸⁰ 54 U.S.C. § 100101.

⁸¹ 16 U.S.C. § 7202.

⁸² 16 U.S.C. § 7202(a).