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16 May 2025

Public Comments Processing
Attn: FWS-HQ-ES-2025-0034
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***RE: Docket No. FWS-HQ-ES-2025-0034; Rescinding the Definition of “Harm”
Under the Endangered Species Act; Notice of Proposed Rulemaking; Request for
Comments; NMERT Project No. NMERT-4491***

To Whom It May Concern,

The New Mexico Department of Game and Fish, Forestry and New Mexico State Parks Divisions at the Energy, Minerals, and Natural Resources Department, and New Mexico Interstate Stream Commission (collectively, “the State Agencies”) have reviewed the USFWS’s and National Marine Fisheries Service (NMFS’s) (collectively, “the Services”) request for comments regarding rescinding the definition of “harm” under the Endangered Species Act (ESA) regulations (50 Code of Federal Regulations [CFR] Part 17 and 50 CFR Part 222) (the “Proposed Action”). The Services are seeking input on the following more specific issues:

- 1) The definition of “harm” in the Services’ ESA regulations includes habitat modification and runs contrary to the best meaning of the statutory term “take”.
- 2) The Services propose to rescind the regulatory definition of “harm” and rest on the statutory definition of “take”

The combined State Agency comments are broken out into the following four main themes:

- 1) Overarching impacts of the Proposed Action
- 2) Species-specific examples
- 3) Agency-specific examples
- 4) Other considerations

Overall, the State Agencies oppose the Proposed Action to rescind the regulatory definition of "harm" under the ESA, specifically the removal of "habitat modification or degradation" as a component of that definition. These Agencies believe the Proposed Action will impede the recovery of threatened and endangered species and, in many cases, will likely contribute to the threat of extinction, because habitat degradation is a primary threat to many listed species. The State Agencies urge the Services to retain "habitat modification and degradation" as critical components of the regulatory definition of "harm" under the ESA and to withdraw the proposed rule. Doing so ensures a science-based, ecologically sound approach to protecting listed species and their habitats that aligns with the original intent of the ESA.

Overarching impacts of the Proposed Action

The State Agencies understand that the Proposed Action stems from recent litigation outcomes, including the *Loper Bright Enterprises v. Raimondo* 603 U.S. 369, 400 (2024) (hereafter *Loper Bright*) decision that overturned the *Chevron* doctrine; that the regulatory definition of "harm" under the ESA has been subject to previous legal challenges; and that the Proposed Action complies with Executive Order 14192, to "alleviate unnecessary burdens placed on the American people". However, the State Agencies are concerned that removing "habitat modification and degradation" from the regulatory definition of "harm" could set a precedent with far-reaching implications for federally listed plants and animals.

Effects on listed species

This Proposed Action contradicts the current scientific understanding of the significant impacts habitat loss has on species' persistence and abundance in general (Quesnelle et al. 2013, Newbold et al. 2015, Betts et al. 2017, Lino et al. 2019). For species listed as federally Threatened or Endangered, habitat modification and degradation are key drivers of the decline and for the initial listing of many of these species. Removing the definition of "harm" from the broader meaning of "take" in the ESA regulations limits the USFWS and NMFS from prohibiting or permitting for actions that lead to these key drivers of species decline. This perpetuates the cycle of habitat degradation and species decline and hastens the potential extinction of multiple federally listed species. Thus, the Proposed Action would not only severely weaken the ability of the ESA to protect federally listed species, but it ignores the part of the purpose of the ESA pertaining to conserving the ecosystems upon which endangered and threatened species depend (Cohen 1996, 16 U.S. Code Section 1531[b]). The Proposed Action may also undermine state-level definitions of "take" and weaken the legal mechanisms used to protect imperiled species, making it significantly more difficult to ensure adequate protection for federally listed species of animals and plants.

Additionally, according to Cowan et al. (2025), harm through habitat modification is the most prevalent form of take and the easiest form of take for the Services to regulate; other forms of take, such as direct mortality, are often difficult, if not impossible, to detect. As a result, habitat modification is often what other federal agencies use, when

taking licensing or permitting actions, to establish an ESA consultation nexus (i.e., to determine that Section 7 consultation must be performed), or that nonfederal entities consider in deciding whether to seek an ESA permit or prepare a habitat conservation plan (more on this below). As a result, if this removal of the regulatory definition of “harm” is implemented, many actions potentially harmful to federally listed species may go unpermitted and their environmental effects unevaluated and unmitigated through the implementation of conservation measures typically identified in the section 7 consultation process. Even if consultation is still undertaken for a specific action, the product of that consultation (e.g., a biological opinion) may exclude conservation measures that address habitat modification, thus mitigating the effectiveness of the implemented safeguards to actually protect federally listed species from further decline.

Specific to private lands, the State Agencies are concerned that the Proposed Action may disincentivize the creation of new voluntary conservation plans under ESA section 10(a) or participation or enrollment in existing conservation efforts under what are now referred to as “conservation benefit agreements” (USFWS 2024). Landowners develop and participate in these plans in part to attain ESA compliance for incidental take that may occur as a result of their activities on private lands that lack a federal nexus. The tradeoffs of implementing commitments under these plans with the protections gained for both species and landowners by doing so become unbalanced if the ESA regulatory definition for “harm” does not encompass habitat modification.

Inconsistencies and ambiguity

The Proposed Action is a move towards limiting actions that could be prohibited or permitted by the Services to those that intentionally lead to the direct mortality or capture of a federally listed organism. There is evidence that the original intent of the ESA was to include indirect take, such as take that may occur as a result of otherwise lawful actions (e.g., a construction project) that destroy the habitat of, and thus injure, a federally listed species. Specifically, section 10(a)(1)(b) of the ESA allows the Secretary of the Interior to issue permits for takings that are “incidental to, and not the purpose of, the carrying out of otherwise lawful activity” (Cohen 1996). There was no need to have allowed the Services to issue indirect take permits if the original intent of the ESA was to only prohibit direct take.

The Proposed Action contradicts the precedent set by the U.S. Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* 515 U.S. 687 (1995) (hereafter *Babbitt v. Sweet Home*), where the Court upheld the USFWS’s regulation, and interpretations made by the Court in this case. Specifically, by rescinding and not clarifying the definition of “harm”, the Proposed Action would create new questions as to what constitutes prohibited take under the ESA. “Harm” under the statutory definition could still be interpreted by a Court, as it was in *Babbitt v. Sweet Home*, to include habitat modification that actually kills or injures wildlife (i.e., the ordinary understanding of “‘harm’ . . . naturally encompasses habitat modification”). Some habitat modification could also constitute “take” because it falls under the regulatory definition of “harass” (50 CFR Part 17.3). At a minimum, the Services need to

address these questions on the scope of the ESA's take prohibition before the Proposed Action can move forward.

Species-specific examples

Broadly, modifying or degrading a species' habitat can result in direct and indirect effects that lead to species' injury, mortality, or population declines. For example, significant drawdowns of groundwater in wetland habitats can permanently alter the conditions required by federally listed plant species that rely on wetland habitats for survival, resulting in their decline or extirpation. Similarly, large-scale forest management activities that irreversibly damage sensitive habitats may result in long-term harm to both plant and animal populations that require mature forest conditions.

For aquatic species, the construction of large dams and water diversions can profoundly alter natural flow patterns, disrupt temperature regimes, and fragment river connectivity. These modifications not only degrade native habitats but also can facilitate the spread of aquatic and terrestrial non-native species, compounding their ecological impacts. As a result, native fishes may experience severe population declines, ultimately leading to their designation as federally Endangered species. Further habitat modification or destruction, if undertaken without careful consideration of ecological impacts, in the habitats of federally listed species substantively impacted by such anthropogenic activities would heighten the risk of their extinction and increase the likelihood that other local native wildlife could decline to the point of requiring federal protection.

Several terrestrial species in New Mexico have been federally listed as Endangered or Threatened primarily as a result of habitat modification and destruction. For example, analysis from the Species Status Assessment for the dunes sagebrush lizard (*Sceloporus arenicolus*) determined that 39% of this species' original range can no longer support this species due to habitat loss. Another 14% of the habitat within the species' range is disturbed, to some degree, by human activities. "Due to their reliance on a very specific and restricted habitat within the Mescalero and Monahans Sandhills, dunes sagebrush lizard[s] are highly susceptible to habitat loss and fragmentation. Removal of habitat can impair breeding, feeding, sheltering, dispersal, and survival, causing declines in abundance or even loss of populations. Habitat loss and fragmentation affect metapopulation dynamics by reducing dispersal and colonization." (USFWS 2023).

The primary factors threatening the western Distinct Population Segment of the yellow-billed cuckoo (*Coccyzus americanus occidentalis*) are the loss and degradation of this species' habitat resulting "from altered watercourse hydrology and natural stream processes, livestock overgrazing, encroachment from agriculture, and conversion of native habitat to predominantly non-native vegetation..." (USFWS 2014). Direct habitat loss, fragmentation, and conversion to non-native vegetation are ongoing and affect species' breeding habitat suitability (both habitat quality and patch size), reproductive attempts, breeding success, and dispersal, and reduces the species' range across the western U.S.

Loss of and alterations to habitat are the greatest threats faced by the lesser prairie-chicken (*Tympanuchus pallidicinctus*). The drivers of grassland habitat loss and fragmentation within this species' range include: the large-scale, past conversion of prairie to cultivated agriculture; the construction of infrastructure for petroleum production; recent construction of infrastructure to support wind energy development; woody plant encroachment; and the construction of roads and electrical distribution lines. All of these landscape changes lead to lesser prairie-chickens stopping their use of affected grassland areas and have occurred throughout this species' historical and current range (USFWS 2022). There are two habitat conservation plans that have been implemented for the lesser prairie-chicken, one focused on renewable energy, transmission line, and communication tower developments (LPCCL 2025) and one on oil and gas developments (LPCCL 2022) within the species' estimated occupied range. These plans identify avoidance and minimization measures, take estimation, and compensatory mitigation approaches that companies participating in one of the plans will take when implementing activities covered under that plan. These plans are important to the continued conservation of the lesser prairie-chicken and, as mentioned above, the future of such plans is called into question by the Proposed Action.

Agency-specific examples

The New Mexico State Parks Division (State Parks) upholds a crucial role in protecting habitats for multiple Threatened and Endangered species, including the Bolson's tortoise (*Gopherus flavomarginatus*), New Mexico jumping mouse (*Zapus hudsonius luteus*), and southwestern willow flycatcher (*Empidonax traillii extimus*) through direct management and by creating safe spaces for these species to thrive. Specifically, State Parks manages areas, facilitates responsible use, limits activities, and works with partners to restore and protect habitats important to the survival of federally listed species. Over the last 92 years, State Parks has supported Threatened and Endangered species through habitat protection, management, restoration, partnerships, education, and legal frameworks. State Parks is guided by laws, like the ESA, which protect habitat. Habitat loss, resulting from habitat destruction, fragmentation, or degradation, is the primary threat to the survival of native wildlife and plants in New Mexico.

Other considerations

The Proposed Action is a Discretionary Action

The Services cannot simply declare that their interpretation of the ESA is the "single" and "best" reading of the statute; this determination is for the Courts to make per *Loper Bright*. Indeed, the U.S. Supreme Court's conclusion in *Babbitt v. Sweet Home*, that the existing regulatory definition of "harm" is a permissible reading of the ESA, forecloses the notion that there is only one interpretation of this definition that compels rescission of the existing definition. The Services' decision whether to have a regulatory definition

of harm is thus a discretionary one that must comply with the National Environmental Policy Act (NEPA).

The Proposed Action also does not fall under the Department of Interior and National Oceanic and Atmospheric Administration (NOAA) categorical exclusions referenced in the rulemaking notice (USFWS and NOAA 2025; page 16104). The Proposed Action is not simply an administrative or technical or procedural matter but rather a consequential regulatory change that will produce significant environmental effects that require environmental analysis under NEPA. This conclusion is supported by the following Court cases: *Solar Energy Industries Association v. Federal Energy Regulatory Commission* 80 F.4th 956, 994 (9th Cir. 2023), held that an “overhaul” of regulations would produce significant environmental effects that required NEPA analysis; and *National Resources Defense Council v. U.S. Department of the Interior* 397 F. Supp. 3d 430, 454 (S.D.N.Y. 2019), found that a solicitor opinion affecting the scope of the Migratory Bird Treaty Act “take” must comply with NEPA.

The environmental effects of the Proposed Action are not too broad or speculative to ascertain. The environmental effects of projects on private lands moving forward without conservation measures being identified and implemented under incidental take permits, as a result of the Proposed Action, can be foreseen and evaluated programmatically. The State Agencies request that the Services prepare an Environmental Assessment to determine whether the Proposed Action will significantly affect the human environment for the purposes of NEPA.

Consistency with Habitat Modification as a Surrogate for Incidental Take

The Proposed Action potentially contradicts the use of surrogate measures, specifically habitat impacts, to quantify incidental take under 50 CFR Part 402.14. Surrogate measures are defined as “similarly affected species or **habitat** or ecological conditions”. Surrogate measures may be used when it is not possible to express anticipated take, or monitor take-related impacts, in terms of a specific number of individuals of the focal federally listed species. There must be a link between the surrogate measure and take and, when using habitat impacts as a surrogate, there must be a “detectable measure of effect” or a sufficiently demonstrated causal link between the effects on the habitat and the impacts on the species (USFWS 1998). This requirement for a demonstrable causal link between habitat impacts as a surrogate measure and ‘take’ of a focal federally listed species implies that any surrogate habitat impacts must cause, or otherwise be associated with, the take of the species. As such, the premise for using habitat as a surrogate for defining the incidental take of federally listed species appears fundamentally the same as that for using habitat modification or degradation in the Services’ regulatory definition of “harm”. This similarity is supported by the majority opinion in *Babbitt v. Sweet Home* wherein Justice Stevens wrote that “Unless “harm” encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate that of other words that use §3 to define take.” The State Agencies request that, should the Proposed Action proceed, the Services clarify how the Proposed Action

affects the use of habitat impacts as a surrogate for the incidental take of species listed under the ESA.

Thank you for the opportunity to review and comment on the Proposed Action and your consideration of these comments.

Sincerely,

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Director

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