



May 9, 2025

VIA ELECTRONIC DELIVERY TO :

Ms. Maureen Foster
Chief of Staff, Exercising the Delegated Authority of the Assistant Secretary for Fish
and Wildlife and Parks
Department of Interior
1849 C Street, N.W.
Washington, DC 20240

And

Ms. Laura Grimm,
Chief of Staff, Exercising the Delegated Authority of the Under Secretary of
Commerce for Oceans and Atmosphere and NOAA Administration
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

Re: Comment on Proposed Rule Docket No. FWS-HQ-ES-2025-0034

Dear Ms. Foster and Ms. Grimm,

Openlands is a not-for-profit that connects people with nature. For over sixty years we have worked to ensure nature is protected and accessible for all people. This includes protecting lands needed for the survival of endangered species.

This proposed rule is contrary to the intent of Congress and the verdict of the Supreme Court. Congress passed The Endangered Species Act of 1973 (ESA) with the plain intent to halt and reverse the trend toward species extinction, whatever the cost. To this end, the Endangered Species Act makes it unlawful for any person to, among other things, “take” any endangered species. The ESA defines the term “take” to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. While the ESA does not further define “harm”, the United States Fish and Wildlife Service (USFWS) passed regulation that defines “harm” to include significant habitat modification or degradation that actually kills or injures wildlife . Thus, under “harm” a “take” can result from both direct and indirect actions such as habitat loss. The Supreme Court

upheld this definition in the case *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 US 687 (1995) (“Sweet Home”).

Proposed Rule

Harm, as commonly used and defined by the Supreme Court, means the unintentional and accidental actions that result in the death of an individual animal. This administration is now seeking to rescind the regulatory definition of “harm” on the grounds that it somehow runs contrary to the ESA’s term “take”. The proposed rule seeks to redefine “harm” to be an affirmative act that is intended against a particular animal. This change would therefore permit the unintended or accidental killing of an endangered animal. The result of this rescission would reduce the ESA to prohibiting only actions that had the “intent” of taking an endangered species, such as hunting and trapping. Thus, rendering the ESA a mere cap on hunting, and an affront to the clear intent of Congress to reverse the trend towards species extinction, whatever the cost.

Currently under the ESA, anyone can apply for an Incidental Take Permit (ITP) to conduct an action that would likely result in the “take” of an endangered species. Many ITPs are issued for activities, like habitat loss, that predictably but unintentionally result in the death of endangered species. Obtaining an ITP is a common and established procedure that results in economic security for the permittee and further protection for the endangered species. Obtaining an ITP is, in most cases, voluntary and has not had lasting consequences on economic growth. By eliminating the definition of harm, and the means for unintentional take, ITPs would be moot and the benefit they provide to wildlife will be lost.

Unlawful Rule Making

The executive branch can not overturn a Supreme Court ruling through agency rule making. This administration attempts such executive overreach by claiming the Sweet Home case was wrongly decided. The basis for this claim of error is because the Court, amongst other reasons, deferred to the agency’s definition of “harm” in deciding the statutory term “take”. In the recent case, *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Supreme Court ruled that courts do not need to defer to agencies when interpreting statute. But the Loper ruling also made it clear that previous rulings based on such deference were still controlling through the legal doctrine of stare decisis. While stare decisis may not control the actions of an agency, agency rules that require the Supreme Court to overturn established precedent must be construed as arbitrary and capricious. Rescinding this

established definition will result in uncertainty in the law and years of costly litigation.

Gross Misconstruing of the Sweet Home Opinion

This administration's rationale for rescinding the term "harm" is faulty and misconstrues the Sweet Home opinion. In Sweet Home, the Court's verdict is only partially based on deference to agency interpretation. Several other doctrines of judicial interpretation are used by the Court to give equally strong support for their holding. Not the least of which, is that the Court found the ordinary understanding of the word "harm" naturally encompasses habitat modification. Another doctrine holds that words in a law should not be read or defined in ways that render them redundant or superfluous. The Court held that the statutory term "harm" must encompass indirect as well as direct injuries, because otherwise the word has no meaning that does not duplicate the meaning of other words that define "take", e.g. kill, hunt, etc.

In deciding that "harm" includes habitat modification, the Court reasoned, that the broad purpose of the ESA supports the decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid. In other words, Congress intended the ESA to protect habitat because it is the loss of habitat that often drives extinction. Many species in America, e.g. Carolina parakeet, Passenger pigeon, the Little Mariana fruit bat, and more, have been lost to extinction because of habitat loss and indirect actions. It would be meaningless to pass a law to prevent extinction without addressing the activities that are actually causing extinction.

This administration relies on the dissenting opinion of Sweet Home as the basis for their opinion. However, the dissenting opinion is not the law, and its legal reasoning was well refuted by the majority and concurring opinions. Reliance on the dissenting opinion is further evidence of the arbitrary capricious nature of this rulemaking.

This effort by the administration to upend established protections for endangered species is unfounded and unnecessary. In the 30 years since the Sweet Home case was decided there has not been any indication that the ESA has impeded our Country's success. Our economy has continued to grow while simultaneously protecting wildlife and species at risk of extinction. Irresponsible efforts by this administration to upend established law that protects this country's wildlife will result in costly litigation and legal uncertainty. The Supreme Court was aware of the vast range of economic and social endeavors that would be impacted by the Sweet

Home verdict. That is why the verdict included the direction for future questions of harm to be addressed in the usual course of the law, through case-by-case resolution and adjudication and should continue to be followed by the judicial and executive branches.