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July 14, 2026

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U.S. Department of the Interior
1849 C Street N.W.
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Brian Nesvik, Director
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Howard Lutnick, Secretary
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Eugenio Piñeiro Soler, Director of NOAA Fisheries
National Marine Fisheries Service
1315 East West Highway, SSMC3
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Via email and certified mail

Re: Notice of Violation of the Endangered Species Act: 2026 Rescission of ESA Harm Definitions

Dear Secretaries Burgum and Lutnick and Directors Piñeiro Soler and Nesvik:

We are writing to provide notice in accordance with the citizen suit provision of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1540(g)(2)(A)(i), that Defenders of Wildlife intends to sue the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively, "the Services") for violations of ESA section 7(a)(2), *id*. § 1536(a)(2), in connection with the issuance, on July 14, 2026, of a final rule rescinding the regulatory definitions of "harm" as used in interpreting and implementing the ESA's statutory definition of "take." Rescinding the Definition of "Harm" Under the Endangered Species Act, 91 Fed. Reg. 43300 (July 14, 2026) ("Final Rule").

Section 7 of the ESA requires consultation when an agency action may affect threatened or endangered species to ensure that the action "is not likely to jeopardize the continued existence" of any listed species "or result in the destruction or adverse modification" of their critical habitat. 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.14(a). As discussed below, consultation is required here, where the Services have rescinded the regulatory definitions of "harm" and are reinterpreting the ESA's section 9 prohibition on unauthorized take to exclude harm caused by significant habitat modification or degradation that actually injures or kills listed wildlife. 91 Fed. Reg. at 43301, 43302. This action will affect listed wildlife by, among other things, undermining ESA section 7 consultations, 16 U.S.C. § 1536(a)(2), and Incidental Take Statements, *id.* § 1536(b)(4), as well as section 10 Incidental Take Permits, *id.* § 1539(a)(1)(B), Conservation Plans, *id.* § 1539(a)(2)(A), and Safe Harbor Agreements, *id.* § 1539(a)(1)(A).

Because the Services have failed to complete section 7 consultation on the rescission and reinterpretation and thus have failed to ensure that their action is not likely to cause jeopardy or destruction/adverse modification of critical habitat, their action is unlawful and in violation of the ESA. Pursuant to section 11(g)(2)(A)(i) of the ESA, *id.* § 1540(g)(2)(A)(i), this letter provides notice that, unless the Services remedy the violations of the ESA identified herein by setting aside their Final Rule rescinding the regulatory definitions of "harm," Defenders of Wildlife intends to challenge the Services' unlawful conduct in federal district court.

I. THE SERVICES MUST CONDUCT ESA SECTION 7(a)(2) CONSULTATIONS

A. Section 7 of the ESA Requires Consultation When an Agency Action May Affect Threatened or Endangered Species or Designated Critical Habitat.

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). "The plain intent of Congress" in enacting the ESA was "to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184.

Congress enacted the ESA "to provide a program for the conservation of . . . endangered species and threatened species" and "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Congress defined "conservation" as "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"—that is, until the point of full recovery. *Id.* § 1532(3). Habitat protection is a vital component of this goal. Indeed, in passing the ESA, Congress recognized that "destruction of natural habitat" is a major cause of extinction. S. Rep. No.

93-307 (1973), *as reprinted in* 1973 U.S.C.C.A.N. 2989, 2990; *see also* 16 U.S.C. § 1533(a)(1)(A) (establishing that a species may be listed as endangered or threatened because of the "present or threatened destruction, modification, or curtailment of its habitat or range").

Courts have described section 7(a)(2) as the "heart of the ESA." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1019 (9th Cir. 2012) (quoting *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011)). To carry out section 7's substantive mandates, all federal agencies are required to consult with the appropriate federal wildlife agency—namely, FWS and/or NMFS—on any agency "action" that "may affect" listed species or designated critical habitat. 50 C.F.R. § 402.14(a); *accord W. Watersheds*, 632 F.3d at 495; *see also* 16 U.S.C. § 1536(a)(2).

1. Agency "Action" Includes the Services' Rulemakings.

An agency "action" is defined broadly and includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies[,]" including "the promulgation of regulations." 50 C.F.R. § 402.02; *see also* U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES CONSULTATION HANDBOOK, at E-6 (1998) (same). The action must also involve "discretionary Federal involvement or control." 50 C.F.R. § 402.03. This definition does not exempt actions taken by the Services themselves. In fact, the Services' Endangered Species Consultation Handbook specifically provides procedures for conducting "Intra-Service Section 7 Consultation" for actions taken by FWS and/or NMFS. CONSULTATION HANDBOOK, *supra*, at 1-5–1-6. The Handbook notes that "Intra-Service consultations and conferences will consider effects of the FWS's actions on listed, proposed and candidate species," *id.* at 1-5, and "NMFS conducts consultations on all activities that it authorizes, funds or permits that may affect listed species," *id.* at 1-6.

The Services' promulgation of a regulation rescinding the regulatory definition of harm is an agency action under section 7(a)(2). *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02.

2. The "May Affect" Threshold Is Not a High Bar.

Every federal agency, including the Services, is required to "review its 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) (emphasis added). The "may affect" threshold for triggering section 7(a)(2) consultation is "relatively low." *Karuk Tribe*, 681 F.3d at 1027 (quoting *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009)). "Any possible effect, whether beneficial, benign, adverse or of an undetermined character," triggers the consultation requirement. *Id*. (emphasis and quotation marks omitted) (quoting *Lockyer*, 575 F.3d at 1018–19). "An agency may avoid the consultation requirement only if it determines that its action will have 'no effect' on a listed species or critical habitat." *Id.*

(citing *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447–48 (9th Cir. 1996)). The action agency must consider listed species and critical habitat within the entire "action area," which is defined to include "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. "Effects of the action" include impacts that "may occur later in time" or "outside the immediate area involved in the action." *Id*.

As detailed below, the rescission of the regulatory definitions of harm clearly "may affect" threatened and endangered species and designated critical habitats. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

B. Since the Passage of the ESA, Take of Endangered Species Has Included Harm Caused by Significant Habitat Modification or Destruction.

The listing of a fish or wildlife species as endangered under the ESA triggers prohibitions under section 9 of the Act, including the prohibition on the unauthorized "take" of such species. 16 U.S.C. § 1538(a)(1)(B)–(C).[1] Prohibitions on unauthorized take may also be extended to threatened species. *See id.* § 1533(d). The ESA defines "take" broadly to mean "to harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect" a species or to attempt to do so. *Id*. § 1532(19) (emphasis added). Although "harm" and the rest of these terms are not further defined in the statute, Congress clearly instructed that they be construed broadly. *See Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 704 (1995) (quoting H.R. Rep. No. 93-412, at 15 (1973)). The Senate Report stressed that "'[t]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 93-307, at 7.

The definition of "take"—including the interpretation of "harm" as used in that definition—has implications throughout the rest of the statute. As discussed above, pursuant to section 7, federal agencies that authorize, fund, or carry out an action—action agencies—must consult with the relevant Service(s)—expert agencies—to ensure that any proposed action is not likely to "jeopardize the continued existence" of any endangered or threatened species, or destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). As part of this section 7 consultation, the expert agency prepares a Biological Opinion ("BiOp"), and if the proposed agency action will result in take that is incidental to that action, the BiOp must include "a written statement that . . . specifies the impact of such incidental taking on the species" and "those reasonable and prudent measures that . . . [are] necessary or appropriate to minimize such impact." *Id.* § 1536(b)(4)(i)–(ii).

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[1] ESA section 9 also prohibits causing another to commit unauthorized take. 16 U.S.C. § 1538(g). As such, federal and state agencies can be vicariously liable for any unauthorized take committed by permittees. *See, e.g.*, *Strahan v. Coxe*, 127 F.3d 155, 163–64 (1st Cir. 1997).

And with respect to private actions, Congress amended the ESA in 1982 to include section 10, which authorizes the Services to grant permits allowing some activity that would otherwise constitute "take." The activities that can be permitted under section 10 include those undertaken "for scientific purposes or to enhance the propagation or survival of the affected species," *id.* § 1539(a)(1)(A)—and incidental take, which is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity," *id.* § 1539(a)(1)(B). To secure an incidental take permit ("ITP") for such activity—and therefore avoid section 9 liability—an applicant must submit a conservation plan to the relevant Service for approval, which must then specify the likely impact of the incidental take and include steps "to minimize and mitigate" the impact. *Id.* § 1539(a)(2)(A)(i)–(ii). Conservation plans under section 10(a)(1)(B) are often referred to as "habitat conservation plans" ("HCPs"). U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK, at 1-2 (2016).

Consistent with the statute, the Services' regulations have defined "harm" to include killing or injuring endangered species through significant habitat modification or degradation for decades. *See Sweet Home*, 515 U.S. at 691 n.2 (citing Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44,412, 44,416 (Sept. 26, 1975)); *see also* Final Redefinition of "Harm," 56 Fed. Reg. 54,748, 54,750 (Nov. 4, 1981) (FWS's 1981 definition of "harm" prohibiting "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering," formerly codified at 50 C.F.R. § 17.3); Definition of "Harm," 64 Fed. Reg. 60,727, 60,731 (Nov. 8, 1999) (NMFS's parallel definition of "harm," prohibiting the impairment of "breeding, spawning, rearing, migrating, feeding or sheltering," formerly codified at 50 C.F.R. § 222.102). In 1995, the Supreme Court upheld the FWS regulation defining "harm", and particularly its inclusion of habitat modification or degradation in the definition of harm, based on "the text, structure, and legislative history of the ESA." *Sweet Home*, 515 U.S. at 696–704.

But now the Services have rescinded those regulatory definitions and have interpreted "harm" to *exclude* significant habitat modification and destruction that kills or injures wildlife. 91 Fed. Reg. at 43301, 43302. This change significantly weakens all of the ESA protections that are based on the statute's fundamental prohibition of unauthorized "take." In spite of the obvious and foreseeable negative implications for imperiled wildlife and critical habitat, the Services have completely failed to conduct the required section 7 analysis of these effects to ensure that the Final Rule is not likely to jeopardize listed species or destroy or adversely modify critical habitat.

C. The Impacts of the Rescission Pose a Significant Threat to the Survival and Recovery of Endangered (and Many Threatened) Species.

Habitat is essential to the life functions of all listed species and weakening the ESA provisions that have been used for decades to protect species from take by protecting their habitat will directly impede the survival and recovery of listed species. In the United States, habitat loss is a driver of biodiversity loss for 90% of species listed as threatened or endangered under the ESA—over 1,400 listed species. Talia E. Niederman et al., *US Imperiled Species and the Five Drivers of Biodiversity Loss*, 75 BIOSCIENCE 524, 526 (2025). As Defenders of Wildlife explained to the Services in our comments on the proposed rule, to destroy habitat or alter it to the point where it no longer functions healthily is to remove the ability of resident species to thrive. Defenders of Wildlife, Comment Letter on Proposal to Rescind the Definition of Harm Under the ESA, FWS-HQ-ES-2025-0034-223181, at 2–6 (May 19, 2025) (Attachment A).[2] This is the very essence of harm that the ESA was intended to prevent.

In our comments on the proposed rescission, Defenders of Wildlife explained that although all species rely on habitat for survival, the link between habitat destruction and injury or death is even stronger for those species that have very specific needs for essential behavioral patterns, including sheltering, feeding, migrating, or breeding. *See id.* at 6–9 (discussing the red-cockaded woodpecker, Florida manatee, and anadromous fish). Indeed, this connection has been repeatedly acknowledged in the Services' own analyses, *e.g.*, U.S. FISH & WILDLIFE SERV., BIOLOGICAL OPINION FOR THE REINITIATION OF CONSULTATION FOR ONGOING LIVESTOCK MANAGEMENT ON THE SACRAMENTO AND DRY CANYON ALLOTMENTS, at 26 (2021), as well as in numerous court cases, *see e.g.*, *Sierra Club v. Yeutter*, 926 F.2d 429, 438 (5th Cir. 1991); *United States v. Plymouth*, 6 F. Supp. 2d 81, 83–84, 91 (D. Mass. 1998). The Services, however, issued the Final Rule without analyzing any of its potential effects on listed species or their critical habitats. As a result, the Services have not properly grappled with the likely impacts of this rescission—the weakening of several key ESA tools for protecting species by protecting their habitats—nor have they ensured that their action will not likely jeopardize the continued existence of listed species or destroy or adversely modify critical habitat.

1. Consultations on Future Federal Agency Action Will Be Incomplete and Fail to Ensure That Those Actions Will Satisfy ESA Section 7(a)(2)'s Substantive Obligations.

Excluding habitat modification and degradation from the definition of "harm" will result in incomplete jeopardy determinations because the Services will not consider habitat-based take as part of their analysis. Bats provide a clear example. As the Vermont Fish & Wildlife Department explained in its comment on the proposed rule, ESA-listed bat species rely on caves for survival during winter months, and "these caves could be destroyed during the part of the year when bats are not using them." Vt. Fish & Wildlife Dep't, Comment Letter on Proposal to Rescind the Definition of Harm Under the ESA, FWS-

[2] These comments are attached and hereby incorporated by reference.

HQ-ES-2025-0034-146385, at 3 (May 15, 2025) (Attachment B). Destroying their caves "will definitively result in the loss of habitat necessary to [the bats'] survival, and result in the further loss of these populations already decimated by disease." *Id.*; *see also* Mo. Dep't of Conservation, Comment Letter on Proposal to Rescind the Definition of Harm Under the ESA, FWS-HQ-ES-2025-0034-232871, at 2–3 (May 19, 2025) (Attachment C) (discussing the impact of the rescission on bats and pollinators). But despite the obvious injury to imperiled bat populations, the off-season destruction of caves would not qualify as "harm," and thus "take," under the Services' new interpretation of the ESA. Because FWS consultation on agency action destroying or adversely modifying temporarily unoccupied caves would not consider the impact of this habitat loss once winter comes, any jeopardy determination would be incomplete.

Similarly, failure to consider the impacts of habitat loss will result in the Services producing deficient Incidental Take Statements ("ITSs"). The ESA requires that, when consulting on agency actions, the relevant Service must produce an ITS that "specifies the impact of such incidental taking of the species." 16 U.S.C. § 1536(b)(4)(i). The ITS also must include "reasonable and prudent measures . . . necessary or appropriate to minimize [the] impact" of the incidental take, *id*. § 1536(b)(4)(ii), as well as "terms and conditions" to implement those measures, *id*. § 1536(b)(4)(vi). If the Services do not analyze take from habitat degradation or modification, an ITS will not accurately describe the impacts of incidental take on the species. Nor will the ITS include reasonable and prudent measures necessary to minimize the impact of the project, because the Services will not develop such measures for habitat-based take. Such shortcomings will violate the ESA and weaken the ITS as a tool to ensure agency actions and any resulting incidental take comply with the substantive obligations of section 7(a)(2).

2. Incentives for Essential Tools for Conserving Habitat on Private Land Will Disappear.

Further, the rescission will weaken the ESA's key tools for habitat protection on private land: HCPs and Conservation Benefit Agreements, which were formerly known as safe harbor agreements ("SHAs"), and candidate conservation agreements ("CCAs"). As the Georgia Department of Natural Resources explained, increases in red-cockaded woodpecker populations that recently resulted in the downlisting of the red-cockaded woodpecker from endangered to threatened were made possible because of the deployment of tools that incentivize states and private landowners to address habitat loss, including HCPs, SHAs, and CCAs. Ga. Dep't of Nat. Res., Comment Letter on Proposal to Rescind the Definition of Harm Under the ESA, FWS-HQ-ES-2025-0034-232786 (Apr. 22, 2025) (Attachment D). Wildlife managers agree, however, that the Services' rescission and reinterpretation undermines these tools by removing the incentive to conserve habitat.

See, e.g., *id*.; Ariz. Game & Fish Dep't, Comment Letter on Proposal to Rescind the Definition of Harm Under the ESA, FWS-HQ-ES-2025-0034-213026, at 2 (May 19, 2025) (Attachment E); N.D. Game & Fish Dep't, Comment Letter on Proposal to Rescind the Definition of Harm Under the ESA, FWS-HQ-ES-2025-0034-232778, at 2 (May 19, 2025) (Attachment F). HCPs, SHAs, and CCAs work by assuring private landowners that they will not be liable for the incidental take of listed species, in exchange for undertaking measures that protect habitat on their land. If habitat degradation and modification are no longer considered forms of take, that incentive to conserve habitat goes away. For example, without the threat of liability for take caused by habitat-based harm, many landowners will have no incentive to get ITPs that incorporate HCPs.

The Services have failed to analyze how the loss of these tools will affect the survival and recovery of listed species. And even though the Services state that the rule is only setting prospective standards, at the very least there are several proposed HCPs that will be immediately affected by the Services' rescission, yet the Services have failed to consider even this smaller universe of impacts via section 7(a)(2) consultation. The Services, therefore, cannot ensure that the Final Rule is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species as required by law. *See* 16 U.S.C. § 1536(a)(2).

3. Example: Northern Spotted Owl

The impacts of the Services' rescission and reinterpretation can be understood by examining the Final Rule's likely consequences for the Northern Spotted Owl. The Northern Spotted Owl is listed as threatened under the ESA and depends on old growth forests for its survival. In 1994, the U.S. Forest Service ("USFS") developed the Northwest Forest Plan ("NWFP") to strike a balance between timber production and protecting the habitat of threatened and endangered species, including the Northern Spotted Owl. USFS is currently amending the NWFP to allow for more timber production from old growth stands. As an agency action that may affect listed species, the NWFP Amendment is subject to section 7 consultation under the ESA to ensure that it will not likely jeopardize the continued existence of listed species like the Northern Spotted Owl or destroy or adversely modify its critical habitat.

Under the now-rescinded regulatory definition of harm, the FWS's section 7 analysis would have included an examination of the number of Northern Spotted Owls that would be killed or injured due to habitat loss that results from the clearing of more trees. But under the new interpretation, it will not. Consequently, the FWS's BiOp will suffer from an incomplete analysis and the USFS will not be able to rely on it to satisfy its substantive obligation to ensure that the NWFP Amendment is not likely to jeopardize the continued existence of the Northern Spotted Owl or destroy or adversely modify the species' critical habitat. Nor will the BiOp's ITS require USFS to take reasonable and prudent measures to minimize the impact of incidental take caused by the habitat destruction that will result from the NWFP Amendment.

Additionally, the Final Rule creates regulatory uncertainty for states and private landowners, thereby threatening the survival and recovery of the Northern Spotted Owl. For example, the Programmatic SHA for Northern Spotted Owls provides ESA regulatory assurances to landowners in exchange for conserving owl habitat. *See* State of Oregon, Comment Letter on Proposal to Rescind the Definition of Harm Under the ESA, FWS-HQ-ES-2025-0034-232778, at 2 (May 15, 2025) (Attachment G). But the Services' rescission and reinterpretation undermines the SHA's incentive structure and will likely result in less conservation of Northern Spotted Owl habitat on private land.

Thus, the Final Rule easily satisfies the low threshold for ESA section 7 consultation. "Only if an agency determines that its action will have no effect on listed species or critical habitat can it dispense with consultation." *Growth Energy v. Env't Prot. Agency*, 5 F.4th 1, 30 (D.C. Cir. 2021). The Final Rule alters 50 years of interpreting the ESA to include prohibition on unauthorized take that kill or injure endangered species through significant habitat modification or degradation. Additionally, the Final Rule significantly changes the way the Services discharge their duties under the ESA: they no longer consider significant habitat modification or degradation to be a "take" that, if unauthorized, violates section 9, or that triggers conservation requirements under section 7 or section 10. This is an action that requires consultation.

II. CONCLUSION AND REMEDY

As set forth in this letter, the Services' Final Rule rescinding the regulatory definitions of "harm" and reinterpreting "harm" to exclude injury and death caused by significant habitat modification or degradation constitutes an agency action that may affect more than a thousand listed species. The Services have unlawfully failed to complete an ESA section 7(a)(2) consultation prior to issuing the Final Rule and unlawfully failed to ensure that their action is not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. The appropriate remedy is for the Services to revoke the Final Rule until they have completed consultation and ensured that they can proceed without violating section 7(a)(2). Until such time, the Services remain in ongoing violation of the ESA. If the Services are unwilling to take appropriate action to comply with the ESA requirements discussed in this letter, we plan to seek redress through litigation.

Please feel free to contact the undersigned counsel if you would like to discuss resolving this issue prior to litigation commencing.

Sincerely,

Erica Pencak
Senior Attorney

Jane P. Davenport
Senior Attorney