May 19, 2025

Submitted Via Regulations.gov

The Honorable Doug Burgum
Secretary
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

The Honorable Howard Lutnick
Secretary
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

Re: Rescinding the Definition of ''Harm'' Under the Endangered Species Act, FWS-HQ-ES-2025-0034, 90 Fed. Reg. 16,102 (April 17, 2025)

Dear Secretary Burgum and Secretary Lutnick:

I write on behalf of Americans for Prosperity Foundation ("AFPF"), a 501(c)(3) nonpartisan organization that educates and trains citizens to be advocates for freedom, creating real change at the local, state, and federal levels. AFPF appreciates the opportunity to comment on the proposal by U.S. Fish and Wildlife Service ("USFWS") and National Marine Fisheries Service ("NMFS") to remove the definition of "harm" from 50 C.F.R. § 17.3 and 50 C.F.R. § 222.102 in furtherance of President Trump's directives.[1]

AFPF applauds President Trump and the Services' efforts to right-size and streamline the federal government's implementation of the Endangered Species Act ("ESA"),[2] consistent with the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*[3] and the Executive Branch's constitutional obligations under the Take Care Clause.[4] AFPF supports the Services' proposal to rescind the regulatory definition of "harm." AFPF agrees that the ESA adequately defines "take" and thus "further elaborating on one subcomponent of that definition—'harm'—is unnecessary in light of the comprehensive statutory definition."[5]

I. *Loper Bright* Justifies Returning To The ESA's Statutory Definition of "Take."

The Supreme Court's landmark decision in *Loper Bright* supports the Services' proposal to remove the definition of "harm" from their regulations and stand on the statutory definition of

[1] *See* E.O. 14219 § 2, 90 Fed. Reg. 10,583, 10,583 (Feb. 19, 2025); Presidential Memorandum Re: Directing the Repeal of Unlawful Regulations (Apr. 9, 2025).

[2] 16 U.S.C. § 1531 *et seq*.

[3] 603 U.S. 369 (2024).

[4] *See* U.S. Const. art. II, § 3.

[5] 90 Fed. Reg. 16,102, 16,104 (April 17, 2025); *see* 16 U.S.C. § 1532(19) (defining "take" using list of examples).

"take." *Loper Bright* squarely overturned the *Chevron* doctrine—a legal fiction that held that statutory silence or ambiguity reflected an implicit delegation of interpretive power to agencies to fill in the gaps in Congress's legislative handiwork and make policy choices announced in binding legislative rules.[6] Under *Chevron*, ambiguous statutory provisions could be given multiple meanings by federal agencies, and an agency's interpretation was entitled to judicial "deference" so long as it was sufficiently plausible to reflect a "permissible" or "reasonable"—as opposed to the best—one.[7] In effect, *Chevron* transferred the power to say what the law is from independent Article III courts to Article II executive agencies.[8] Where it applied, *Chevron* forced a court to defer to an agency's views on what the law is even when the agency's interpretation of a statute was not the best reading.[9] *Chevron* allowed agencies to make policy choices carrying the force of law even in the absence of congressional authorization in the form of an actual delegation of discretionary authority by Congress.[10] As *Loper Bright* makes clear, federal statutes "do—in fact, must—have a single, best meaning," which "is fixed at the time of enactment."[11] And under *Loper Bright*, if an interpretation of a statute "is not the best, it is not permissible."[12]

Federal agencies must respect and follow the best reading their organic statutes. Agencies are creatures of statute, which possess only those powers Congress chooses to confer upon them,[13] subject to constitutional limits.[14] They "literally ha[ve] no power to act" absent congressional authorization.[15] Before *Loper Bright*, the *Chevron* doctrine allowed agencies to exercise discretionary authority under the guise of resolving statutory ambiguity "even when Congress has given them no power to do so."[16] In the wake of *Loper Bright*, federal regulations and other agency statutory interpretations that could only be defended under the *Chevron* regime as "permissible" interpretations of putatively ambiguous statutory provisions—but which depart from the statute's single best meaning—cannot be grounded in an actual statutory delegation of discretion and thus fall outside of the agency's statutory authority.[17] This holds true regardless of how long such

---

[6] *Loper Bright*, 603 U.S. at 412. For an insightful overview of *Loper Bright*'s impact on statutory interpretation, *see generally* Eric Bolinder, *Litigating* Loper Bright*: Interpretive Challenges and Solutions for the Post-*Chevron *Era* (April 04, 2025) (128 W. Va. L. Rev. ____ (2025) (forthcoming)), https://ssrn.com/abstract=5205437.

[7] *See Chevron, U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837, 843–44 & n.11 (1984), *overruled by Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024); *see also Michigan v. EPA*, 576 U.S. 743, 762 (2015) (Thomas, J., concurring).

[8] *See Loper Bright*, 603 U.S. at 413–16 (Thomas, J., concurring); *see also id.* at 433, 435 (Gorsuch, J., concurring).

[9] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016).

[10] *See Loper Bright*, 603 U.S. at 411. *Chevron* also displaced the rule of lenity—the principle that ambiguities in criminal statutes should be construed narrowly—allowing the government to demand deference for broad statutory interpretations. *See, e.g*., *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or*., 515 U.S. 687, 704 n.18 (1995); *see Loper Bright*, 603 U.S. at 434 (Gorsuch, J., concurring) (describing lenity as "another of *Chevron*'s victims").

[11] *See Loper Bright*, 603 U.S. at 400.

[12] *Id.*

[13] *See FEC v. Cruz*, 596 U.S. 289, 301 (2022); *see also West Virginia v. EPA*, 597 U.S. 697, 722–23 (2022).

[14] *See Loper Bright*, 603 U.S. at 395.

[15] *Cruz*, 596 U.S. at 301; *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A]n administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

[16] *Loper Bright*, 603 U.S. at 411.

[17] *Loper Bright* rejected the idea that ambiguities in federal statutes are implicit delegations of interpretive authority to agencies, *see id.* at 399, as well as the notion that resolving ambiguities requires making policy judgments that

interpretations have been on the books and irrespective of whether prior judicial decisions have upheld specific agency actions based on granting *Chevron* deference to agency constructions.[18]

The President, though his subordinates in Executive Branch agencies, is constitutionally required to "take Care that the Laws" he is tasked by Congress with implementing "be faithfully executed[.]"[19] The public interest also plainly requires that agencies comply with their organic statutes.[20] Consistent with these principles, to the extent the Services conclude that their regulatory definition of "harm" unnecessarily expands upon the statutory text in a way that is unlikely to survive judicial review after *Loper Bright*, the proper course of action is to rescind that definition and stand on the statutory definition of "take," as the Services propose to do.[21]

II. The Courts And The Services Arrived At The Current Definition of "Harm" Without Attempting to Determine The ESA's Single Best Meaning.

The ESA prohibits "takes" of listed threatened or endangered species without a permit.[22] Congress defined the statutory term "take" to "mean[] to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[23] The Services have provided interpretive gloss on the word "harm" in the statutory definition of "take" to "include significant habitat modification or degradation" and extend to activities "significantly impairing essential behavioral patterns" of listed species.[24] Violations of this prohibition carry both civil and criminal penalties, including imprisonment.[25]

In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Supreme Court upheld the USFWS's interpretation of "harm" by relying on *Chevron* and concluding that "Congress did not unambiguously manifest its intent to adopt" a narrower reading of "harm" to exclude habitat modification and that USFWS's broader reading was "reasonable."[26] In doing so,

---

should be made by agencies, *see id.* at 403. As *Loper Bright* teaches, "statutory ambiguity . . . is not a reliable indicator of actual delegation of discretionary authority to agencies." *Id.* at 411.

[18] *See, e.g.*, *In re MCP No. 185*, 124 F.4th 993, 1002–03 (6th Cir. 2025); *see United States v. Trumbull*, 114 F.4th 1114, 1125 (9th Cir. 2024) (Bea, J., concurring in judgment); *Tennessee v. Becerr*a, 131 F.4th 350, 373–74 (6th Cir. 2025) (Kethledge, J., dissenting in part, concurring in judgment in part).

[19] U.S. Const. art. II, § 3. The President has directed agencies to identify "regulations that are based on anything other than the best reading of the underlying statutory authority or prohibition[.]" E.O. 14219, 90 Fed. Reg. at 10,583.

[20] *See Odebrecht Constr. v. Sec'y, Fla. DOT*, 715 F.3d 1268, 1290 (11th Cir. 2013); *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations.").

[21] *See* 90 Fed. Reg. at 16,103.

[22] 16 U.S.C. § 1538(a)(1)(B)–(C).

[23] *Id.* § 1532(19). This statutory definition reflects an "unusually specific recitation by Congress of its intent[.]" *Sweet Home Chapter of Cmtys. for a Great Or. v. Babbitt*, 1 F.3d 1, 12 (D.C. Cir. 1993) (Sentelle, J., dissenting), *opinion modified on reh'g*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 515 U.S. 687 (1995).

[24] *See* 50 C.F.R. §§ 17.3, 222.102.

[25] 16 U.S.C. §§ 1540(a)(1), (b)(1).

[26] 515 U.S. at 703–04. The *Sweet Home* majority "deferred, with scarcely any explanation, to" USFWS's interpretation even though violations of the ESA can carry criminal penalties, "brush[ing] the rule of lenity aside in a footnote[.]" *Whitman v. United States*, 574 U.S. 1003, 1005 (2014) (Scalia, J., statement respecting the denial of certiorari). *Sweet*

the *Sweet Home* Court afforded deference to the USFWS's interpretation of the scope of its power under the ESA.[27] Now that, after *Loper Bright*, courts no longer ask whether Congress unambiguously foreclosed an agency's interpretation and no longer defer to agency interpretations,[28] the existing regulatory definition of "harm" rests on shaky ground.[29]

Under *Loper Bright*, the meaning of the word "harm" in the statutory definition of "take" is not a "complex policy choice" left to agency policymaking discretion but is instead a pure question of statutory interpretation.[30] While the word "harm" can carry a range of meanings, the standard tools of statutory construction help ascertain its original public meaning at the time of enactment. Canons like *noscitur a sociis* teach that words in a list that have something in common should be read in a similar manner.[31] The interpretative project is also informed by the ESA's structure and the rule of lenity.[32] And given that land-use regulation "lies at the core of traditional state authority," federalism principles also come into play.[33]

The Services should jettison the current regulatory definition of "harm" and return to the proper method of statutory interpretation whereby agencies, the courts, and the public interact to apply the proper canons of construction to arrive at the correct meaning of that term. Nothing in the ESA requires the Services to issue a legislative rule defining the word "harm," which is simply a subcomponent of the ESA' statutory definition of "take."[34] Allowing Congress's uncharacteristically specific statutory definition to stand on its own terms without any regulatory gloss, at minimum, fits comfortably within the ESA.

For the foregoing reasons, the Services should amend 50 C.F.R. § 17.3 and 50 C.F.R. § 222.102 to remove the definition of "harm" and stand on the statutory definition of "take." If you

---

Home cited 16 U.S.C. §§ 1533 and 1540(f) as support for its claim that the ESA delegates "broad . . . interpretive power to the Secretary." 515 U.S. at 708. But the majority did not discuss or analyze the text of those provisions and did not independently determine and fix the boundaries of the USFWS's interpretive discretion under the ESA, *see id.*, as *Loper Bright* now requires, 603 U.S. at 395; *see, e.g.*, *Moctezuma-Reyes v. Garland*, 124 F.4th 416, 420–21 (6th Cir. 2024); *Tex. Med. Ass'n v. United States HHS*, 110 F.4th 762, 774–75 (5th Cir. 2024). *Cf. Ryan LLC v. FTC*, 746 F. Supp. 3d 369, 382–85 (N.D. Tex. 2024).

[27] *Sweet Home*, 515 U.S. at 703, 708.

[28] *See Loper Bright*, 603 U.S. at 400, 412–13.

[29] *See generally Sweet Home*, 515 U.S. at 714–36 (Scalia, J., dissenting).

[30] *Compare id.* at 708 (majority op.), *with Loper Bright*, 603 U.S. at 401–02.

[31] *See* Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts § 31 p.195 (2012); *see also Dubin v. United States*, 599 U.S. 110, 124–25 (2023).

[32] *See United States v. Santos*, 553 U.S. 507, 514 (2008) (discussing lenity). The *Sweet Home* majority relied, in part, on "the broad purpose of the ESA" and its " legislative history" to uphold USFWS's "harm" definition. *See* 515 U.S. at 698, 704. That approach to statutory interpretation is at odds with textualism, *see Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018); *Slack Techs., LLC v. Pirani*, 598 U.S. 759, 769 (2023), and the rule of lenity, *see Hughey v. United States*, 495 U.S. 411, 422 (1990).

[33] *Sackett v. EPA*, 598 U.S. 651, 679 (2023); *see id.* at 708–09 (Thomas, J., concurring).

[34] After *Loper Bright*, the extent to which, if at all, the ESA textually delegates discretion to the Services to issue binding legislative rules altering the statutory definition of "take" may warrant a through statutory investigation. *Cf.* Laura Myron, Chevron *Deference and Interpretive Authority After* City of Arlington v. FCC, 38 Harv. Envtl. L. Rev. 479, 488 (2014) (arguing *Sweet Home* may have been decided differently without *Chevron* because the Court "could determine under the statute that the best reading of the ESA is that Congress did not intend to delegate interpretive authority over the Act's definition sections").

have questions about this comment, please contact me at mpepson@afphq.org. Thank you for your attention to this matter.

Sincerely,

/s/ Michael Pepson
Michael Pepson
Americans for Prosperity Foundation
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-4529
mpepson@afphq.org