

The Hon. Tiffany M. Cartwright

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

CENTER FOR BIOLOGICAL DIVERSITY,
COLUMBIA RIVERKEEPER,
CONSERVATION LAW FOUNDATION,
CONSERVATION NORTHWEST, FRIENDS
OF THE WILD SWAN, OREGON WILD,
SIERRA CLUB, SWAN VIEW COALITION,
and WILDEARTH GUARDIANS,

Plaintiffs,

vs.

DOUGLAS BURGUM, Secretary of the
Interior; KEVIN LILLY, Principal Deputy
Assistant Secretary for Fish and Wildlife and
Parks; U.S. FISH AND WILDLIFE SERVICE;
HOWARD LUTNICK, Secretary of Commerce;
TIMOTHY R. PETTY, Assistant Secretary of
Commerce for Oceans and Atmosphere and
Deputy NOAA Administrator; and NATIONAL
MARINE FISHERIES SERVICE,

Defendants.

No. 2:26-cv-02474-TMC

**[PROPOSED] FIRST
SUPPLEMENTAL COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

SUPPLEMENTAL COMPLAINT AND AGENCY ACTIONS

Pursuant to Fed. R. Civ. P. 15(d) and Local Rule 15(a), Plaintiffs Center for Biological Diversity *et al.* supplement their First Amended Complaint for Declaratory and Injunctive Relief, filed September 14, 2026, with this First Supplemental Complaint to address subsequent actions by Federal Defendants. Specifically, on September 14, 2026, Brian Nesvik, Director of the U.S. Fish and Wildlife Service, issued a legal memo to “FWS Directorate” on the “Scope of the Endangered Species Act’s ‘take’ prohibition following the Harm Rule (91 Fed. Reg. 43300),” and John Luce, General Counsel, National Oceanic and Atmospheric Administration, issued the same memo to eight sections within the agency (collectively the “Take Memos”). This First Supplemental Complaint adds review of the Take Memos to the claims in the First Amended Complaint concerning Federal Defendants’ recission of the harm rule, 91 Fed. Reg. 43300, for violations of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*¹

INTRODUCTION

1. For fifty years, common sense, biological science, and federal law have agreed on an overarching concept in the protection of fish and wildlife: any activity that destroys the habitat where imperiled fish and wildlife shelter, sleep, feed, or raise their young just as plainly destroys the species itself. When a dam blocks stream passage, threatened and endangered salmon suffer; when forests with nesting trees for marbled murrelets are logged, threatened

¹ In accordance with Local Rule 15(a), Plaintiffs have not incorporated by reference any part of the preceding pleading, including exhibits. Added text is highlighted in yellow; deleted text is struck through.

1 murrelets slide closer to extinction. Destruction and degradation of habitat kills threatened and
2 endangered species just as surely as shooting them. Now, however, Federal Defendants have
3 arbitrarily abandoned that fundamental concept.

4 2. This suit challenges the Federal Defendants’ rescission of the regulatory
5 definition of “harm” in the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*—a
6 rescission that defies the text and purpose of the statute, fifty years of administrative policy, and
7 U.S. Supreme Court precedent.

8 3. Since 1973, the ESA has served as the nation’s most effective conservation law,
9 saving numerous imperiled species from extinction and moving them toward recovery. In the
10 ESA, Congress affirmed our nation’s commitment to the conservation of threatened and
11 endangered species and their habitats—the forests, grasslands, prairies, rivers, lakes, and seas
12 that these species need to survive. Both the statutory text and legislative history demonstrate
13 Congress’s understanding that habitat destruction is a chief threat to imperiled species. Congress
14 committed the nation to countering that threat. The Act’s overarching purpose is “to provide a
15 means whereby the *ecosystems* upon which endangered species and threatened species depend
16 may be conserved.” 16 U.S.C. § 1531(b) (emphasis added).

17 4. As one means to accomplish this objective, the ESA prohibits the “take” of
18 endangered and threatened wildlife, which is defined by statute to include “harm.” *Id.* §
19 1532(19). From 1975 to 2026, the U.S. Fish & Wildlife Service (“FWS”)—which jointly
20 administers the ESA with the National Marine Fisheries Service (“NMFS”)—defined “harm” by
21 regulation to include habitat destruction. Last amended in 1981, FWS’s definition of “harm”
22 included “significant habitat modification or degradation where it actually kills or injures
23 wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or

1 sheltering.” 50 C.F.R. § 17.3. This definition reflected the scientifically proven and common-
2 sense principle that a species can be driven to extinction by acts that destroy its habitat without
3 the direct application of force to members of the listed species; the definition also recognized
4 that the ESA was intended to prevent that outcome.

5 5. In 1995, the Supreme Court upheld FWS’s definition of “harm,” explaining that
6 “an ordinary understanding of the word ‘harm’ supports it,” “the broad purpose of the ESA
7 supports” it, and a 1982 amendment to the Act “strongly suggests that Congress understood [the
8 Act] to prohibit indirect as well as deliberate takings.” *Babbitt v. Sweet Home Chapter of Cmty.*
9 *for a Great Oregon*, 515 U.S. 687, 697–700 (1995).

10 6. NMFS promulgated a definition of “harm” in 1999 that substantively mirrored the
11 FWS definition. NMFS’s definition included “significant habitat modification or degradation
12 which actually kills or injures fish or wildlife by significantly impairing essential behavioral
13 patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R.
14 § 222.102.

15 7. This legal protection against significant habitat destruction that kills or injures
16 endangered wildlife has proven essential to the ESA’s effectiveness at preventing the extinction
17 of imperiled species and promoting their recovery. It ensures, for example, that the dam blocking
18 salmon migration, the logging project that cuts down a tree for nesting owls, and the oil and gas
19 development in Alaska that disturbs polar bears are regulated in the interest of species
20 conservation, just as the direct killing of these species would be. In practice, including such
21 activities within the ESA’s regulatory ambit means that species are not driven to extinction by
22 “take” that is incidental to a commercial or industrial project’s execution. At the same time, the
23 Act provides a reasonable pathway for such projects to proceed if they “minimize and mitigate”

1 their impacts and do “not appreciably reduce the likelihood of the survival and recovery of the
2 species in the wild.” 16 U.S.C. §§ 1536(b)(4), 1539(a)(2)(B).

3 8. On July 10, 2026, FWS and NMFS (collectively, the “Services”) signed the repeal
4 of their respective regulatory definitions of “harm,” with publication in the Federal Register on
5 July 14, 2026. *See* Rescinding the Definition of “Harm” Under the Endangered Species Act, 91
6 Fed. Reg. 43300 (July 14, 2026) (“Rescission”). Defying clear congressional intent and Supreme
7 Court precedent, the Services claimed that the Rescission was compelled because their
8 regulatory definitions did not represent the “best reading” of the statute. *Id.* at 43301. They
9 sought to justify their action under the Supreme Court’s recent ruling in *Loper Bright Enterprises*
10 *v. Raimondo*, 603 U.S. 369 (2024), which affirmed the judiciary’s central role in statutory
11 interpretation. Yet they disregarded *Loper Bright*’s affirmance of statutory *stare decisis*
12 principles, and more fundamentally, advanced an Executive Branch interpretation of statutory
13 terminology based on “individual policy preferences”—the very sort of interpretation that *Loper*
14 *Bright* rejected. *Id.* at 403.

15 9. Far from reflecting a “judgment of the Judiciary,” as *Loper Bright* prescribes, *id.*
16 at 386, the Services’ proffered statutory interpretation underlying the Rescission adopted the
17 *dissenting view* from the Supreme Court’s *Sweet Home* decision as the law of the land. Under
18 this view, the term “harm” in the ESA’s definition of “take” applies only to an affirmative action
19 “directed immediately and intentionally against a particular animal”—e.g., wounding, trapping,
20 or killing. *Sweet Home*, 515 U.S. at 720 (Scalia, J., dissenting). Yet the *Sweet Home* majority
21 rejected the dissent’s limited reading on the basis of the language, structure, and legislative
22 history of the ESA. *See id.* at 696–708. Contrary to any logical reasoning, the Services’
23

1 Rescission—adopted as the “single, best meaning of the statute,” 91 Fed. Reg. at 43301—is the
2 interpretation already rejected by a majority of justices of the U.S. Supreme Court.

3 10. In their Rescission, the Services did not promulgate a new regulatory definition of
4 “harm,” instead asserting, “Given that ‘take’ is defined in the statute, and that the role and
5 meaning of the term ‘harm’ within the larger definition of ‘take’ was expertly explicated by
6 Justice Scalia in his *Sweet Home* dissent— an interpretation which we have herein adopted—we
7 find that maintaining a freestanding definition of ‘harm’ is unnecessary.” *Id.* at 43302. But even
8 in the absence of a replacement definition, the Services intended to “mak[e] clear that habitat
9 modification or degradation does not qualify as ‘take.’” *Id.* at 43306.

10 11. The Rescission discards a longstanding and critical regulatory protection for
11 imperiled wildlife based upon an irrational and unsupported interpretation of the ESA that would
12 undermine the Act’s extraordinary record of success in preventing the extinction of and
13 recovering threatened and endangered species. The Rescission violates the plain language and
14 overarching purpose of the ESA; it also lacks any reasoned basis and is arbitrary and capricious
15 under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 *et seq.*

16 12. Additionally, the Services failed to consider and disclose the significant
17 environmental impacts from the Rescission in violation of the National Environmental Policy
18 Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.* The Rescission is not compelled by statute, nor is it
19 “nondiscretionary,” 91 Fed. Reg. at 43307, and it will have significant impacts on the human
20 environment. The Rescission also raises extraordinary circumstances, barring the use of a
21 categorical exclusion to avoid NEPA analysis, contrary to the Services’ explanation. *See id.* at
22 43306–07.

1 13. The Services also violated ESA Section 7, 16 U.S.C. § 1536, by failing to engage
2 in consultation regarding the impacts of the Rescission on imperiled species and their critical
3 habitat—an essential step that the ESA mandates to ensure that federal agencies avoid actions
4 that are likely to jeopardize listed species or impair the habitat they need for survival and
5 recovery.

6 14. To remedy these violations of law, Plaintiffs seek an order from this Court
7 declaring the Rescission invalid, vacating the Rescission, prohibiting reliance on the Rescission,
8 and reinstating the regulatory definitions of “harm” that guided the Services’ administration of
9 the ESA for over fifty years.

10 15. Additionally, on September 14, 2026, Brian Nesvik, Director of the U.S. Fish and
11 Wildlife Service, issued a legal memo to “FWS Directorate” on the “Scope of the Endangered
12 Species Act’s ‘take’ prohibition following the Harm Rule (91 Fed. Reg. 43300)” (“Nesvik
13 Memo,” attached as Exhibit C), and John Luce, General Counsel, National Oceanic and
14 Atmospheric Administration (“NOAA”), issued an identical memo to eight agency sections
15 (“Luce Memo,” attached as Exhibit D). These memos (collectively, the “Take Memos”) expand
16 upon the Rescission by misinterpreting the statutory term of “take” to solely include intentional,
17 affirmative conduct that has the purpose of hurting the imperiled animal.

18 16. The Take Memos violate the plain language and overarching purpose of the ESA;
19 they also lack any reasoned basis, are arbitrary and capricious, and failed to comply with
20 applicable notice-and-comment rulemaking requirements under the APA. To remedy these
21 violations of law, Plaintiffs seek an order from this Court declaring the Memos invalid, vacating
22 the Memos, and prohibiting the Services from relying on the Memos and their interpretation of
23 statutory language.

JURISDICTION AND VENUE

17. This action is brought pursuant to the APA, 5 U.S.C. §§ 701–706, and the ESA, 16 U.S.C. § 1540(g)(1), which waive the Federal Defendants’ sovereign immunity. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question). Pursuant to 16 U.S.C. § 1540(g)(2), Plaintiffs provided 60 days’ notice of intent to sue to the Services for failure to consult on the Rescission in violation of ESA Section 7(a)(2) on July 14, 2026. A copy of the notice letter is appended as Exhibit A.

18. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3), as at least one of Plaintiffs is headquartered in this district, Plaintiffs have members and offices in this district, and many of the consequences of the Federal Defendants’ violations of the law giving rise to Plaintiffs’ claims occur or will occur in this district.

PARTIES

19. Plaintiffs in this action are:

A. CENTER FOR BIOLOGICAL DIVERSITY (“Center”), a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center is incorporated in California and headquartered in Tucson, Arizona, with field offices throughout the United States and Mexico, including in Seattle, Washington. The Center’s mission is tied to the belief that the welfare of human beings is deeply linked to nature—to the existence in our world of a vast diversity of wild animals and plants. Because diversity has intrinsic value, and because its loss impoverishes society, the Center works to secure a future for all species, great and small, hovering on the brink of extinction, using science, law, and creative media, with a focus on protecting the lands, waters, and climate that species need to survive.

i. The Center and its members are concerned with the conservation of imperiled species, including ones that will be affected by repeal of the harm regulations, and with the effective implementation of the ESA. The Center has over 93,000 members, including over 3,000 members in Washington. The Center's members derive recreational, professional, commercial, scientific, educational, and aesthetic benefits from their interactions with threatened and endangered species and their habitat across the United States, and they are harmed by the repeal of the regulatory definition of harm and by the issuance of the Take Memos by Federal Defendants. The Center submitted comments on the proposed repeal of the harm rule.

ii. The Center's individual members, including members Noah Greenwald and Betsy Norton, have visited, studied, worked, and recreated on lands that are home to threatened and endangered species, and they have specific intentions to continue to do so frequently and on an ongoing basis. Mr. Greenwald's recreational and professional interests include the Habitat Conservation Plan being developed for western Oregon's state forests, home to seventeen endangered and threatened species. The amount of take that must be mitigated, according to the draft Western Oregon State Forests Habitat Conservation Plan, is largely based on the expected loss and modification of habitat. For some species, like Oregon Coast coho salmon, loss and detrimental modification of habitat is the primary means of take—take that the Services no longer acknowledge with the repeal of the harm definition. Ms. Norton has specific interest in protected species and habitat that are currently being addressed through development of a Habitat Conservation Plan in Bush Prairie, Olympia, Washington. The Bush Prairie Habitat Conservation Plan aims to protect habitat for the Olympia pocket gopher, streaked horned lark, Oregon vesper sparrow, and Oregon spotted frog—all species that bring Ms. Norton great enjoyment as she regularly hikes and birds in the area. The rescission of the harm rule—and

1 failure to consider habitat degradation and modification to constitute take—will adversely impact
2 Mr. Greenwald and Ms. Norton’s interests in these habitats and species.

3 B. COLUMBIA RIVERKEEPER, a non-profit organization with principal places of
4 business in Hood River and Portland, Oregon. Columbia Riverkeeper’s overarching mission is to
5 protect and restore the water quality of the Columbia River and all life connected to it, from the
6 headwaters to the Pacific Ocean. With respect to salmon recovery, Columbia Riverkeeper’s long-
7 term goal is abundant and harvestable populations of wild salmon. In the mid-term, Columbia
8 Riverkeeper’s goal is clean and free-flowing rivers that facilitate salmon recovery and
9 sustainable fisheries. Columbia Riverkeeper values the intrinsic right of salmon to survive, their
10 value to the Pacific Northwest ecosystem and economy, and their role in helping to fulfill
11 America’s treaty promises to Tribal Nations.

12 i. Columbia Riverkeeper pursues its mission and these goals in order to protect its
13 over 20,000 members’ abilities to live, work, recreate, and fish for salmon near or in their
14 communities, properties, and the Columbia and Snake Rivers. Columbia Riverkeeper pursues its
15 mission and goals by combining strong citizen involvement, grassroots organizing, a science-
16 based approach to conservation and environmental protection, strategic communications, and a
17 determination to enforce key environmental laws. Its members derive recreational, professional,
18 commercial, scientific, educational, and aesthetic benefits from their interactions with threatened
19 and endangered species and their critical habitat, and they are harmed by the repeal of the
20 regulatory definition of harm and by the issuance of the Take Memos by Federal Defendants.

21 Columbia Riverkeeper submitted comments on the proposed repeal of the harm rule.

22 ii. Columbia Riverkeeper’s individual members, including members Miles Johnson
23 and Cathryn Tortorici, have visited, studied, worked, and recreated on lands that are home to

1 threatened and endangered species, and they have specific intentions to continue to do so
2 frequently and on an ongoing basis. Mr. Johnson has personal and professional interests in
3 Columbia Basin threatened and endangered salmon, specifically with regard to their river and
4 aquatic habitat that is harmed by the operation of federal dams on the Snake River. Ms. Tortorici,
5 a former federal biologist with NMFS, has a personal and professional interest in recovery of
6 Pacific Northwest threatened and endangered salmon and steelhead in the Columbia and
7 Willamette Rivers. These interests are harmed by the repeal of the regulatory definition of harm.

8 C. CONSERVATION LAW FOUNDATION (“CLF”), a nonprofit regional
9 conservation organization based in Boston, Massachusetts, with offices in each New England
10 state. CLF protects New England’s environment for the benefit of all people, using the law,
11 science, and the market to create solutions that preserve natural resources, build healthy
12 communities, and sustain a vibrant economy.

13 i. CLF pursues its mission to protect its over 8,000 members’ abilities to live, work,
14 and recreate in a thriving New England. CLF stands up for the rule of law, sound science,
15 thoughtful analysis, intellectual honesty, and ethical action. CLF’s members derive recreational,
16 professional, commercial, scientific, educational, and aesthetic benefits from their interactions
17 with threatened and endangered species and their critical habitat, and they are harmed by the
18 repeal of the regulatory definition of harm and by the issuance of the Take Memos by Federal
19 Defendants. CLF submitted comments on the proposed repeal of the harm rule.

20 ii. CLF’s individual members, including members Brett Ciccotelli and Dwayne
21 Shaw, have visited, studied, worked, and recreated on lands that are home to threatened and
22 endangered species, and they have specific intentions to continue to do so frequently and on an
23 ongoing basis. Mr. Ciccotelli works on Atlantic salmon habitat restoration projects, including

1 work to secure removal of the Branch Lake Stream dam on the Union River. Mr. Shaw is the
2 executive director of the Downeast Salmon Federation. In his personal and professional life, he
3 has spent decades improving salmon habitat and plans to continue this conservation work to help
4 the species recover. Both Mr. Ciccotelli and Mr. Shaw are particularly concerned about the
5 ongoing relicensing of the Ellsworth Hydroelectric project along the Union River, which
6 currently delays and blocks access to Atlantic salmon spawning and rearing habitat. The repeal
7 of the harm rule will affect these interests in the relicensing if the federal agencies administering
8 the relicensing process no longer consider habitat degradation and modification to constitute
9 take.

10 D. CONSERVATION NORTHWEST (“CNW”), a non-profit regional conservation
11 organization based in Seattle, Washington, with an office in Twisp and staff in Bellingham,
12 Chewelah, Ellensburg, Okanogan, Olympia, Omak, Onalaska, and Spokane, Washington. CNW
13 focuses on conservation and restoration of wildlands and wildlife in the Pacific Northwest and
14 British Columbia, Canada. The organization is recognized as a regional leader in wildlife
15 conservation, with a strong record of advocating for science-based conservation policy. CNW’s
16 mission is to protect and connect habitat and restore imperiled wildlife from the Pacific Coast to
17 the Canadian Rockies.

18 i. CNW has over 17,000 members and supporters and engages in science-based
19 advocacy through collaboration on projects that protect wildlife habitat and restore forest and
20 watershed ecological resilience. CNW is an active voice strongly advocating for imperiled
21 species such as the northern spotted owl, marbled murrelet, Canada lynx, grizzly bear, gray wolf,
22 wolverine, Pacific fisher, Columbia basin sage grouse, Columbia basin pygmy rabbit, and
23 woodland caribou. CNW’s members derive recreational, professional, commercial, scientific,

1 educational, and aesthetic benefits from their interactions with threatened and endangered
2 species and their critical habitat in the Pacific Northwest United States and western Canada, and
3 they are harmed by the repeal of the regulatory definition of harm and by the issuance of the
4 Take Memos by Federal Defendants. CNW submitted comments on the proposed repeal of the
5 harm rule.

6 ii. CNW's individual members, including members David Werntz, David
7 Moskowitz, and Joe Scott, have visited, studied, worked, and recreated on lands that are home to
8 threatened and endangered species, and they have specific intentions to continue to do so
9 frequently and on an ongoing basis. Mr. Werntz's personal and professional passion is
10 conserving imperiled wildlife, including the northern spotted owl and its habitat in Washington.
11 He has been actively involved in national forest planning and amendments, including the
12 Northwest Forest Plan. Ongoing work by the U.S. Forest Service to amend the Northwest Forest
13 Plan should address take of threatened northern spotted owls and other wildlife due to habitat
14 destruction and degradation, but the Rescission threatens to undermine that process. Mr.
15 Werntz's personal and professional interests include advocating for strong protections for
16 remaining mature and old-growth forests in the Pacific Northwest, which are essential habitat for
17 threatened northern spotted owls. The presence of the northern spotted owl and northern spotted
18 owl habitat in the areas where Mr. Werntz hikes and visits has been a source of great enjoyment
19 and is one of the reasons he chooses to recreate in those areas. Mr. Moskowitz's personal and
20 professional interests center on wildlife photography, biology, tracking, and education. He is the
21 photographer and author of three books: Caribou Rainforest, Wildlife of the Pacific
22 Northwest, and Wolves in the Land of Salmon, co-author and photographer of Peterson's Field
23 Guide to North American Bird Nests and photographer of Big River: Resilience and Renewal in

1 the Columbia Basin. Mr. Moskowitz helped establish the Cascades Wolverine Project, a
2 grassroots effort to support wolverine recovery in the North Cascades using field science, visual
3 storytelling, and building backcountry community science. Mr. Moskowitz's economic and
4 professional interests in threatened and endangered species such as Wolverine, Canada lynx,
5 White-tailed ptarmigan, and Mountain caribou are compromised by the Rescission and the loss
6 of habitat protection for these species. Mr. Scott is also a member and staff member whose
7 personal and professional focus is on restoring grizzly bears to their former habitat in the North
8 Cascades in Washington. Mr. Scott hikes and camps in the habitat of many other threatened and
9 endangered species in the North Cascades and other federal and state forests in Washington
10 every year and has definite plans to continue to recreate in this habitat in the future.

11 E. FRIENDS OF THE WILD SWAN ("Friends"), a Montana non-profit
12 environmental organization that works to protect and restore fish and wildlife habitat on public
13 lands in the Swan and Flathead River drainages. Friends' goals are to protect and improve water
14 quality for people and native fish, maintain and recruit old-growth forest habitat to ensure the
15 viability of old-growth dependent birds and wildlife, and improve fish and wildlife habitat
16 security by reducing road densities on public lands.

17 i. Friends pursues its mission on behalf of its approximately 350 members and
18 supporters to protect their ability to live, work, and recreate in proximity to imperiled species and
19 their habitat in the Swan and Flathead River drainages. Friends' members derive recreational,
20 professional, commercial, scientific, educational, and aesthetic benefits from their interactions
21 with threatened and endangered species and their critical habitat, and they are harmed by the
22 repeal of the regulatory definition of harm **and by the issuance of the Take Memos** by Federal
23

1 Defendants. Friends of the Wild Swan submitted comments on the proposed repeal of the harm
2 rule.

3 ii. Friends' individual members, including member Arlene Montgomery, have
4 visited, studied, worked, and recreated on lands that are home to threatened and endangered
5 species, particularly grizzly bears and bull trout, and they have specific intentions to continue to
6 do so frequently and on an ongoing basis. Ms. Montgomery has lived in Swan Valley for thirty-
7 four years and is able to recreate in the forests near her home easily and in all seasons. Ms.
8 Montgomery has long worked to reduce road densities within grizzly bear habitat, and federal
9 agencies have in the past used road density management standards as a surrogate for measuring
10 impacts that cause prohibited take. Pending Forest Service management actions and mitigation of
11 take caused by those actions in the Flathead National Forest hinge on the longstanding definition
12 of harm as including harm to habitat, and the repeal of the harm rule threatens to undermine
13 current protective standards and allow more roads in grizzly and bull trout habitat.

14 F. OREGON WILD, a nonprofit organization headquartered in Portland, Oregon,
15 with satellite offices in Eugene, Bend, and Enterprise, Oregon. Oregon Wild's mission is to
16 protect and restore Pacific Northwest wildlands, wildlife, and waters—particularly in Oregon—
17 as an enduring legacy for future generations. Oregon Wild's members hike, recreate, bird watch,
18 and appreciate nature throughout the Pacific Northwest, and the organization and its members
19 have a long history of advocating for federal protections for threatened and endangered species
20 and the habitat they need to survive. In fact, Oregon Wild was an amicus curiae (under the name
21 Oregon Natural Resources Council) in the U.S. Supreme Court case *Babbitt v. Sweet Home*
22 *Chapter of Communities for a Great Oregon*, where the Supreme Court upheld the definition of
23 harm that Federal Defendants have now rescinded.

i. Oregon Wild and its over 20,000 members and supporters are concerned with the conservation of imperiled species, including species that will be affected by repeal of the harm definition. Oregon Wild's members derive recreational, professional, commercial, scientific, educational, and aesthetic benefits from their interactions with threatened and endangered species and their habitat across the Pacific Northwest, and they are harmed by the repeal of the regulatory definition of harm and by the issuance of the Take Memos by Federal Defendants. Oregon Wild submitted comments on the proposed repeal of the harm rule.

ii. Oregon Wild's individual members, including members Doug Heiken and Bob Van Dyk, have visited, studied, worked, and recreated on lands that are home to threatened and endangered species, and they have specific intentions to continue to do so frequently and on an ongoing basis. Mr. Heiken's personal and professional interests include advocating for strong protections for remaining mature and old-growth forests in the Pacific Northwest, which are essential habitat for threatened northern spotted owls. Mr. Heiken regularly visits public lands in Oregon that contain remaining habitat for northern spotted owls and marbled murrelets. Ongoing work by the U.S. Forest Service to amend the Northwest Forest Plan, as well as anticipated changes to the Resource Management Plans for Bureau of Land Management forests in Oregon, will address take of threatened northern spotted owls and other wildlife due to habitat destruction and degradation. Mr. Van Dyk is an avid angler and often hikes and fishes in streams near his home. He has worked on protection of salmon and steelhead habitat from degradation from commercial logging, and he helped spearhead the Private Forest Accord, legislation that amended the Oregon Forest Practices Act with an aim to avoid and minimize the effects of logging on a number of aquatic species, while also providing certainty to landowners through a federal Habitat Conservation Plan. The resulting agreement assumes that degrading salmon and

1 trout habitat can amount to take under the ESA, a foundational concept undermined by Federal
2 Defendants' repeal of the regulatory definition of harm.

3 G. SIERRA CLUB, one of the oldest environmental organizations in the United
4 States. Sierra Club is incorporated in the State of California as a Nonprofit Public Benefit
5 Corporation with headquarters in Oakland, California and offices in many states, including an
6 office in Seattle, Washington. Sierra Club is dedicated to protecting and preserving the natural
7 and human environment, and its purpose is to explore, enjoy, and protect the wild places of the
8 earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to
9 educate and enlist humanity to protect and restore the quality of the natural and human
10 environments. Its mission includes engaging its members and the public to protect public lands,
11 wildlife habitat, and wildlife, and it has been a longtime, active public advocate for imperiled
12 wildlife. Sierra Club was also an amicus curiae in *Babbitt v. Sweet Home Chapter of*
13 *Communities for a Great Oregon*.

14 i. Sierra Club pursues its mission on behalf of its members and supporters
15 nationwide to protect their ability to live, work, and recreate in and around imperiled species and
16 their habitat. The organization has approximately 595,000 members nationwide, including about
17 22,993 members in the state of Washington. Sierra Club members derive recreational,
18 professional, commercial, scientific, educational, and aesthetic benefits from their interactions
19 with threatened and endangered species and their critical habitat across the United States, and
20 they are harmed by the repeal of the regulatory definition of harm and by the issuance of the
21 Take Memos by Federal Defendants. Sierra Club submitted comments on the proposed repeal of
22 the harm rule.

1 ii. Sierra Club’s individual members, including members Bill Arthur and Dan
2 Ritzman, have visited, studied, worked, and recreated on lands that are home to threatened and
3 endangered species, and they have specific intentions to continue to do so frequently and on an
4 ongoing basis. Mr. Arthur is an avid angler, and he has fished Pacific Northwest rivers for
5 decades. Mr. Arthur has also regularly visited national forests throughout Washington, Oregon,
6 and Northern California. The Forest Service is currently amending the Northwest Forest Plan,
7 and Mr. Arthur is concerned that due to the Rescission, consultations for the ongoing proposed
8 Northwest Forest Plan amendment and activities under the forest management plans will fail to
9 treat impacts to listed species caused by habitat modification as incidental take. Mr. Ritzman is
10 also a long-time Sierra Club member whose personal and professional interests (as both a
11 conservation advocate and an Arctic guide) include efforts to protect the Arctic National Wildlife
12 Refuge and its Coastal Plain from oil and gas development. The repeal of the regulatory
13 definition of harm risks undermining federal consultations for oil and gas activities that affect
14 polar bears, spectacled eiders, and Steller’s eiders by allowing degradation of their habitat.

15 H. SWAN VIEW COALITION (“Coalition”), a Montana nonprofit organization
16 dedicated to pulling people together to conserve the community, quiet, recreation, water quality,
17 fish, and wildlife of the Swan Valley Range. The Coalition advocates to improve environmental
18 protections for wildlife, including grizzly bears and bull trout, in connection with federal actions
19 affecting the Flathead National Forest, through submitting comments and legally challenging
20 federal actions that harm wildlife and their habitat.

21 i. The Coalition pursues its mission on behalf of its approximately 500 members
22 and supporters to protect their ability to live, work, and recreate in proximity to imperiled species
23 and their habitat. Coalition members derive recreational, professional, commercial, scientific,

1 educational, and aesthetic benefits from their interactions with threatened and endangered
2 species and their critical habitat, and they are harmed by the repeal of the regulatory definition of
3 harm and by the issuance of the Take Memos by Federal Defendants. The Coalition submitted
4 comments on the proposed repeal of the harm rule.

5 ii. The Coalition's individual members, including Keith Hammer, have visited,
6 studied, worked, and recreated on lands that are home to threatened and endangered species, and
7 they have specific intentions to continue to do so frequently and on an ongoing basis. Mr.
8 Hammer lives near the border of the Flathead National Forest, and he has a strong interest in
9 conservation of grizzly bears and bull trout in the forest. On hikes, Mr. Hammer seeks to view
10 grizzly bears and signs of bear activity. He often sees these signs while helping maintain hiking
11 trails through Swan View Coalition's volunteer agreement with the Flathead National Forest. Mr.
12 Hammer's advocacy to protect his interests by reducing road densities in grizzly and bull trout
13 habitat—work that depends on recognizing how habitat harm results in harm to individual bears
14 and fish—is threatened by Federal Defendants' repeal of the harm definition.

15 I. WILDEARTH GUARDIANS (“Guardians”), a non-profit environmental
16 organization dedicated to protecting and restoring the wildlife, wild places, wild rivers, and
17 health of the American West. Guardians is incorporated in New Mexico and headquartered in
18 Santa Fe, New Mexico, with additional offices in Denver, Colorado; Missoula, Montana;
19 Portland, Oregon; and Tucson, Arizona. Guardians and its members are concerned about
20 protecting threatened and endangered species from extinction and extensively rely upon the ESA
21 to ensure imperiled species receive the protections they need to survive and recover.

22 i. Guardians pursues its mission on behalf of its approximately 210,000 members
23 and supporters nationwide to protect their ability to live, work, and recreate in and around

1 imperiled species and their habitat. Guardians' members derive recreational, professional,
2 commercial, scientific, educational, and aesthetic benefits from their interactions with threatened
3 and endangered species and their critical habitat across the United States, and they are harmed by
4 the repeal of the regulatory definition of harm and by the issuance of the Take Memos by Federal
5 Defendants. Guardians submitted comments on the proposed repeal of the harm rule.

6 ii. Guardians' individual members, including members Sean Stevens and Daniel
7 Timmons, have visited, studied, worked, and recreated on lands that are home to threatened and
8 endangered species, and they have specific intentions to continue to do so frequently and on an
9 ongoing basis. Mr. Stevens has invested his personal and professional time and energy into
10 making sure threatened and endangered species have a viable path to recovery by keeping their
11 habitats healthy and connected. For decades, the Federal Defendants' definition of harm as
12 including significant habitat modification or degradation has been a tool to protect imperiled
13 salmon populations, marbled murrelets, and northern spotted owls in the Pacific Northwest. The
14 pending Western Oregon State Forests Habitat Conservation Plan depends on its ability to
15 protect listed species by preventing significant habitat modification and degradation. Mr.
16 Timmons's personal and professional interests include protecting water flows within headwater
17 streams in the Colorado River system, including flows that serve as habitat for cutthroat trout,
18 and in the Rio Grande, ensuring connected river habitat. If FWS does not consider such habitat
19 degradation and modification to constitute take, it may not require pending management plans
20 and biological opinions to mitigate harm to the endangered silvery minnow and other species
21 caused by the drying of the Rio Grande, resulting in an ineffective consultation process that
22 allows the silvery minnow to dry out into oblivion.

20. Plaintiff groups and their members derive recreational, scientific, professional, commercial, and aesthetic benefits from threatened and endangered species and their habitat. Plaintiffs have members who reside near, visit, or otherwise use and enjoy threatened and endangered species and their habitat in a variety of ways, including wildlife viewing, education, recreation, and aesthetic purposes. Plaintiffs have members who reside, work, travel, and recreate in places where imperiled animals and their habitat are found, along with federal and non-federal land, facilities, and activities requiring federal permits and licenses subject to the ESA's Section 7 (biological opinions and incidental take statements) and Section 10 (habitat conservation plans and incidental take permits) requirements. Individual member declarations are attached as Exhibit B.

21. Plaintiffs have a concrete interest in the Services' lawful implementation of the ESA and its role in preventing harm to and promoting recovery of imperiled wildlife; the regulatory repeal challenged in this lawsuit fundamentally undermines and contradicts the requirements of the ESA. The ESA expressly declares that endangered and threatened "species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). The decision to eliminate the ESA harm definition **and invalidly narrow the definition of take** will cause severe adverse impacts to ecosystems throughout the nation. The known harms that would result from this loss of biological diversity are enormous, not to mention the loss of the "*unknown* uses that endangered species might have and . . . the *unforeseeable* place such creatures may have in the chain of life on this planet." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 178–79 (1978) (the value of this genetic heritage is "quite literally, incalculable").

22. Plaintiffs' aesthetic, conservation, economic, recreational, scientific, and educational interests have been, are being, and, unless their requested relief is granted, will continue to be adversely and irreparably injured by Federal Defendants' repeal of the harm definition **and invalid narrowing of the definition of take**. These are actual, concrete injuries, traceable to Federal Defendants' conduct, that would be redressed by the requested relief of invalidating the Rescission, ~~and~~ reinstating the harm rule, **and vacating and prohibiting Federal Defendants from relying on the Take Memos**. Plaintiffs have no adequate remedy at law.

23. Federal Defendants in this action are:

A. DOUGLAS BURGUM, U.S. Secretary of the Interior, in his professional capacity. Mr. Burgum has responsibility for implementing and fulfilling the duties of the United States Department of the Interior, including administering the ESA with regard to threatened and endangered terrestrial and freshwater plant and animal species;

B. KEVIN LILLY, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks, in his professional capacity. Mr. Lilly signed the Rescission on July 10, 2026;

C. U.S. FISH AND WILDLIFE SERVICE, an agency within the U.S. Department of the Interior, charged with administering the ESA with respect to threatened and endangered terrestrial and freshwater plant and animal species;

D. HOWARD LUTNICK, U.S. Secretary of Commerce, in his professional capacity. Mr. Lutnick has responsibility for implementing and fulfilling the duties of the United States Department of Commerce, including administering the ESA with regard to threatened and endangered marine species and anadromous fish species;

E. TIMOTHY R. PETTY, Assistant Secretary of Commerce for Oceans and Atmosphere and Deputy **National Oceanic and Atmospheric Administration** ("NOAA") Administrator, in his professional capacity. Mr. Petty signed the Rescission on July 10, 2026; and

1 F. NATIONAL MARINE FISHERIES SERVICE, an agency within the U.S.
2 Department of Commerce, NOAA, responsible for administering the ESA with respect to
3 threatened and endangered marine species and anadromous fish species.

4 BACKGROUND

5 I. THE IMPORTANCE OF HABITAT TO THE SURVIVAL AND RECOVERY OF 6 IMPERILED SPECIES

7 24. Habitat loss is the driving force behind the mounting threat of species extinction.
8 In a recent analysis of 20,784 species on the International Union for Conservation of Nature's
9 "Red" List of most imperiled global species, scientists found that nearly nine out of every ten
10 species were affected by habitat destruction. For more than 70 percent of those species, habitat
11 destruction was the primary factor threatening their continued existence.

12 25. The ESA's decades-old regulatory definition of "harm" reflected an
13 overwhelming body of scientific evidence demonstrating that loss of habitat imperils species in
14 multiple ways. Habitat loss can disrupt essential biological functions such as breeding, feeding,
15 and sheltering. Habitat loss, including fragmentation and degradation, disturbs imperiled species
16 in their day-to-day movements, such as foraging and migration. Without sufficient habitat,
17 juveniles may be less successful in dispersal from their natal territories, and adults may be less
18 successful dispersing across the landscape to find new breeding sites. Significant habitat loss
19 threatens to impede the recovery of imperiled species and even doom them to extinction.

20 26. Many examples illustrate the direct connection between habitat loss and the
21 survival of members of ESA-listed species. Pacific Northwest salmon and steelhead populations
22 have been unable to spawn, rear, and migrate due to the reduction of river flows and construction
23 of dams. Grizzly bears have produced fewer cubs due to displacement and habitat fragmentation
24 from the proliferation of access roads and trails in their habitat. *Rufa* red knot shorebirds have

1 found insufficient food during migratory stopovers due to overexploitation of horseshoe crabs on
2 the Atlantic Coast, impairing their ability to complete their lengthy migratory journeys from
3 Tierra del Fuego to the Canadian Arctic.

4 II. THE ENDANGERED SPECIES ACT

5 27. In 1973, recognizing that various species had gone extinct or had been “so
6 depleted in numbers that they are in danger of or threatened with extinction,” Congress passed
7 the Endangered Species Act. 16 U.S.C. § 1531(a)(1)–(2). One of the chief purposes of the ESA is
8 “to provide a means whereby the ecosystems upon which endangered species and threatened
9 species depend may be conserved, [and] to provide a program for the conservation of such
10 endangered species and threatened species.” *Id.* at § 1531(b). Since its enactment more than fifty
11 years ago, the ESA has remained “the most comprehensive legislation for the preservation of
12 endangered species ever enacted by any nation.” *Tenn. Valley Auth.*, 437 U.S. at 180.

13 28. To afford a species the protections of the ESA, the Secretary of the Interior or the
14 Secretary of Commerce, acting through the Services, must first list the species as either
15 “endangered” or “threatened” under Section 4 of the statute. *See* 16 U.S.C. § 1533. A species is
16 “endangered” when it “is in danger of extinction throughout all or a significant portion of its
17 range,” *id.* § 1532(6), while a species is “threatened” when it is “likely to become an endangered
18 species within the foreseeable future throughout all or a significant portion of its range,” *id.*
19 § 1532(20); *see also id.* § 1533(c).

20 29. The ESA generally prohibits the “take” of listed species. *Id.* § 1538(a)(1)(B), 50
21 C.F.R. § 17.21(c) (endangered species); 16 U.S.C. § 1533(d), 50 C.F.R. § 17.31(a) (threatened
22 species). To “take” a listed species means “to harass, harm, pursue, hunt, shoot, wound, kill, trap,
23 capture, or collect” it, “or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

1 Congress intended this prohibition to be interpreted broadly to include “every conceivable way
2 in which a person can ‘take’ wildlife.” S. Rep. No. 93-307, at 7 (1973).

3 30. The word “harm” in this “take” prohibition encompasses substantial impacts from
4 habitat modification or degradation. *See Sweet Home*, 515 U.S. at 696–708 (upholding “harm”
5 definition that included significant habitat degradation).

6 31. Notwithstanding this prohibition, the Services may issue permits for the take of
7 listed species to non-federal applicants under ESA Section 10 “if such taking is incidental to, and
8 not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B).
9 These “incidental take permits” cannot be issued unless the applicant has submitted a
10 “conservation plan” to the Services that specifies, among other things, the impact of the
11 anticipated taking, the planned steps to minimize and mitigate those impacts, the available
12 funding to take those steps, and the alternatives to the taking that were considered by the
13 applicant. *Id.* § 1539(a)(2)(A).

14 32. The Services may issue an ESA Section 10 incidental take permit only if they find
15 that the applicant will minimize and mitigate the impacts of the incidental take “to the maximum
16 extent practicable”; that there is adequate funding for the habitat conservation plan; and that the
17 taking “will not appreciably reduce the likelihood of the survival and recovery of the species in
18 the wild.” *Id.* § 1539(a)(2)(B).

19 33. Applying these provisions, the Services have issued hundreds of incidental take
20 permits since Congress created the incidental take permit program in 1982. These permits enable
21 activities by private entities or individuals to go forward while balancing the survival needs of
22 imperiled species.

34. While Section 10 regulates actions of non-federal entities, Section 7(a)(2) ensures that actions taken by federal agencies comport with the ESA's purpose to conserve endangered and threatened species. *See id.* § 1536(a)(2). The Section 7 regulatory process also relies on the ESA take prohibition to ensure adequate protection for endangered and threatened species. Section 7(a)(2) requires each federal agency, in consultation with NMFS or FWS (depending on the species involved), to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of any designated critical habitat. *Id.*

35. Agency “action” under this provision broadly includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas.” 50 C.F.R. § 402.02. Such actions include “the promulgation of regulations” and “the granting of licenses” and “permits,” as well as “actions directly or indirectly causing modifications to the land, water, or air.” *Id.*

36. “Jeopardize the continued existence of” is defined as engaging in an action that “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” *Id.*

37. “Destruction or adverse modification” is defined as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species.” *Id.*

38. To implement Section 7(a)(2), each federal action agency must determine whether its actions “may affect” any endangered or threatened species or designated critical habitat. *Id.*

§ 402.14(a). If the action agency determines that its proposed action is “not likely to adversely affect” any listed species or critical habitat, NMFS and/or FWS, the consulting agencies, must concur in that determination in writing. *See id.* § 402.13(c). If the consulting agency does not concur—or if the action agency determines in the first instance that its proposed action is “likely to adversely affect” listed species or critical habitat—the action agency must formally consult with one or both of the consulting agencies to ensure it does not violate the Section 7(a)(2) prohibition on “jeopardy” and “destruction or adverse modification.” *Id.* § 402.14(a), (b)(1).

39. The result of the ESA Section 7(a)(2) formal consultation is the preparation by the consulting agency of a “Biological Opinion” that describes the proposed action’s expected impact on listed species and critical habitat and the consulting agency’s opinion on whether the action is “[l]ikely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.” 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(1)(iii), (iv)(A). In fulfilling the requirements of Section 7(a)(2), each agency must “use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2).

40. Section 7 also establishes a process for authorizing federal actions that will incidentally take—but not jeopardize the continued existence of—ESA-listed species. For such actions, the consulting agency must provide the action agency with a statement that specifies the expected impact of such taking and prescribes reasonable and prudent measures to minimize such impact and terms and conditions to implement such measures. *Id.* § 1536(b)(4). Any incidental taking that complies with the terms and conditions of this “incidental take statement” is not prohibited by the ESA. *Id.* § 1536(o)(2).

41. No provision of law exempts the Services themselves from the Section 7(a)(2) consultation requirement. Rather, where the action agency and the consulting agency are the

1 same, as here, the agency must engage in internal or intra-agency consultation. *See* U.S. Fish &
 2 Wildlife Serv. & Nat'l Marine Fisheries Serv., *Endangered Species Consultation Handbook* 1-5
 3 to 1-6, App'x E (1998).

4 III. THE NATIONAL ENVIRONMENTAL POLICY ACT

5 42. Congress enacted NEPA to “encourage productive and enjoyable harmony
 6 between man and his environment; to promote efforts which will prevent or eliminate damage to
 7 the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the
 8 understanding of the ecological systems and natural resources important to the Nation.” 42
 9 U.S.C. § 4321. Congress affirmed “the continuing responsibility of the Federal Government to
 10 use all practicable means” to, among other things, “fulfill the responsibilities of each generation
 11 as trustee of the environment for succeeding generations” and “preserve important historic,
 12 cultural, and natural aspects of our national heritage.” *Id.* § 4331(b)(1), (4).

13 43. To accomplish Congress’s goals, NEPA imposes a “look before you leap”
 14 mandate. NEPA generally requires every federal agency, including the Services, to consider fully
 15 and disclose in a “detailed statement” the environmental consequences of their proposed actions
 16 and to evaluate a reasonable range of alternate ways to accomplish their goals before they make
 17 the decision whether to proceed with a given action. *Id.* § 4332(2)(C). An agency must prepare
 18 such a statement, known as an environmental impact statement (“EIS”), for every “proposed
 19 agency action . . . that has a reasonably foreseeable significant effect on the quality of the human
 20 environment.” *Id.* § 4336(b)(1).

21 44. An agency must “ensure the professional integrity, including scientific integrity,
 22 of the discussion and analysis in [its] environmental document,” *id.* § 4332(2)(D), and must
 23 “make use of reliable data and resources.” *Id.* § 4332(2)(E).

45. The purpose of an EIS is to inform the decision-makers and the public of the significant environmental impacts of the proposed action, including means to mitigate those impacts, and reasonable alternatives that will have lesser adverse environmental effects. *See id.* § 4332(2)(C); *see also Seven Cnty. Infrastructure Coal. v. Eagle County*, 605 U.S. 168, 177 (2025). In this way, “NEPA helps agencies to make better decisions and to ensure good project management.” 605 U.S. at 177.

46. Where an agency finds that its actions are not likely to have significant effects, or if the significance of the effects is unknown, it generally must prepare a more streamlined environmental assessment (“EA”) of its actions. 42 U.S.C. § 4336(b)(2). The EA must “set forth the basis of such agency’s finding of no significant impact or determination that an environmental impact statement is necessary.” *Id.*

47. An agency can dispense with preparing an EIS or EA only if it finds that the proposed agency action fits within a duly adopted categorical exclusion or if it is excluded from environmental review by another provision of law. *See id.* § 4336(a)(2), (b)(2).

48. A categorical exclusion is “a category of actions that a Federal agency has determined normally does not significantly affect the quality of the human environment within the meaning of [42 U.S.C.] section 4332(2)(C).” *Id.* § 4336e(1). Actions are ineligible for a categorical exclusion if they meet any of the “extraordinary circumstances” exemption criteria. 43 C.F.R. § 46.215. Extraordinary circumstances include actions that have “significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands; floodplains; national monuments; migratory birds; and other ecologically significant or critical areas”;

“highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks”; “precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects”; or “significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species.” *Id.* § 46.215(b), (c), (d), (g); *see also* Nat’l Oceanic & Atmospheric Admin., *Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities* at 9 (2025) (“NOAA NEPA Guidance”) (listing similar examples of extraordinary circumstances).

IV. HISTORY OF THE “HARM” DEFINITION

49. The regulation of “take” is a key component of the species’ protection programs established by both Section 9 and Section 7 of the ESA. For over fifty years, such regulation has encompassed habitat modification that poses significant adverse consequences for endangered and threatened wildlife. Indeed, the inclusion of habitat destruction in the regulatory definition of “harm,” as a form of “take,” reflects the unwavering statutory interpretation of the past nine presidential administrations (five Republican and four Democratic). Until now, no administration has issued a contrary interpretation.

50. FWS first promulgated a definition of “harm” in 1975 that included “significant environmental modification or degradation” that “significantly disrupt[s] essential behavioral patterns” for imperiled species. 40 Fed. Reg. 44412, 44416 (Sept. 26, 1975). In 1981, FWS clarified that such habitat destruction must “actually kill[] or injure[] wildlife” to qualify as “harm,” and that definition remained in place until the Rescission. *See* 46 Fed. Reg. 54748, 54750 (Nov. 4, 1981).

51. The ESA’s Section 10 incidental take provision, added by congressional amendment in 1982, corroborated FWS’s definition of “harm” and confirmed Congress’s intent for “take” to encompass more than just deliberate and intentional impacts. The provision allows the Services to issue permits for takings that are “incidental to, and not the purpose of,” otherwise lawful activities—a framework that assumes and depends upon the idea that the ESA’s prohibition against takings extends to those that are not deliberate, intentional, or purposeful. 16 U.S.C. § 1539(a)(1). Similarly, the ESA’s Section 7 provisions pertaining to incidental take statements, also added by the 1982 congressional amendment, allow the Services to permit incidental takings for otherwise lawful federal activities—a framework dependent upon the same background understanding of take. *Id.* § 1536(b)(4)(B), (b)(4)(C)(i). When amending the statute, rather than reverse or weaken the prohibition on “harm” as defined by FWS, Congress leveraged and built upon it. Indeed, the legislative history from 1982 states plainly that “harm,” as used in the “take” definition, “may occur as a result of habitat modification.” S. Rep. No. 97-418, at 26 (1982).

52. The Supreme Court upheld FWS’s definition of “harm” in 1995 in *Sweet Home*. The Court based its determination on a careful examination of the statutory text and structure, legislative history, and post-enactment congressional action, all of which it found to support the definition. *Sweet Home*, 515 U.S. at 695. After engaging in this in-depth review, the *Sweet Home* Court upheld the “harm” definition as a reasonable interpretation of the statute, using the then-prevailing administrative law standard first articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

53. When considering the plain text of the ESA, the *Sweet Home* Court was guided by the “ordinary understanding of the word ‘harm’” and the need to give “harm” independent

1 meaning in addition to the other verbs in the “take” definition. 515 U.S. at 697–98. The
2 legislative history of the statute reinforced this plain language interpretation with its emphasis on
3 take being “defined in the broadest possible terms” and not limited to intentional behaviors. *Id.* at
4 704–05.

5 54. The *Sweet Home* Court also found that the 1982 ESA amendment adding the
6 Section 10 incidental take permitting provision supported FWS’s definition of “harm.” *Id.* at 707.
7 The Court pointed to evidence that “Congress had habitat modification directly in mind” when it
8 added the incidental take provision: “Both the Senate Report and the House Conference Report”
9 treated as a model for the new permitting process a case in which development threatened
10 incidental harm to an endangered butterfly through modification of its habitat. *Id.*

11 55. In addition to upholding FWS’s interpretation of “harm,” the *Sweet Home* Court
12 rejected the interpretation—articulated by the dissent and the Court of Appeals in the opinion
13 below—that “harm” was limited to activities associated with hunting and deliberate killing. The
14 Court rejected that interpretation based on “three errors”: a flawed premise, disregard for
15 contradictory statutory text, and misapplication of an interpretive canon (*noscitur a sociis*). *Id.* at
16 701–02. In this portion of the *Sweet Home* opinion, the Court did not invoke *Chevron* but rather
17 described the logical errors and legal flaws that rendered the dissent’s interpretation (which the
18 Services have now adopted) inconsistent with the statute.

19 V. THE PROPOSED RULE

20 56. On April 17, 2025, the Services published a proposal to rescind the longstanding
21 regulatory definition of “harm” under the ESA (the “Proposed Rule”). *See* Rescinding the
22 Definition of “Harm” Under the Endangered Species Act, 90 Fed. Reg. 16102 (Apr. 17, 2025). In
23 attempting to justify this abrupt departure from a half-century of consistent agency practice that

1 the Supreme Court had explicitly approved, the Services asserted that they were “compelled” to
 2 take this action by the Supreme Court’s holding in *Loper Bright Enterprises v. Raimondo* and the
 3 “take Care” clause of the U.S. Constitution. *Id.* at 16103–04.

4 57. *Loper Bright* is a 2024 Supreme Court decision that overruled the *Chevron*
 5 doctrine, which prescribed judicial deference to reasonable agency interpretations of ambiguous
 6 statutory language. The *Loper Bright* Court found that, under the APA, “‘the reviewing court’—
 7 not the agency whose action it reviews—is to ‘decide *all* relevant questions of law’ and ‘interpret
 8 . . . statutory provisions.’” 603 U.S. at 398 (quoting 5 U.S.C. § 706). Courts are not “somehow
 9 relieved of [their] obligation to independently interpret” ambiguous statutes, because, the *Loper*
 10 *Bright* Court reasoned, even those ambiguous statutes “must” have “a single, best meaning.” *Id.*
 11 at 400. Even so, the Court emphasized that the holdings of earlier cases upholding agency
 12 actions under *Chevron* “are still subject to statutory *stare decisis* despite our change in
 13 interpretive methodology.” *Id.* at 412. And, notwithstanding its overruling of *Chevron*, the *Loper*
 14 *Bright* Court acknowledged that “respect” for agency interpretations of statutes remained
 15 “especially warranted when an Executive Branch interpretation was issued roughly
 16 contemporaneously with enactment of the statute and remained consistent over time.” *Id.* at 386.

17 58. Addressing this judicial precedent, the Proposed Rule stated that the longstanding
 18 “harm” definition was upheld by the Supreme Court in *Sweet Home* “under *Chevron* deference.”
 19 90 Fed. Reg. at 16103. The Services then erroneously claimed that *Loper Bright* now forced
 20 them to rescind the regulatory definition of harm and effectuate what they considered “the single,
 21 best meaning of the statute.” *Id.*

22 59. To the contrary, *Loper Bright* did not require federal agencies to discard
 23 longstanding interpretations upheld by the Supreme Court under the *Chevron* framework based

1 on a sudden about-face in an agency’s preferred statutory interpretation. In fact, the *Loper Bright*
2 Court did the opposite, reaffirming that judges, not “political actors” of the Executive Branch,
3 should resolve statutory ambiguities. 603 U.S. at 403–04. As *Loper Bright* explained, the
4 *Chevron* doctrine was unworkable in large part because it required political actors to interpret
5 statutes—such that statutory interpretation could turn on “individual policy preferences”—
6 whereas “resolution of statutory ambiguities involves legal interpretation,” a task best left to the
7 courts. *Id.* at 399–400, 403–04.

8 60. The Proposed Rule proffered the very sort of politicized Executive Branch
9 statutory interpretation that *Loper Bright* rejected, premised upon the Services’ sudden reversal
10 as to the “single, best meaning” of “take” within the ESA. Specifically, the Services adopted the
11 interpretation of “take” from the *Sweet Home* dissent. *See* 90 Fed. Reg. at 16103. That rejected
12 interpretation claimed that a historical understanding of the term “take” (and, therefore, the
13 concepts it comprised, including “harm”) meant “to reduce those animals, by killing or
14 capturing, to human control,” and “take” must require an “affirmative act[] . . . directed
15 immediately and intentionally against a particular animal.” *Id.* The Services did not explain how
16 or why the *Sweet Home* dissent, not the majority, supplied the “single, best” meaning of “take,”
17 or why a purported historic definition of “take” should override the definition that Congress
18 supplied.

19 61. The Services acknowledged *Loper Bright*’s admonition that cases previously
20 decided under *Chevron*, including *Sweet Home*, “are still subject to statutory *stare decisis*.” *See*
21 *id.* However, the Services suggested that the Proposed Rule was exempt from statutory *stare*
22 *decisis* because *Sweet Home* did not determine that the regulatory definition at issue was “the
23 only possible . . . reading” of the statute. *Id.* The Services failed to acknowledge that the focus of

1 the *Chevron* doctrine was not to declare the only possible reading of the statute, but only to
2 determine whether the agency’s interpretation was a reasonable one.

3 62. The Services did not propose to codify any different definition to replace the
4 longstanding definition of “harm,” asserting that there was no need because the ESA itself
5 defined “take.” *Id.* The Services further stated that elaborating on one term within the statutory
6 definition of “take” was “unnecessary in light of the comprehensive statutory definition.” *Id.*

7 63. However, even absent a replacement definition, the Services explained that, under
8 their new statutory interpretation, “harm” and the larger concept of “take” did not include
9 “actions that impair the habitat of protected species.” *Id.*

10 64. The Services did not articulate any scientific rationale for the Proposed Rule, nor
11 did they cite any scientific research in support of it.

12 65. Regarding NEPA compliance, the Services claimed that the Proposed Rule was a
13 “nondiscretionary action” and as such was exempt from NEPA review under 42 U.S.C.
14 § 4336(a)(4), which waives NEPA’s environmental review requirements for nondiscretionary
15 actions as to which an agency “does not have authority to take environmental factors into
16 consideration.” *Id.* at 16104. In the alternative, the Services claimed that the Proposed Rule
17 qualified for a categorical exclusion under NEPA because, if finalized, the action would allegedly
18 have “no significant individual or cumulative effect on the quality of the human environment.”
19 *Id.* at 16104–05. No matter the theory, the Services did not describe or evaluate the
20 environmental impacts of the Proposed Rule.

21 66. Regarding ESA Section 7 consultation compliance, the Services claimed that the
22 Proposed Rule did not require such consultation. *See id.* at 16105. They asserted that “the plain
23 language, structure, and purposes of the ESA” reflect that “Congress never intended to place a

1 consultation obligation on the Services’ promulgation of implementing regulations under the
2 Act.” *Id.*

3 67. The Proposed Rule received approximately 358,000 public comments. Those
4 comments overwhelmingly opposed the Federal Defendants’ proposed regulatory change.

5 68. Scientists, environmental and community-based non-profit organizations, Tribal
6 Nations, and other entities representing diverse interests submitted comments in opposition to the
7 Proposed Rule. Many of these commenters presented the large body of scientific information
8 demonstrating that habitat protection is central to the survival and recovery of listed species,
9 explained why the Services’ asserted legal bases for the rule were invalid, and demonstrated that
10 the Services needed to subject the Proposed Rule to full NEPA review as well as ESA Section 7
11 consultation.

12 69. Many Tribes submitted comments in opposition to the Proposed Rule, presenting
13 scientific, legal, and cultural arguments against repeal of the harm definition, as well as alleging
14 breach of obligations of the federal government to sovereign Tribal Nations.

15 70. Many States submitted comments in opposition to the Proposed Rule. Among
16 other arguments, a number of States expressed that, if finalized, the Proposed Rule would
17 undermine their substantial reliance interests in the longstanding regulatory definition of harm.
18 Absent a federal commitment to treat destruction of listed species’ habitat as “take” under the
19 ESA, these States asserted that they would face significant financial, administrative, and
20 regulatory burdens to fill the gap in protection of listed species created by the Rescission.

21 71. Other commenters also answered the Services’ call for comments specific to
22 “reliance interests” in the longstanding “harm” definition. *See id.* at 16103–04. For example, a
23 national trade association representing ecological restoration investment firms explained that, if

1 finalized, the Proposed Rule would effectively strand nearly half a billion dollars' worth of
2 investments in conservation outcomes made in reliance on the longstanding regulatory definition
3 of harm.

4 VI. THE RESCISSION

5 72. On July 10, 2026, the Services finalized their rule to rescind the regulatory
6 definition of "harm," carrying forward the flaws in the Proposed Rule. *See* 91 Fed. Reg. 43300
7 (July 14, 2026).

8 73. The Services offered only a brief rationale for the Rescission, repeatedly
9 neglecting or disregarding factors that should have been central to their decision-making. In
10 response to commenters' concerns about scientific evidence, reliance interests, impacts on states
11 and tribes, and regulatory confusion, the Services asserted that rescinding the longstanding and
12 Supreme Court-approved definition of "harm" was nondiscretionary, and in some instances
13 altogether denied the legitimacy of commenters' interests.

14 74. The Services contended that the action was "nondiscretionary" because the prior
15 definition of "harm" did not match their new position on the best reading of the statute. *See id.* at
16 43307. Although the Services cited *Loper Bright*, which tasks *reviewing courts* with determining
17 a statute's best reading, *see, e.g., id.* at 43301, they cited no authority that compels an *agency* to
18 promulgate a rule when it changes its statutory interpretation. Instead, the Services suggested
19 that FWS acted disingenuously when initially defining "harm" in 1975—a definition that no
20 administration has questioned since that year, other than a minor clarification in 1981. *See id.* at
21 43300–01. Nor did the Services reconcile their "nondiscretionary" characterization with their
22 professed exercise of judgment when disregarding alternatives to the Rescission and
23 commenters' descriptions of reliance interests in the longstanding definition. *See id.* at 43306.

1 75. While the Services claimed to be “effectuat[ing] the Executive Branch’s
2 obligation to ‘take Care that the Laws be faithfully executed,’ U.S. Const. art. II, section 3,” they
3 did not explain how replacing a definition that the Supreme Court upheld with one that the Court
4 rejected fulfilled that obligation. *See, e.g., id.* at 43307.

5 76. The Services did not acknowledge the public comments containing extensive
6 scientific evidence that the Rescission would negatively affect protected species. The Services
7 attempted to deflect questions about the Rescission’s effects by pointing to other sections of the
8 ESA that address habitat conservation in specific, limited circumstances. *See id.* at 43306. At
9 times, the Services recognized that the Rescission would significantly reduce habitat protection
10 measures, *see id.* at 43304, but they omitted any discussion of impacts on protected species. The
11 Services cited no scientific evidence that the Rescission would be beneficial or even neutral for
12 preventing extinction or promoting recovery.

13 77. The Services summarily concluded that any reliance interests in the longstanding
14 definition of “harm” are “outweighed by the constitutional interest in repealing” it. *Id.* at 43308.
15 While claiming to acknowledge the presence of reliance interests, the Services dismissed
16 relevant comments by asserting that they merely described illegitimate or extraneous factors. For
17 example, the Services depicted commenters with economic interests in the prior definition of
18 “harm,” including nearly a half-billion dollars in habitat conservation investments, as engaged in
19 “essentially rent-seeking” “cast in the form of reliance interests.” *Id.* at 43308–09. The Services
20 concluded that state governments’ reliance on the definition of “harm” as part of larger
21 conservation frameworks, as well as private individuals’ interests in ecological stability, “are
22 really policy disagreements.” *Id.* at 43309.

78. The Services did not prepare an Environmental Impact Statement or an Environmental Assessment for the Rescission. The Services claimed that the Rescission is “a nondiscretionary action with respect to which [they do] not have authority to take environmental factors into consideration.” *Id.* at 43316 (quoting 42 U.S.C. § 4336(a)(4)). Alternatively, they applied a categorical exclusion covering actions “that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case,” and that extraordinary circumstances do not apply. *Id.* (quoting 43 C.F.R. § 46.210(i)).

79. The Services did not engage in ESA Section 7 consultation on the Rescission, claiming that they “are acting solely in their role as administrators of the ESA” and the consultation requirements of Section 7(a)(2) do not apply. *Id.*

VII. THE TAKE MEMOS

80. The Rescission became effective on September 14, 2026. 91 Fed. Reg. at 43300. Unbeknownst to the public, the Services issued the Take Memos internally on the same day. The Memos purport to address the scope of the ESA’s “take” prohibition following the Rescission. However, they do more than interpret the Service’s prior conclusion that the word “harm” in the statute’s take definition no longer includes habitat destruction or modification. Instead, the Memos seek to re-define take to entirely eliminate the concept of incidental take. In this regard, the Memos state that take includes only “an affirmative act that is intentionally and purposefully directed at a particular animal.” Take Memos at 1.

81. Under this extreme theory, for a person to commit a prohibited “taking,” “the person must intend to act on an animal and must do so for the purpose of affecting the animal.”

Nesvik Memo at 2; Luce Memo at 3. Accordingly, “[a] vessel that inadvertently strikes a whale has not taken it, because the vessel’s course was not set against the whale. Felling a tree is not a take of the bats roosting in it unless the tree is felled for the purpose of killing or capturing them. In each instance the conduct is directed at the water or at the timber and reaches the animal only ‘indirectly and accidentally.’” Take Memos at 3.

82. By focusing exclusively on the purpose of the act, the interpretation offered in the Take Memos defies the language of the ESA itself, which explicitly provides that “taking” includes actions that are “incidental to, *and not the purpose of*, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B) (emphasis added). The Memos announce a new and substantive change in application of the ESA that contradicts the relevant statutory language.

83. Moreover, despite announcing a substantive change in law that goes beyond the Rescission they purport to interpret, and contradicts and nullifies whole provisions of the ESA, the Services did not subject either Memo to notice and public comment.

84. The Services have still not publicly posted the Take Memos: the Nesvik Memo came to light through an investigative newspaper article, *see* Catrin Einhorn, *Trump Administration Moves to Gut a Core Endangered Species Protection*, NY Times (Sept. 16, 2026), <https://www.nytimes.com/2026/09/16/climate/endangered-species-act-change.html>, and the Luce Memo was provided to Plaintiff Center for Biological Diversity in response to a request under the Freedom of Information Act. The text of the two memos is identical.

VIII. IMPACTS OF THE RESCISSION AND TAKE MEMOS

A. Imminent Illegal Habitat Destruction

85. The rescission of the harm definition will have an immediate effect on pending biological opinions (following ESA Section 7 consultation) for federal projects and incidental

1 take permit applications for non-federal projects where take is anticipated and directly caused by
2 habitat destruction or degradation.

3 86. For example, the Forest Service is currently in the middle of an amendment
4 process for the Northwest Forest Plan, which governs management of 17 national forests across
5 24.5 million acres in Washington, Oregon, and northern California and conserves multiple
6 federally listed species that rely on the region's mature and old-growth forest habitat to survive.
7 Proposed changes in 2025 included increased logging in habitat for the threatened northern
8 spotted owl and marbled murrelet, and the Forest Service has announced it will propose further
9 changes, including to the protections currently given to northern spotted owls' prey species, in
10 the fall of 2026.

11 87. The Forest Service has acknowledged that it will need to consult with FWS and
12 NMFS under ESA Section 7 on the amendment to the Northwest Forest Plan, but after the
13 Rescission, that consultation and subsequent biological opinion is likely to result in inadequate
14 habitat protections for the northern spotted owl and marbled murrelet, as well as threatened and
15 endangered salmon, steelhead, and trout, which will in turn allow actions that increase extinction
16 threats to those species.

17 88. In another example, the Rescission will upend the finalization of the draft Bush
18 Prairie Habitat Conservation Plan ("HCP"), being developed by the City of Tumwater and the
19 Port of Olympia, Washington. The draft HCP specifies that the take of ESA-listed species
20 resulting from these activities largely falls under the regulatory definition of harm, and it creates
21 prairie and wetland reserves to mitigate for habitat destruction. The Services' rescission of the
22 regulatory harm definition will undermine the draft Bush Prairie HCP's measures intended to
23

1 preserve habitat on which the Olympia pocket gopher, streaked horned lark, Oregon vesper
2 sparrow, and Oregon spotted frog rely.

3 B. Regulatory Confusion

4 89. The Rescission also sows confusion across the regulated community by signaling
5 that, after fifty years of regulatory certainty, the Services will no longer require incidental take
6 permits for any modification or degradation of listed species' habitat, or otherwise treat
7 modification or destruction of habitat as "take" under the ESA—despite the requirement to the
8 contrary in the text of the ESA. Omission of permitting for habitat-related takings will mean,
9 among other things, that the Services will no longer require entities whose proposed actions
10 threaten such takings to comply with the regulatory process to avoid and reduce the resulting
11 impacts on listed species, including by preparing conservation plans that minimize and mitigate
12 the impacts of the incidental take "to the maximum extent practicable." 16 U.S.C.
13 § 1539(a)(2)(B).

14 90. Similarly, the Rescission indicates that the Services themselves will no longer
15 treat modification or degradation of listed species' habitat as "take" when preparing Biological
16 Opinions through the Section 7(a)(2) consultation process. Omission of such treatment will
17 mean, among other things, that the Services will no longer prescribe reasonable and prudent
18 measures or alternatives to minimize the impact of habitat-related takings or the terms and
19 conditions necessary to implement such measures. *See id.* § 1536(b)(4)(C)(ii), (iv).

20 91. The Rescission also sows confusion across the regulated community about habitat
21 protection measures in existing habitat conservation plans with incidental take permits and
22 existing biological opinions with incidental take statements. In the Rescission, the Services state
23 that "permits or incidental take statements finalized prior to the effective date of this rule will not

1 be required to be reevaluated under this final rule.” 91 Fed. Reg. at 43302. If the Services will no
2 longer require incidental take permits or statements for modification or degradation of listed
3 species’ habitat, or otherwise treat modification or destruction of habitat as “take” under the
4 ESA, that stance will throw the continuing legal validity of existing take permits and
5 consultations into question. Members of the regulated community could well decide they no
6 longer need to abide by the terms of existing take permits and statements, including
7 implementation of conservation measures.

8 92. The Rescission also signals that the Services will not be monitoring or enforcing
9 obligations imposed by those permits/statements. In fact, the Rescission invites take permit
10 holders to return permits they no longer need where “the permittee is mitigating only for habitat
11 impacts that were considered prohibited as take when their permit was issued.” *Id.* at 43305.

12 93. In addition, because the Rescission leads members of the regulated community to
13 erroneously believe that habitat destruction no longer constitutes “take,” they may destroy listed
14 species’ habitat in reliance on the Rescission and cause severe harm to endangered and
15 threatened species.

16 C. Elimination of Incidental Take

17 94. While the Rescission signals that the Services will no longer treat modification or
18 degradation of listed species’ habitat as “take,” the Take Memos go even further, signaling that
19 the Services will no longer treat *any* actions that harass, harm, pursue, hunt, shoot, wound, kill,
20 trap, capture, or collect listed species as take as long as those actions were not “purposeful”
21 against the animal. This executive nullification of duly enacted ESA mandates will have untold
22 impacts on already imperiled species, which are threatened primarily by take incidental to
23

1 industrial and commercial activity, not by take from actors whose purpose is to injure or kill
 2 imperiled wildlife.

3 95. Because the Take Memos lead members of the regulated community to
 4 erroneously believe that incidental take will no longer constitute “take” and signal that the
 5 federal government will not enforce the prohibition on most “take,” such individuals are likely to
 6 engage in activities that cause severe harm to endangered and threatened species. Similarly,
 7 because the Services themselves will no longer recognize the concept of incidental take, the role
 8 of incidental take statements in minimizing harm to endangered and threatened species from
 9 such incidental taking will be reduced and likely eliminated altogether.

10 FIRST CLAIM FOR RELIEF

11 Violation of the Endangered Species Act and the Administrative Procedure Act: 12 Contrary to Law and Failure of Rational Decisionmaking

13 96. Plaintiffs re-allege and incorporate by reference the allegations set forth in each of
 14 the preceding paragraphs of this Complaint.

15 97. The ESA prohibits “take,” including “harm” that encompasses substantial impacts
 16 to imperiled species from habitat modification or degradation. 16 U.S.C. §§ 1532(19),
 17 1539(a)(1)(B).

18 98. Under the APA, a “reviewing court shall . . . hold unlawful and set aside agency
 19 action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or
 20 otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

21 99. When promulgating a rule, the Services must articulate a satisfactory explanation
 22 for their action, including a rational connection between the facts found and the choice made. A
 23 regulation is arbitrary and capricious under the APA where “the agency has relied on factors

1 which Congress has not intended it to consider, entirely failed to consider an important aspect of
2 the problem, offered an explanation for its decision that runs counter to the evidence before the
3 agency, or is so implausible that it could not be ascribed to a difference in view or the product of
4 agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29,
5 43 (1983).

6 100. An agency changing course must show “that the new policy is permissible under
7 the statute [and] that there are good reasons for it.” *Fed. Commc’ns Comm’n v. Fox Television*
8 *Stations*, 556 U.S. 502, 515 (2009). “An agency changing its course by rescinding a rule is
9 obligated to supply a reasoned analysis for the change beyond that which may be required when
10 an agency does not act in the first instance.” *State Farm*, 463 U.S. at 30.

11 101. Federal Defendants failed to rationally justify the Rescission. The Services
12 adopted the ESA statutory interpretation advanced by a dissenting opinion in *Sweet Home*,
13 notwithstanding that the *Sweet Home* majority rejected that very interpretation as inconsistent
14 with the statutory text, structure, and legislative history. The *Sweet Home* Court upheld FWS’s
15 “harm” definition as reasonable and consistent with the statute; it also unequivocally rejected the
16 interpretation proffered by the lower court, the dissent, and now the Services. The *Sweet Home*
17 Court ultimately stated that it “need not decide whether the statutory definition of ‘take’ compels
18 [FWS’s] interpretation of ‘harm’” because it upheld FWS’s definition under *Chevron*. 515 U.S.
19 at 703. Nevertheless, the Services in the Rescission had no basis for choosing—among all
20 possible statutory interpretations—the one interpretation that the Supreme Court had already
21 rebuffed.

22 102. In addition, in the Rescission, Federal Defendants purported to apply the Supreme
23 Court’s *Loper Bright* precedent but actually issued an Executive Branch interpretation informed

by political policy considerations—the very type of interpretation methodology that *Loper Bright* rejected when it overruled *Chevron*. Moreover, while purporting to acknowledge *Loper Bright*’s affirmance of statutory *stare decisis* principles for cases decided under *Chevron*, Federal Defendants nullified those principles by limiting them to anomalous circumstances: a reviewing court previously would have had to make contradictory determinations that a statute was sufficiently ambiguous to trigger *Chevron* deference *and* that the agency’s interpretation was “the only possible . . . reading.” 91 Fed. Reg. at 43301. Further, Federal Defendants entirely failed to consider *Loper Bright*’s instruction that “interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute’s meaning.” 603 U.S. at 394.

103. The Services’ finalization of the Rescission is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of the ESA and the APA, 5 U.S.C. § 706(2)(A).

SECOND CLAIM FOR RELIEF

Violation of the National Environmental Policy Act and the Administrative Procedure Act: Failure To Prepare an Environmental Impact Statement/Environmental Assessment and Invalid Invocation of Categorical Exclusion

104. Plaintiffs re-allege and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

105. NEPA requires an agency undertaking a “major Federal action[] significantly affecting the quality of the human environment” to prepare a “detailed statement” on the environmental impacts of its action and reasonable alternatives. 42 U.S.C. §§ 4332(2)(C), 4336(b)(1). Even where an agency’s undertaking “does not have a reasonably foreseeable significant effect on the quality of the human environment, or if the significance of such effect is

1 unknown,” the agency must evaluate the impact of its action in an environmental assessment. *Id.*
2 § 4336(b)(2).

3 106. The Rescission renounced a longstanding, statutorily grounded interpretation of
4 the ESA that protected endangered species from habitat destruction resulting in injury or death,
5 and the Rescission indicated that the Services would henceforward exclude that protection from
6 their implementation and enforcement of the Act. The Services’ action “has a reasonably
7 foreseeable significant effect on the quality of the human environment.” *Id.* § 4336(b)(1).

8 107. Nevertheless, the Services failed to evaluate the Rescission in an environmental
9 impact statement. Nor did they address the Rescission in an environmental assessment.

10 108. The Services wrongly asserted that the Rescission is “a nondiscretionary action
11 with respect to which such agency does not have authority to take environmental factors into
12 consideration” and therefore exempt from NEPA. *Id.* § 4336(a)(4). The Rescission is
13 discretionary, and the Services’ contention that the ESA compels the Rescission is unfounded.
14 Even if, for the sake of argument, the Services had properly interpreted the ESA, they failed to
15 evaluate alternatives to the Rescission as required by NEPA, including abiding by statutory *stare*
16 *decisis* principles as discussed in *Loper Bright*.

17 109. The Services are also wrong in asserting that the Rescission qualifies for a
18 categorical exclusion from NEPA analysis. The Services attempted to invoke a categorical
19 exclusion reserved for “[p]olicies, directives, regulations, and guidelines: that are of an
20 administrative, financial, legal, technical, or procedural nature; or whose environmental effects
21 are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later
22 be subject to the NEPA process, either collectively or case-by-case.” 43 C.F.R. § 46.210(i);
23 NOAA NEPA Guidance at App’x E, E-14. However, the Rescission will have concrete impacts

1 on listed species and is not of a merely “administrative, financial, legal, technical, or procedural
2 nature.” The effects of the Rescission are not too broad, speculative, or conjectural to analyze
3 and, regardless, there is no indication that the effects will later be subject to the NEPA process.
4 In fact, they will not be. The Services’ referenced categorical exclusion—and all other
5 categorical exclusions—are inapplicable.

6 110. Moreover, the Rescission presents extraordinary circumstances that prohibit the
7 use of any categorical exclusion. For example, the Department of the Interior (which includes
8 FWS) has determined that extraordinary circumstances exist for actions that “[h]ave significant
9 impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened
10 Species or have significant impacts on designated Critical Habitat for these species.” 43 C.F.R. §
11 46.215(g). NMFS has described extraordinary circumstances as including “adverse effects on
12 species or habitats protected by the ESA.” NOAA NEPA Guidance at 9. The effects of the
13 Rescission on species currently—and proposed to be—listed and protected under the ESA are
14 significant and adverse. Other extraordinary circumstances that apply to the Rescission are
15 highly controversial environmental effects, highly uncertain and potentially significant
16 environmental effects, and precedential effect for future actions. *See* 43 C.F.R. § 46.215; NOAA
17 NEPA Guidance at 9. Each of those extraordinary circumstances would be independently
18 sufficient to prohibit the Services’ reliance on a categorical exclusion.

19 111. The Services’ evasion of NEPA under an invalid claim of nondiscretionary
20 action; their improper invocation of a categorical exclusion; their failure to recognize
21 extraordinary circumstances that prevent use of a categorical exclusion; and their failure to
22 prepare an environmental impact statement or even an environmental assessment that examines
23

the effects of the Rescission and a reasonable range of alternatives violated NEPA and the APA, 5 U.S.C. § 706(2).

THIRD CLAIM FOR RELIEF

Violation of the Endangered Species Act and the Administrative Procedure Act: Failure to Consult Under ESA § 7

112. Plaintiffs re-allege and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

113. Section 7(a)(2) of the ESA requires that each federal agency, in consultation with FWS and/or NMFS, ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of critical habitat of such species. 16 U.S.C. § 1536(a)(2). Action is defined to include the promulgation of regulations; actions that may directly or indirectly cause modifications to the land, water, or air; and actions that are intended to conserve listed species or their habitat. 50 C.F.R. § 402.02.

114. If a federal agency, including FWS or NMFS itself, determines that its proposed action “may affect” listed species or critical habitat, the agency must engage in such Section 7(a)(2) consultation with FWS and/or NMFS, depending on the species involved. *Id.* § 402.14(a). The “may affect” hurdle is easily met, encompassing any possible effect, whether beneficial, benign, adverse, or of an undetermined character. *See California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018–19 (9th Cir. 2009).

115. Unless the agency determines, with concurrence from the relevant Service, that its proposed action “is not likely to adversely affect any listed species or critical habitat,” formal consultation is required. 50 C.F.R. §.402.14(a), (b)(1). Formal consultation concludes with the

1 preparation of a biological opinion by FWS and/or NMFS addressing whether the proposed
2 action will jeopardize threatened or endangered species or result in the destruction or adverse
3 modification of critical habitat, and setting forth any necessary measures for avoiding,
4 minimizing, and mitigating any adverse impacts. 16 U.S.C. § 1536(b). An action agency may
5 avoid formal consultation by engaging in “informal consultation” with FWS and/or NMFS and
6 obtaining a written concurrence that the project is not likely to adversely affect threatened or
7 endangered species or critical habitat. 50 C.F.R. §§ 402.13(a), 402.14(b)(1).

8 116. The Services have acknowledged that their own actions are subject to internal
9 consultation with the FWS Endangered Species Office or NMFS Office of Protected Resources.
10 *See* Endangered Species Consultation Handbook 1-5 to 1-6, App. E (1998).

11 117. The Rescission marks a dramatic shift in the Services’ regulatory approach that
12 will have significant impacts on listed species and critical habitat, but the Services did not
13 conduct any Section 7 consultation on the Rescission. Instead, without pointing to anything
14 specific about the statute, they asserted that, based on “the plain language, structure, and
15 purposes of the ESA,” consultation requirements do not apply to the Services’ promulgation of
16 ESA implementing regulations. 91 Fed. Reg. at 43316. To the contrary, the plain language,
17 structure, and purposes of the ESA required that the Services comply with Section 7 in
18 promulgating the Rescission.

19 118. For these reasons, the Services’ failure to consult on the Rescission under ESA
20 Section 7 was arbitrary, capricious, contrary to the ESA, and in violation of the APA, 5 U.S.C.
21 § 706(2).

FOURTH CLAIM FOR RELIEF

Violation of the Endangered Species Act and the Administrative Procedure Act:
Contrary to Law and Failure of Rational Decisionmaking

119. Plaintiffs re-allege and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

120. The ESA prohibits “take” of endangered and threatened species. 16 U.S.C. §§ 1532(19), 1539(a)(1)(B). By its own terms, the ESA contemplates that “take” may occur that is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B), (a)(2); *see also id.* § 1536(b)(4)(B), (b)(4)(C)(i). The 1982 ESA amendment adding the Section 7 incidental take statement and Section 10 incidental take permitting provisions demonstrates Congress’s intention and understanding that the ESA’s prohibition against takings extended to those that are not deliberate or intentional. *See* H.R. Rep. No. 97-835, at 8 (1982) (Conf. Rep.).

121. The ESA authorizes the Services to permit such “incidental” take. 16 U.S.C. §§ 1536(b)(4)(B), (b)(4)(C)(i), 1539(a)(1)(B). However, incidental take is prohibited absent compliance with a set of detailed prescriptions by the Services and project proponents. For non-federal actions, the Services must review and make enumerated findings on a conservation plan submitted by the permit applicant that evaluates the impacts of predicted incidental take, ways to mitigate and minimize those impacts, and alternative actions. *See* 16 U.S.C. § 1539(a)(2)(A), (a)(2)(B). For federal actions, the Services must prepare a biological opinion that describes the proposed action’s expected impact on listed species and critical habitat, as well as a statement that specifies the expected impact of incidental take resulting from the action and mandates reasonable and prudent measures to minimize such impact. 16 U.S.C. § 1536(b)(3)(A), (b)(4).

122. Under the APA, a “reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

123. The Take Memos unlawfully read all provisions related to “incidental take” out of the ESA. The Memos announce the Services’ interpretation of “take” as “reach[ing] only an affirmative act that is intentionally and purposefully directed at a particular animal.” Take Memos at 1. This interpretation of “take” contradicts the plain language of the statute, which states that activities may still qualify as illegal “take” even where they are “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B), (a)(2); *see also id.* § 1536(b)(4)(B), (b)(4)(C)(i).

124. In this way, the Take Memos seek to dismantle safeguards of the ESA that Congress had carefully designed. Instead of prohibiting incidental take absent these rigorous safeguards, the Services would place incidental take—no matter how destructive, extensive, or preventable—entirely beyond the reach of the law.

125. The interpretation reflected in the Take Memos further impermissibly renders all statutory provisions related to conservation plans—which are required submissions alongside permit applications for incidental take—as well as the portions of biological opinions that give rise to incidental take statements—mere surplusage. 16 U.S.C. §§ 1539(a)(2)(A), (a)(2)(B), 1536(b)(4)(B).

126. The Take Memos utterly fail to explain how their proffered interpretation of “take” comports with the plain language, structure, and purposes of the ESA.

127. The Take Memos are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of the ESA and the APA. 5 U.S.C. § 706(2)(A).

FIFTH CLAIM FOR RELIEF

Violation of the Administrative Procedure Act:
Failure to Engage in Notice-and-Comment Rulemaking

128. Plaintiffs re-allege and incorporate by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

129. The APA requires agencies to engage in notice-and-comment rulemaking to promulgate rules that create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress. 5 U.S.C. § 553(b).

130. The Take Memos create rights, impose obligations, and effect a change in existing law. Far beyond merely elaborating on the Rescission, the Memos depart sharply from duly enacted statutory text and related implementing regulations that establish the concept of, and requirements surrounding, “incidental take.” The Take Memos displace that statutory and regulatory text with new interpretations of the statutory term “take.” *See* Nesvik Memo at 2; Luce Memo at 3. By contrast, and by the Services’ own admission, the Rescission “involve[d] a single regulatory definition.” 91 Fed. Reg. at 43302 n.7.

131. The Services did not publish, give notice, or accept comments on the Take Memos.

132. By issuing the Take Memos under the guise of internal guidance, rather than engaging in notice-and-comment rulemaking, the Services’ actions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of the APA. 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court:

A. Declare that the Services violated the ESA, NEPA, and the APA when they issued the Rescission;

B. Vacate the Rescission;

C. Reinstate the harm rules previously set forth at 50 C.F.R. §§ 17.3 and 222.102;

D. Enjoin FWS and NMFS from applying the Rescission and require them to apply, utilize, and follow the harm rules previously in force;

E. Declare that the Services violated the ESA and the APA when they issued the Take Memos.

F. Vacate the Take Memos.

G. Enjoin FWS and NMFS from applying the reasoning in the Take Memos to limit the definition of incidental take.

H. Grant such restraining orders and/or preliminary and permanent injunctive relief as Plaintiffs may request to ensure that threatened and endangered species and their habitat do not suffer irreparable harm pending resolution of the merits of this action;

I. Award Plaintiffs their reasonable fees, expenses, costs, and disbursements, including attorneys' fees associated with this litigation under the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(4), and the Equal Access to Justice Act, 28 U.S.C. § 2412.

J. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 1st day of October, 2026.

s/ Kristen L. Boyles

Kristen L. Boyles (WA Bar No. 23806)
Earthjustice
810 Third Ave., Suite 610
Seattle, WA 98104
T: (206) 343-7340
kboyles@earthjustice.org

s/ Benjamin M. Levitan

Benjamin M. Levitan (NY Bar No. 5215058)
(*pro hac vice*)
Earthjustice
48 Wall Street, Floor 15
New York, NY 10005
T: (202) 797-4317
blevitan@earthjustice.org

s/ Sharmeen Morrison

Sharmeen Morrison (CA Bar No. 360435)
(*pro hac vice*)
Earthjustice
180 Steuart Street #194330
San Francisco, CA 94105
T: (415) 217-2005
smorrison@earthjustice.org

s/ Timothy J. Preso

Timothy J. Preso (MT Bar No. 5255)
(*pro hac vice*)
Earthjustice
P.O. Box 4743
Bozeman, MT 59772-4743
T: (406) 586-9699
tpreso@earthjustice.org

Attorneys for all Plaintiffs

s/ Erica A. Fuller

Erica A. Fuller (MA Bar No. 669647)
(*pro hac vice*)
Conservation Law Foundation
62 Summer St.
Boston, MA 02110

1 T: (508) 400-9080
2 efuller@clf.org

3 *Attorney for Plaintiff Conservation Law Foundation*

4 s/ Brian Segee

5 Brian Segee (CA Bar No. 200795)

6 (pro hac vice)

7 Center for Biological Diversity

8 226 W. Ojai Ave., Suite 101-442

9 Ojai, CA 93023

10 T: (805) 750-8852

11 bsegee@biologicaldiversity.org

12 *Attorney for Plaintiff Center for Biological*
13 *Diversity*