



May 19, 2025

VIA ELECTRONIC SUBMISSION

Gina Schultz
Acting Assistant Director, Ecological Services
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: Rescinding the Definition of “Harm” Under the Endangered Species Act (Docket No. FWS-HQ-ES-2025-0034).

Dear Acting Assistant Director Schultz:

The American Road & Transportation Builders Association (ARTBA), representing over 8,000 members in the transportation construction industry, respectfully submits comments on the proposal from the Fish and Wildlife Service and National Marine Fisheries Service (collectively, the Services) to rescind the regulatory definition of “harm” under the Endangered Species Act (ESA). ARTBA members strongly support species conservation but also rely on regulatory clarity and predictability to deliver critical infrastructure projects efficiently. The Services’ proposal helps ensure that ESA regulations align with the statute’s text, reflect recent judicial developments, and provide a clearer framework for compliance. Therefore, **ARTBA supports the Services’ proposal.**

Background

ARTBA represents members of all sizes across every sector of the transportation construction industry, including contractors, materials suppliers, planning and design firms, state and local transportation agencies, and safety and equipment manufacturers. Our members are responsible for building and maintaining the nation’s highways, bridges, and other critical infrastructure. They are conscientious stewards of the environment, committed to delivering projects safely, efficiently, responsibly, and cost-effectively.

Many ARTBA members voluntarily implement wildlife mitigation efforts, even when not required by law. However, ongoing regulatory uncertainty continues to create challenges for timely and

effective project delivery. One key source of this uncertainty has been overly broad interpretations of the ESA ¹, which extend beyond the statute’s plain language and impose burdensome requirements on infrastructure projects—often with little or no additional benefit to wildlife.

The ESA establishes a framework for protecting animal species listed as threatened or endangered and regulates activities that may affect those species. Among its provisions, the ESA prohibits any person from engaging in the “take” of a listed animal. The statute defines “take” to include actions such as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempts to engage in any of those actions. ²

Although the ESA does not define the term “harm,” the Services have historically interpreted it through regulation. That regulatory definition expands “harm” to include species habitat modifications that interfere with essential behaviors like breeding, feeding, or sheltering, and that may ultimately lead to injury or death. ³

This broader interpretation was challenged in court and ultimately upheld by the U.S. Supreme Court. ⁴ In that case, the Court did not determine whether the agency’s definition was the best reading of the statute but instead deferred to the Services’ interpretation under the then-controlling *Chevron* doctrine. ⁵ *Chevron* required courts to defer to federal agencies’ interpretations of ambiguous statutes, so long as those interpretations were considered reasonable. ⁶

In 2024, the Supreme Court overturned the *Chevron* doctrine in *Loper Bright*. ⁷ Without *Chevron*, courts now interpret statutes based on their plain meaning, without automatically deferring to agency views. In light of this shift, the Services have proposed rescinding the regulatory definition of “harm” and returning to an interpretation that more closely reflects the ESA’s actual language.

ARTBA supports this proposal and offers the following additional comments.

ARTBA’s Comments

- I. The definition of “take” should be limited to direct actions against listed species.

¹ See, e.g., Comments from the American Road & Transportation Builders Association on Regulations Concerning Endangered and Threatened Species and Designation of Critical Habitat, Docket Nos. FWS-HQ-ES-2021-0104, FWS-HQ-ES-2021-0107, FWS-HQ-ES-2023-0018 (Aug. 21, 2023), available at <https://www.artba.org/resource/comment-opposing-changes-proposed-by-fish-wildlife-service-to-endangered-species-act-regulations/>.

² 16 U.S.C. § 1532(19).

³ 50 C.F.R. § 17.3 (2024)

⁴ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

⁵ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁶ *Id.*

⁷ *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

Transportation construction sites are dynamic environments, with the progression of work often driving changes in conditions literally overnight. At the same time, ARTBA members take their conservation responsibilities seriously, often exceeding regulatory requirements by implementing voluntary mitigation and preventative measures to protect wildlife. However, even with these proactive efforts, unexpected developments—such as the sudden appearance of a species or habitat activity—can trigger work stoppages or limitations. For many contractors, especially small and mid-sized firms, delays of even a few days can be financially burdensome. Contractors need to mobilize and begin each stage of work without facing unpredictable regulatory obstacles that threaten project schedules, ultimately delaying availability of critical infrastructure assets.

As noted above, the ESA defines “take” by listing specific, direct actions including “harass,” “pursue,” “hunt,” “shoot,” and “kill.”⁸ “Harm” appears on this list but is the only term the Services have defined by regulation. That definition goes beyond the other listed terms by including indirect effects like habitat modification⁹—making “harm” an outlier. This interpretation is inconsistent with the plain meaning of the surrounding terms, all of which involve affirmative conduct that directly injures or kills a species.¹⁰

The Supreme Court’s recent decision in *Loper Bright* reinforces the need to follow the statute’s text rather than defer to agency interpretations. Without *Chevron* deference, courts will look to the language Congress enacted, guided by traditional tools of statutory interpretation. These tools affirm that if Congress had intended habitat modification to fall within the definition of “take,” then it would have included that term explicitly. Instead, Congress addressed habitat protection elsewhere in the ESA, through provisions for critical habitat and agency consultation.¹¹

By rescinding the regulatory definition of “harm,” the Services are realigning the rule with the statutory framework and legal precedent. Thus, only actions that directly injure or kill a listed species fall within the scope of a “take.”

II. The Services should issue guidance to ensure consistent implementation.

The Services should issue implementation guidance to support regulatory predictability. With the removal of the regulatory definition of “harm,” regulated entities need clarity on how the change will affect permitting, enforcement, and project planning. Timely guidance will help ensure consistent application across field offices, prevention of unnecessary project delays, and

⁸ *Supra* note 2.

⁹ *Supra* note 3.

¹⁰ Under established canons of statutory interpretation, when a law lists specific things, courts assume that what’s not listed was intentionally left out. *E.g.*, *expressio unius est exclusio alterius*.

¹¹ See 16 U.S.C. § 1533(a)(3) (critical habitat designation); § 1536(a)(2) (agency consultation to avoid destruction or adverse modification of critical habitat).

confidence among public agencies and project sponsors to proceed under the new legal framework.

Conclusion

ARTBA appreciates the opportunity to provide these comments. Our members are committed to protecting wildlife while efficiently delivering infrastructure projects that keep people and goods moving safely. Rescinding the regulatory definition of “harm” reflects congressional intent, aligns with recent Supreme Court precedent, and reduces regulatory uncertainty. This allows projects to move forward with greater confidence and fewer delays. ARTBA stands ready to support the Services as this rulemaking moves forward. For more information, please contact Prianka Sharma at psharma@artba.org.

Sincerely,

/s/

Prianka P. Sharma
Vice President and Counsel for Regulatory Affairs
American Road & Transportation Builders Association