



INTERNATIONAL CRANE FOUNDATION

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Docket No. FWS-HQ-ES-2025-0034

Official Comments by the International Crane Foundation regarding the USFWS and NOAA Revising the Definition of “Harm” Under the Endangered Species Act

USFWS and NOAA Officials:

The International Crane Foundation works worldwide to conserve all 15 species of cranes and the ecosystems, watersheds, and flyways on which they depend. We have two major offices in the United States, one in Rockport, Texas, and our global headquarters in Baraboo, Wisconsin. The Whooping Crane (*Grus americana*) is the rarest crane in the world, and we have long collaborated with the U.S. Fish and Wildlife Service in the continued recovery of this iconic species. We have had representation on the International Whooping Crane Recovery Team, have played a key role in periodic updates of the species' Recovery Plan, and have delivered key recovery actions for the species including leadership of the effort to reintroduce a migratory population to the eastern United States. The Endangered Species Act has been a key component of our collective progress, and we have a strong interest in its effective administration.

On 17 April 2025, the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration (NOAA) proposed a rule change under the guidance of the Trump Administration to redefine “harm” as it is applied under the Endangered Species Act (ESA). Signed into law in 1973—the same year as the International Crane Foundation was established—the ESA is a keystone of conservation success. It is credited with saving 99 percent of the species it protects, like the endangered Whooping Crane, which was part of the first cohort of species protected by the law (Greenwald et al. 2019. PeerJ 7:e6803). We believe that the proposed change in the definition of “harm” will heavily impact the ESA’s capacity to recover species from the brink of extinction. Therefore, we advocate against this proposed rule change.

The ESA prevents “take” which means to “harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct” related to “threatened” or “endangered species.” For regulatory purposes, the USFWS and NOAA currently define “harm” as including “significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.” This interpretation was upheld in the 1995 Supreme Court case “Babbitt v. Sweet Home Chapter of Communities for a Great Oregon” based on an earlier 1984 Supreme Court case entitled “Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.” that is often referred to as the “Chevron Doctrine.” However, in 2024 the Supreme Court overturned the Chevron Doctrine in a case entitled “Loper Bright Enterprises v. Raimondo,” which established a new precedent for agency interpretation of existing acts which specifies that an agency’s interpretation of a rule must match “the single best meaning of a statute.” This has paved the way for a reinterpretation of the definition of “harm” under the ESA. The administration suggests that the word “take” is preeminent and that the definition of “harm” is subsumed thereunder. Moreover, they contend that the single best interpretation of “take” reflects the “well-established, centuries-old understanding” that the word represents an *intentional* effort to “kill or capture a wild animal.” However, we contend that the narrow discussion surrounding a single definition overlooks larger themes in the ESA that underscore its recognition that indirect threats such as habitat loss and passive threats such as poorly

sited or marked energy infrastructure (e.g., transmission lines) are primary drivers of species loss and extinction.

We assert that the proposed redefinition of “harm” is inconsistent with the intent of the ESA and represents an unreasonable interpretation of the Act’s various sections and their operational interconnections. The word “harm” needs to include impacts to habitat (and indirect impacts) or several provisions and definitions in Section 3 of the ESA don't make logical sense. For instance, the term “critical habitat” for a threatened or endangered species means: “(i) the specific areas within the geographical area occupied by the species, at the time it is listed.... on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.” The ESA requires critical habitat designations be “prudent and determinable” and that federal actions avoid “destroying” or “adversely modifying” these critical areas. The ESA clearly recognizes the essential value of habitat conservation to mitigating threats to a species of concern. If “harm” does not include impacts to habitat, why would the Act envision “critical habitat” wherein federal nexus actions that could imperil species are prohibited or need to be mitigated?

Furthering our point, Section 4 of the ESA lays out the factors that “...determine whether any species is an endangered species...” including: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Here again, the first driver of extinction highlighted is the destruction of habitat. Also, note that threat factors A, D, and E clearly reflect the indirect nature of many threats to threatened & endangered Species. The ESA strongly considers habitat loss and indirect threat drivers like energy infrastructure and ultimately relies less on species’ demographic information for listing determinations than most other legal frameworks for species conservation in the world (e.g., Canada). In any case, limiting habitat loss and the amelioration of other indirect threat drivers are core tenants of the ESA.

The proposed new definition of “harm” would only protect species from intentional killing or injury, like through hunting or trapping, and not from the degradation or loss of habitat that plants and animals need to survive. By emphasizing that harm must be intentional,

the change allows for inadvertent killing or injury to endangered plants and animals. For instance, this rule change could result in the loss of our ability to effectively site energy resources to accommodate endangered species' movement corridors and migratory pathways. Large transmission lines and other elevated infrastructure have been associated with unintentional, or "incidental," take of endangered species, including Whooping Cranes.

In the early 1940s, only 21 Whooping Cranes remained in the wild due to unregulated hunting and massive habitat loss. Today, there are more than 690 wild Whooping Cranes, mostly due to these vital legal protections, habitat conservation, and reintroduction efforts supported by the ESA. As arguably the second rarest breeding bird in North America after the also endangered California Condor (*Gymnogyps californianus*), the Whooping Crane remains endangered and still needs our help and firm legal protections. Direct habitat impacts such as freshwater diversions, wetland drainage, land development, powerline collisions, and other disturbances at key feeding and roosting sites throughout the species' wintering, migratory, and breeding range will almost certainly increase if this proposed rule change goes into effect. We are also concerned that the proposed rule change may create infinite loopholes and legal escapes for anyone who shoots a Whooping Crane by allowing them to say they "didn't mean to do it."

The ESA is the most important law for protecting and conserving threatened plants and animals in our country. We believe that the proposed rule change regarding the definition of "harm" will have extremely negative impacts on threatened and endangered species and their effective conservation as most drivers of biodiversity loss and species extinction are not intentional or direct. For example, the most comprehensive research indicates that the greatest driver of biodiversity loss and extinction in the United States and globally is habitat loss and degradation (Wilcove et al. 1998. *BioScience* 48(8):607-615; Caro et al. 2022. *Conservation Letters* 15(3):e12868; Jaureguiberry et al. 2022. *Science Advances* 8:eabm9982). We advocate that this proposed rule change be halted, and that the current definition of "harm" be retained.

We greatly appreciate your consideration of our comments. We believe strongly in the power of partnerships, and our long collaboration with the Department of Interior and its various agencies has been highly productive for species conservation. We firmly believe this rule change will impact our shared efficacy in ensuring a future for the Whooping Crane and other endangered species. We hope you will seriously consider our comments on this matter given our rapport and collegial history working together.

Sincerely,

Richard Beilfuss, Ph.D., *President & CEO*

x Richard Beilfuss 14 May 2025

Andrew J. Caven, *Vice President – North America Programs*

x Andrew J. Caven 14 May 2025

Anne E. Lacy, *Director of Eastern Flyway Programs - North America*

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