Congress of the United States
Washington, DC 20515

November 10, 2026

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

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

Dear Secretary Burgum and Secretary Lutnick:

We write in strong opposition to the U.S. Fish and Wildlife Service's (FWS's) and National Oceanic and Atmospheric Administration's (NOAA's) – ("the Services") unlawful reinterpretation of "harm" and "take" in the Endangered Species Act (ESA). In two internal memoranda to staff released on September 14, 2026 – one issued by the FWS Director Brian Nesvik and another from NOAA General Counsel John Luce – the Services reinterpret settled law regarding protections for threatened and endangered wildlife under the ESA. The ESA is one of America's most successful and widely supported environmental laws.

The memoranda reinterpret unlawful "take" under the ESA to only include intentional actions targeting threatened and endangered species. [1][2] Under this interpretation, incidental killing, injury, or other forms of take resulting from otherwise lawful activities would fall outside the ESA's protections. With nearly a third of America's wildlife at risk of extinction, we should bolster our efforts to protect threatened and endangered species, not weaken them.

This reinterpretation raises concerns about the future of the ESA's incidental take permitting system. For decades, the ESA has provided a framework for allowing

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1 Einhorn, C. "Trump Administration Moves to Gut a Core Endangered Species Protection," *New York Times*. 16 Sept. 2026. Retrieved from: https://www.nytimes.com/2026/09/16/climate/endangered-species-act-change.html.

2 Endangered Species Act, 16 U.S.C. § 1532(19).

economic activity to proceed while requiring reasonable measures to avoid and minimize harm to threatened and endangered species. These memoranda would undermine that framework by removing incentives to prevent foreseeable wildlife deaths and injuries.

This illegal reinterpretation of take, combined with the Department of the Interior (DOI) and the Department of Commerce (DOC) rule rescinding the regulatory definition of "harm" under the ESA, which went into effect on September 14, 2026, [3] would render Section 9 prohibitions hollow, in essence only preventing purposeful take of an animal. Until September, the Services had long recognized that significant habitat modification or degradation could constitute "harm" because it could have indirect impacts on the survival of an animal. [4] These new memoranda attempt to entirely eliminate any guardrails on incidental take.

We have worked in Congress to safeguard the ESA and ensure federal agencies carry out their duty under the ESA to prevent extinction and recover species. We are alarmed by the enormous consequences the interpretation could have for species across the country. To better understand the Services' position and assist the oversight of the House Natural Resources Committee and the Senate Environment and Public Works Committee, please respond to the following questions by November 30, 2026:

1. Do the September 14, 2026 memoranda represent the official legal position of DOI and the DOC? If so, when did it take effect, and what legal guidance did DOC and DOI issue to field offices regarding its implementation?

2. What statutory language and legal precedent support the memoranda's conclusion that incidental killing or injury of endangered species does not constitute a prohibited "take" unless the activity was specifically intended to target the animal?

3. How do DOI and DOC reconcile the new interpretation with the Supreme Court's decision in *Babbitt*, which upheld the inclusion of habitat modification that kills or injures protected wildlife within the ESA's definition of "harm"?

4. Do DOI and DOC continue to require incidental take permits for activities that may foreseeably kill or injure endangered species? If the memorandum changes those requirements, please describe how.

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3 Rescinding the Definition of "Harm" Under the Endangered Species Act, 91 Fed. Reg. 43,300. 14 Jul. 2026. Retrieved from: https://www.federalregister.gov/documents/2026/07/14/2026-14195/rescinding-the-definition-of-harm-under-the-endangered-species-act.

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

5. What protections would remain available for endangered species whose threats involve incidental take, including incidental harm and habitat destruction, from otherwise lawful activities?

6. Did DOI and DOC consult with states, Tribes, or other relevant stakeholders before issuing or distributing the memorandum? If so, please describe the nature and timeline of such consultations.

7. Will DOI suspend implementation of the memorandum pending a public explanation of its legal basis and an assessment of its implications on the ESA?

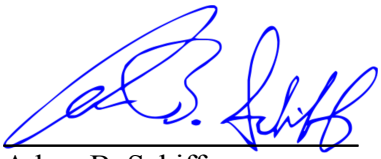
The ESA has provided a framework for protecting endangered wildlife while allowing economic activity to continue with appropriate safeguards for over 50 years. Any reinterpretation that could eliminate protections for these species is a serious and troubling departure from that framework and would undermine the law's implementation. The Services must abandon this approach and preserve the ESA's longstanding protections for threatened and endangered wildlife and the communities that depend on them.

Please contact the Natural Resources Committee Subcommittee on Water, Wildlife and Fisheries minority staff at (202) 225-6065 with any questions about this request. We look forward to your prompt response to this oversight request.

Sincerely,

Jared Huffman
Member of Congress
Ranking Member,
Committee on Natural
Resources

Debbie Dingell
Member of Congress



Adam B. Schiff
United States Senator



Donald S. Beyer Jr.
Member of Congress



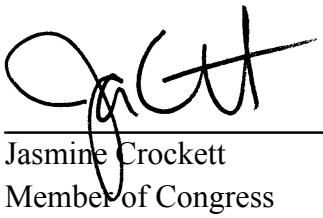
Sheldon Whitehouse
United States Senator
Ranking Member, Senate
Committee on
Environment & Public
Works



Raja Krishnamoorthi
Member of Congress



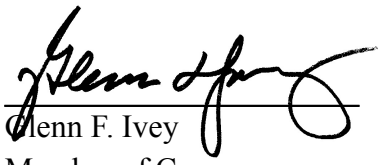
Scott H. Peters
Member of Congress



Jasmine Crockett
Member of Congress



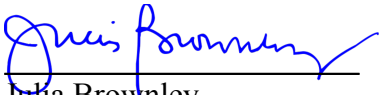
Jill Tokuda
Member of Congress



Glenn F. Ivey
Member of Congress



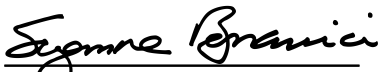
Melanie Stansbury
Member of Congress



Julia Brownley
Member of Congress



Sarah McBride
Member of Congress



Suzanne Bonamici
Member of Congress



Diana DeGette
Member of Congress



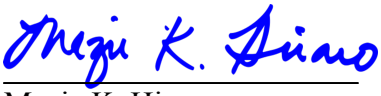
Kevin Mullin
Member of Congress



Frank Pallone, Jr.
Member of Congress



Mike Levin
Member of Congress



Mazie K. Hirono
United States Senator



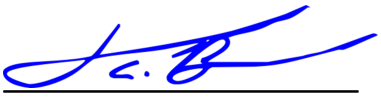
Emily Randall
Member of Congress



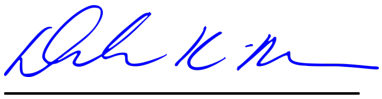
Ed Case
Member of Congress



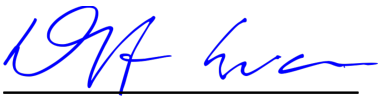
Steve Cohen
Member of Congress



Cory A. Booker
United States Senator



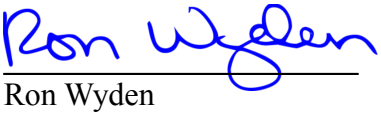
Deborah K. Ross
Member of Congress



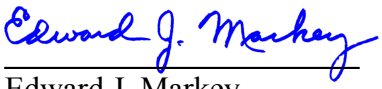
Dwight Evans
Member of Congress



Dave Min
Member of Congress



Ron Wyden
United States Senator



Edward J. Markey
United States Senator



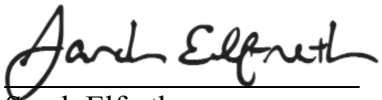
Mark DeSaulnier
Member of Congress



Richard Blumenthal
United States Senator



Jack Reed
United States Senator



Sarah Elfreth
Member of Congress



Chris Van Hollen
United States Senator



Bernard Sanders
United States Senator



Dina Titus
Member of Congress



Martin Heinrich
United States Senator

Rashida Tlaib
Member of Congress

Becca Balint
Member of Congress

Debbie Wasserman Schultz
Member of Congress

Mary Gay Scanlon
Member of Congress

Alex Padilla
United States Senator

Jeffrey A. Merkley
United States Senator

Responding to Committee
Document Requests

In responding to document requests from the Committee on Natural Resources, please apply the instructions and definitions set forth below:

Instructions

1. In complying with the request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data, or information should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization, or individual denoted in this request has been, or is currently, known by any other name than that herein denoted, the request should be read also to include them under that alternative identification.

3. Documents must be provided in electronic form (i.e., memory stick, thumb drive, or internet-based). Documents produced should also be organized, identified, and indexed electronically. Documents should be produced in their native file format. For example, emails from Microsoft Outlook should have a ".pst" file extension, Excel files should have an ".xls_" or similar extension, and Microsoft Word documents should have a ".doc_" extension. Consult with the Committee to determine the appropriate format in which to produce the information.

4. Each document produced should be produced in a form that renders the document capable of being copied.

5. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, or folder transmitted through the internet is produced, each should contain an index describing its contents.

6. Documents produced in response to this request should be produced together with copies of file labels, dividers or identifying markers with which they were associated when this request was issued. To the extent that documents were not stored with file labels, dividers, or identifying markers, they should be organized into separate folders by subject matter prior to production.

7. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.

8. It shall not be a basis for refusal to produce documents that any other person or entity also possesses a non-identical or identical copy of the same documents.

9. If compliance with the request cannot be made in full, compliance should be made to the extent possible and should include an explanation of why full compliance is not possible.

10. In the event that any document or part of a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such

document or part of a document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

11. If any document responsive to this request was, but no longer is, in your possession, custody, or control, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances by which the document ceased to be in your possession, custody, or control.

12. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

13. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.

14. All documents should be Bates-stamped sequentially and produced sequentially.

15. Documents produced to the Committee in response to this request should be delivered to minority staff in Room 1332 of the Longworth House Office Building or directly through the internet.

Definitions

1. The term **"document"** means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone calls, text messages, MMS or SMS messages, other mobile-to-mobile messages, instant messages or online chat messages, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotape, recordings and motion pictures), and electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, memory sticks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing

any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term **"documents in your possession, custody, or control"** means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that you have placed in the temporary possession, custody, or control of any third party.

3. The term **"communication"** means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to- face, in a meeting, by telephone, facsimile, mail, e-mail (desktop or mobile device), text message, MMS or SMS message, other mobile-to-mobile message, instant message or online chat, telexes, releases, personal delivery, or otherwise.

4. The terms **"and"** and **"or"** shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

5. The terms **"person"** or **"persons"** means natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof.

6. The term **“identify,”** when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

7. The terms **"referring or relating,"** with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is in any manner whatsoever pertinent to that subject.

8. The term **“employee”** means agent, borrowed employee, casual employee, consultant, contractor, defacto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.