The administration has proposed revoking the definition of harm in the regulations implementing Section 9 of the Endangered Species Act (ESA). Section 9 is the section of the ESA that prohibits taking a member of a listed species. The change is significant because that definition of harm included, in some circumstances, actions that modify the habitat of an endangered species. Without this regulatory definition, the scope of the ESA could significantly shrink. While Section 9 of the ESA would still prohibit individuals from directly killing, injuring, or capturing members of a listed species, it would not prohibit habitat destruction on private lands where no federal permit, funding, or action is present. Importantly, Section 7 of the ESA would still prevent the federal government from taking actions that jeopardize the existence of a listed species, or adversely modify the critical habitat of a listed species.

Some initial thoughts on the implications of the proposal.

First, this will undoubtedly be harmful from a conservation perspective. This will significantly reduce protection for listed species on non-federal lands, particularly in states that do not have their own endangered species protections. (California has an Endangered Species Act that does provide some protections against habitat modification for listed species. I'll post about how California might respond soon.) But I've always been a little mystified why this change hadn't been proposed in past Republication administrations – perhaps there's been a concern about the disruption the change would cause, including to regulated party interests (as I'll discuss below), perhaps it was seen as too politically fraught. However, here we are.

Second, the change will cause significant disruption, and not just to species. Will parties currently bound by existing permits under the Section 9 based on the existing regulation continue to be bound by those permits? In many cases, those permittees made long-term, irreversible commitments (such as conservation easements) based on the existing regulation.

In addition, I'm not sure that this change will provide a lot of certainty for those who want to do major development projects in areas that have endangered species habitat. Development activities might still directly kill or injure members of listed species through land clearance, modification, and construction activities. (For instance, Utah prairie dogs live in burrows, and so must affirmatively must be moved if you want to develop their habitat.) Even without habitat modification, the prohibitions under the ESA are quite broad and similar to those under the Migratory Bird Treaty Act (MBTA), which can significantly limit actions by private parties. (For instance, construction projects sometimes must avoid activity during nesting season for birds protected under the MBTA.) And unlike the MBTA,

which only is enforced by the government, the ESA is enforceable by citizen suits. Thus, while the Trump Administration could issue an interpretation of how it would enforce the MBTA that would dramatically limit its scope, such an approach will not work under the ESA. One related interesting question will be what kind of proof of death or injury to listed species will be required if there are citizen suits against development projects. (Notably, the agency is not proposing a replacement definition of "harm", but leaving it undefined – probably because that allows it to move quicker in terms of revoking the prior definition. But that lack of definition of harm could further increase uncertainty for private actors.)

The change will also probably have an effect on implementation of Section 7 for federal agencies. In ensuring their actions do not cause jeopardy or adverse modification, federal agencies must go through a consultation process with the US Fish and Wildlife Service or the National Marine Fisheries Service, which includes assessing, and minimizing, the take their actions will produce. By eliminating the consideration of habitat modification in assessing take, the change will likely reduce the amount of habitat protections that are imposed through that consultation process.

Finally, there are some very interesting questions around how the agency is seeking to make this change, and the statutory interpretation issues at play. The proposal is extremely short: Basically the agency asserts that the "best reading" of the ESA precludes the definition of harm in the regulation, and therefore the agency has a nondiscretionary duty to repeal the regulation. The agency is also relying on this theory to avoid any NEPA analysis for the change. That is . . . an unusual approach to drafting regulations.

The existing definition of harm was upheld by the Supreme Court (in *Sweet Home v. Babbitt* in the 1990s) as a reasonable interpretation of the ESA that warranted deference under the Chevron doctrine. The agency proposal to rescind the harm definition relies on a minority opinion in *Sweet Home* (drafted by Scalia) that asserts that the take prohibition under Section 9 only applies to actions that directly kill, injure, or capture members of listed species. The Supreme Court eliminated *Chevron* deference last year in *Loper Bright*, but explicitly stated that prior caselaw applying *Chevron* was good law and would not be overruled. Nonetheless, the agency proposal relies on *Loper Bright* as the basis for its reasoning.

The administration is clearly looking for a cheat code here that will allow it, with minimal effort, to rapidly repeal lots of regulations. But I'm somewhat skeptical the courts will buy an approach in which an agency baldly asserts that it knows the best interpretation of the statute, therefore it need not do any analysis of its change other than legal reasoning, and courts will simply approve the change under the Administrative Procedure Act (which allows

for judicial review to ensure that agency decisions are not arbitrary and capricious). There is some irony here – *Loper Bright* was all about how courts should recapture legal interpretation from agencies, and now an agency is trying to use *Loper Bright* to minimize judicial review. If a court agrees with the administration that this really is the best reading of the statute, then the gambit might well work, but if not, the agency will find itself back to square one. In general, I think courts will be dubious of agencies simply relying on statutory interpretation to justify changes in regulations because, if this spreads more broadly, it could short-circuit judicial review of a wide range of agency actions. (Especially where an agency decision involves a question of law, as in this case, as opposed to findings of fact.)

I also think that the administration is hoping they can get a court to declare their reading of the statute the "best" one, and therefore the only permissible one, so that a future administration cannot restore the prior harm definition. Again, I'm a little skeptical of this outcome, because it would mean that a court (presumably the Supreme Court) is overruling *Sweet Home*'s conclusion that the prior definition was permissible, an outcome in conflict with *Loper Bright*'s statement that those decisions remain good law.

Lastly, how persuasive is the agency's argument that the Scalia dissent in *Sweet Home* reflects the best meaning of the statute? That is an assessment for another day, but I'd just note that Scalia's *Sweet Home* dissent is in a fair amount of tension with the implementation of the ESA for over forty years, and also with other components of the law, including the permitting system in Section 10 of the ESA.