



May 1, 2025

Comments on Docket No. FWS-HQ-ES-2025-0034, submitted electronically via <https://www.regulations.gov/>

On behalf of The Rewilding Institute (TRI) and its members nationwide, thank you for the opportunity to comment on the proposal by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to rescind the regulatory definition of “harm” in the Endangered Species Act (ESA).

TRI is a non-profit organization that promotes scientific information on wilderness conservation and the keystone wildlife species whose existence bolsters ecological resilience. These comments are written by David R. Parsons, M.S., a wildlife biologist who worked at FWS for 24 years and led the agency’s efforts to reintroduce the endangered Mexican gray wolf to the Southwest; and Nadia Steinzor, M.S., a policy analyst who advances protections for wolves and other endangered and threatened species.

The Rewilding Institute is strongly opposed to the proposal and disagrees with the Services’ assertion that habitat modification and destruction are inconsistent with the term “take.”

Species cannot be managed or protected separately from their habitats. All animals (including humans) are inextricably connected to the habitats—essentially “homes”—in which they live, which provide the shelter, food, water, and mates necessary for survival. The Services’ current proposal is tantamount to allowing someone who destroys a farm family’s crops, equipment, and house to claim innocence because they did not kill the farmers themselves.

Extensive scientific evidence underscores that actions that degrade and destroy the habitats of endangered and threatened species impact their continued existence. In just the last 50 years, the populations of many wildlife species have declined over 70 percent (2024 Living Planet data report, <https://livingplanet.panda.org/en-GB/>). Habitat alteration, fragmentation, and destruction are widely acknowledged to be leading causes of biodiversity loss and species extinction (overview at <https://eowilsonfoundation.org/what-is-the-half-earth-project/the-extinction-crisis>).

In 2021, FWS proposed the removal of 23 species from ESA listing because they had gone extinct—with the agency itself emphasizing that habitat degradation and loss were a leading cause of their demise (Federal Register Vol. 86, No. 187, 54298, 9/30/21).

The Service’s proposal contradicts the intent of Congress when it enacted the ESA. In passing the ESA, Congress fully understood the importance of conserving habitat as a necessary foundation

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for conserving species that depend upon those habitats. ESA §17.3 defines “harm” in the definition of “take” as an act including “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”

Notably, this definition does not prohibit economic activities generally, but those that would actually result in the killing or injuring of wildlife, i.e., acts that compromise the survival of species protected under the ESA are prohibited unless modified to avoid such impacts to listed species. By now proposing to change this definition and eliminate habitat considerations, the Services are seeking to overturn foundations of the law itself, in particular:

- ESA §2(a) states that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation,” i.e., that the survival of species cannot be separated from economically-driven activities such as drilling, mining, forestry, and agriculture.
- ESA §2(b) states that one of the purposes of the Act is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” i.e., that protection of fish and wildlife habitat is required.

The Services’ proposal appears to rely largely on a dissenting, not authoritative, Supreme Court decision. The proposal refers to a 30-year-old dissent written by Supreme Court Justice Scalia in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, a case in which the majority of the Supreme Court upheld the current regulatory definition of harm under the ESA. Basing a proposed rule change on a dissenting argument while ignoring the substance of a majority ruling of the Supreme Court flies in the face of established legal precedent and the Rule of Law.

Notably, the majority opinion in *Babbitt v. Sweet Home* elaborates and relies on extensive statutory history of the ESA and legal precedent to support the current definition of “harm” in the Act—not simply the “Chevron deference” principle, as the Services’ purport in the current proposal. The Administrative Branch’s mere desire to erase a word and its definition does not give it the authority to do so, particularly when that definition is rooted in the intent of the Legislative Branch (Congress) when it enacted the ESA. That definition has been reaffirmed by a precedent-setting Supreme Court decision that remains in effect.

If enacted, the proposal would likely result in significantly more “take” of threatened and endangered species and compromise enforcement of the ESA. Making direct killing the only type of “take” under the ESA would mean that to enforce violations, individual humans (e.g., local residents, wildlife advocates, and employees of the Services) would be required to locate the bodies and determine the cause of death of listed species. This would be practically impossible in natural environments, particularly ones that have been drilled, cut, plowed, or otherwise degraded. As a result, those responsible for “take” could conduct their activities with impunity.

In contrast, proving that habitats have been impacted and modified in ways that destroy or diminish the capacity of the habitat to support “essential behavioral patterns, including breeding, feeding, or sheltering” (i.e., the current definition of “harm”) is based on the known biological and ecological requirements of listed species and consistent with 50 years of species protection under the ESA.

With regard to the Services’ request for commenters to identify “reliance interests” associated with this proposed rule change, we conclude that those interests are preponderantly held by the wildlife

that are listed as threatened or endangered under the ESA. At a time of historic and significant habitat loss and biodiversity decline, the Services should not be proposing changes that further imperil legally protected species. Further, TRI, its members, and the public at large have a reliance interest in the protection of the wildlife and habitats intrinsic to ecological stability.

For all these reasons, we strongly oppose the Services' proposal and request that it not be enacted.

Sincerely,



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