



**THE WILDLIFE SOCIETY**  
North Dakota Chapter

*North Dakota Chapter*

## THE WILDLIFE SOCIETY

P.O. Box 1442 • Bismarck, ND 58502

May 19, 2025

Public Comment Processing  
Attn: FWS-R3-ES-2025-0034  
US Fish and Wildlife Service  
MS: PRB/3W  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

RE: Proposed Rule - Rescinding the Definition of Harm under the Endangered Species Act

The North Dakota Chapter of the Wildlife Society (NDCTWS) represents over 300 wildlife and natural resource professionals and students. The mission of NDCTWS is to inspire, empower, and enable current and future wildlife professionals to sustain healthy wildlife populations and habitats in North Dakota through science-based management for the benefit of all. NDCTWS strives to be a recognized source that provides knowledge, resources, and representation for the conservation and management of wildlife to ensure sustainable populations and healthy ecosystems. As such, NDCTWS would like to take this opportunity to provide comments on the proposed rule to rescind the definition of harm under the Endangered Species Act of 1973 (ESA).

NDCTWS is in strong opposition of the U.S. Fish and Wildlife Service's (USFWS) proposed rule. Habitat has been a primary focus of the ESA since its creation. Stated in the Act itself, its purposes "are to provide means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...". Removing the definition of harm would not only severely restrict the Act's effectiveness, but it also stands in contradiction to the Act's original intent.

This proposed rule also contradicts a Supreme Court decision clarifying that take does, in fact, include habitat modification. This decision, in *Babbitt v. Sweet Home Chapter of Communities for Great Oregon*, 515 U.S. 687 (1995) was supported by three reasons:

1. The ordinary meaning of "harm" naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.
2. The ESA's broad purpose of providing comprehensive protection of endangered and threatened species supports the reasonableness of the Secretary's definition
3. The fact that Congress in 1982 authorized the Secretary to issue permits for takings that § 9(a)(1)(B) would otherwise prohibit

The opinion of the court went on to further explain that despite the word "harm" being undefined in the Act itself, the Interior Department regulations that implement the statute define it as:

“Harm in the definition of ‘take’ in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” 50 CFR § 17.3 (1994).

The decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024), as referenced in the proposed rule, does not override the court’s decision in *Babbitt v. Sweet Home Chapter of Communities for Great Oregon*, 515 U.S. 687 (1995). It may take power away from the experts within the agencies and place it in the hands of the judiciary if a statute is deemed ambiguous; however, with harm being defined in the Interior Department’s regulations, and with a previous Supreme Court decision clearly stating habitat modification falls under harm, it stands to reason that there is no ambiguity surrounding the term harm and the ESA’s intent to protect both species and the habitats they depend on.

Rescinding the definition of harm, specifically with the intention of removing the ESA’s ability to provide protection to the habitats species depend on, would have dire consequences. There is no lack of evidence that habitat loss, destruction, and fragmentation are the main contributors to species declines (Balmford et al., 2005, Buchmann et al., 2013, Dirzo and Raven, 2003, Dobson et al., 2006, Ewers and Didham, 2006, Fahrig, 2003, Gibbons et al., 2000, Goncalves-Souza et al., 2020, Haddad et al., 2015, Hanski, 2005, Horvath et al., 2019, Kerr and Deguise, 2004, Krauss et al., 2010, Maxwell et al., 2016, Murphy and Romanuk, 2013, Powers and Jetz 2019, Sanchez-Bayo and Wyckhuys, 2019, Sandor et al., 2022, Tilman et al., 2001, Wilson, 1988). Based on the abundance of research and expert input, it is clear that the USFWS, who’s mission is “working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people”, has a responsibility to not only protect declining species, but the habitats they depend on as well.

Eliminating habitat protection will surely lead to further population declines and an increased litigation burden, as more species are going to end up being petitioned for ESA protection. The ability for wildlife managers to conserve and recover endangered and threatened species will also be compromised. Removing habitat protection from the ESA effectively disincentivizes programs and practices meant to protect habitat. Furthermore, this change will likely impact Section 7 consultations, Section 10 permits, Habitat Conservation Plans (HCPs), and Conservation Benefit Agreements (CBAs) making recovery significantly more difficult.

As such, NDCTWS urges that this rulemaking process be suspended. If rulemaking continues, we highly encourage modifying the language within the proposed rule to indicate that changes are purely clerical, with the current interpretation of "harm" based on Supreme Court precedent maintaining unchallenged. NDCTWS and its members stand ready to contribute expertise to meaningful ESA modifications if such is deemed necessary. However, the focus must be on modifications meant to enhance the effectiveness of the ESA, rather than diminish protections.

Thank you for the opportunity to comment on the proposed Rule.

Sincerely,



Curt Francis  
NDCTWS Chapter President