

**THREAT TO ENDANGERED SPECIES HABITATS: AN ANALYSIS OF THE
PROPOSED RULE AND COMMENTS TO RESCINDING THE DEFINITION OF HARM
UNDER THE ENDANGERED SPECIES ACT**

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The American public has long held an interest in the fate of threatened and endangered species.² Although legislative efforts spanned decades to arrive at the protections afforded to such species today, the largely bipartisan support resulted in the enactment of the Endangered Species Act (ESA) in 1973.³

On April 17, 2025, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), the agencies tasked with administering the ESA, proposed a rule to alter the regulatory definition of harm, as affirmed in 1995 by the United States Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.⁴ The current regulatory definition of harm, which the proposed rule seeks to remove, broadly includes habitat modification—the modification of lands that house wildlife such that “essential behavioral patterns, including breeding, feeding or sheltering” are disrupted.⁵ In its proposed rulemaking, the FWS emphasized that the Court’s decision in *Sweet Home* affirmed the agencies’ interpretation based on *Chevron* deference, which was recently overturned

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² RUSSELL MCLENDON, Most Americans support the Endangered Species Act— but that might not matter, *Mother Nature Network*, https://www.biologicaldiversity.org/news/media-archive/a2018/ESA_MNN_7.29.18.pdf, (July 29, 2018).

³ *Id.*

⁴ Rescinding the Definition of “Harm” Under the Endangered Species Act, 90 Fed. Reg. 16102, 16103 (proposed Apr. 17, 2025); *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687 (1995).

⁵ 50 C.F.R. § 17.3 (West 2024).

in *Bright Enterprises v. Raimondo*.⁶ FWS now asserts that in light of *Chevron*'s overturning, the definition of harm must align with the statute's authorizations.⁷

This article details the history of the legislative efforts to protect United States wildlife and plant species, ultimately resulting in the protections afforded under the ESA. With that background, the article will then consider the current rescission efforts of the FWS to limit the regulatory definition of harm under the ESA. Then, the article will evaluate the arguments made by supporters and opponents of the proposed rule. Lastly, the article will consider the fate of the proposed rule.

I. LEGISLATIVE HISTORY RESULTING IN THE ENDANGERED SPECIES ACT (ESA)

A. *Early Efforts to Protect U.S. Wildlife*

Congress's first attempt to protect species facing extinction was the Lacey Act.⁸ Passed in 1900, the act attempted to protect United States wildlife in numerous ways.⁹ Most notably, it sought to disrupt the market for commercial hunting and the shipment of illegally captured animals between states.¹⁰ To achieve this purpose, "[t]he Act. . .permits the Department Of The Interior to seize the offending items or animals, and to export or destroy any such prohibited eggs, fish or wildlife at the expense of the importer," and, "The Lacey Act also makes it unlawful to import into

⁶ Rescinding the Definition of "Harm" Under the Endangered Species Act, 90 Fed. Reg. 16102, 16103 (proposed Apr. 17, 2025), *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984), overruled by *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 412 (2024).

⁷ Rescinding the Definition of "Harm" Under the Endangered Species Act, 90 Fed. Reg. 16102, 16103 (proposed Apr. 17, 2025).

⁸ BRIAN CZECH & PAUL R. KRAUSMAN, *THE ENDANGERED SPECIES ACT: HISTORY, CONSERVATION BIOLOGY AND PUBLIC POLICY* 32 (2001) (ebook).

⁹ The United States Department of Agriculture Animal and Plant Health Inspection Service, *THE LACEY ACT: FEDERAL REGULATION AND PROTECTION OF WILDLIFE AND PLANTS* 77 (Gilbert E. Morgan & Deavon Hill eds., 2012) (ebook) (established the framework to challenge illegal trafficking of animals and identified destructive "exotic species.")

¹⁰ *Id.*

the United States or any of its territories any wildlife, including fish, mollusks and crustacea, and their eggs”.¹¹ However, the implemented law primarily assisted the enforcement of existing wildlife laws.¹² The law applied broadly to all plants, animals, and fish obtained in any manner that violated existing state or tribal law.¹³ The Lacey Act also had significant implications to federal law, as well as foreign law.¹⁴

Alternative avenues for wildlife conservation emerged during Theodore Roosevelt’s presidency.¹⁵ In an effort to provide sanctuaries for local flora and fauna, Roosevelt designated Pelican Island, Florida as federal land dedicated to conservation.¹⁶ However, that was just the beginning; throughout his presidency Roosevelt established 52 wildlife sanctuaries.¹⁷

Further legislative efforts followed when the United States entered a treaty with Canada to protect migratory birds.¹⁸ The treaty was ratified as The Migratory Bird Treaty Act of 1918.¹⁹ Similar treaties were entered into and ratified between the United States and other nations.²⁰ Congress established the Migratory Bird Conservation Act of 1929.²¹ The act created the Migratory Bird Conservation Commission, which was responsible for identifying land that migratory birds

¹¹ HENRY D. MCCOY II, AMERICAN AND INTERNATIONAL AQUACULTURE LAW: A COMPREHENSIVE LEGAL TREATISE AND HANDBOOK COVERING AQUACULTURE LAW, BUSINESS AND FINANCE OF FISHES, SHELLFISH AND AQUATIC PLANTS 222-24 (2000) (ebook).

¹² *Id.* at 222.

¹³ *Id.* at 225.

¹⁴ *Id.*

¹⁵ CZECH & KRAUSMAN, *infra* note 17.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 33.

¹⁹ *Id.*

²⁰ *Id.*; See 16 U.S.C.A. § 703 (West) (codifying treaties between the United States and Mexico, Japan, Russia protecting migratory birds).

²¹ SHANNON C. PETERSEN, ACTING FOR ENDANGERED SPECIES: THE STATUTORY ARK 11 (2002).

frequented, so that the Department of the Interior could purchase the land to benefit the birds.²²

Around this same time, in 1934, the Fish and Wildlife Coordination Act was passed.²³ The act aimed to protect fish in national waterways by prompting those building dams to identify the fish to be impacted by construction through collaboration with the Bureau of Fisheries.²⁴ Moreover, the act insisted upon the protection of ecosystems by denoting them as federal lands.²⁵ Additional acts were proposed throughout the 1930s.²⁶ These efforts came to fruition with the passage of the Bald Eagle Protection Act in 1940.²⁷

While Congress made significant strides in the first half of the 20th century, World War II greatly impacted its momentum.²⁸ Regardless, many of the aforementioned statutes established a strong basis upon which later legislation was able to emerge.²⁹

B. The Endangered Species Acts of 1966 and 1969

The burgeoning social interest in ecology inspired a more proactive approach to the conservation of animal and plant species.³⁰ In 1964, the Committee on Rare and Endangered Wildlife Species published a list of 63 endangered species.³¹ This list

²² CZECH & KRAUSMAN, *supra* note 7, at 33.

²³ PETERSEN, *supra* note 20, at 13.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 15.

²⁷ *Id.* at 16.

²⁸ *Id.*

²⁹ *Id.* at 20.

³⁰ *Id.* at 21.

³¹ CZECH & KRAUSMAN, *supra* note 7, at 37.

was the first official one of its kind to denote species threatened by the likelihood of extinction.³²

Such extensive threats to United States wildlife spurred Congress to pass the Endangered Species Preservation Act in 1966.³³ Under this act, the Secretary of the Interior was tasked with creating and maintaining a comprehensive guide of animals and fish deemed endangered.³⁴ Then, based on this identification, the law attempted to protect national wildlife in two ways. First, it expressly provided that federal agencies were to protect endangered animals' habitats to a "practicable" extent.³⁵ Second, the act prohibited the removal of endangered wildlife from the predetermined national sanctuaries.³⁶ Beyond these efforts, the act also created the National Wildlife Refuge System to oversee the existing refuges and expand their safe haven to all endangered species.³⁷ Endangered species could not be taken from these preserves, however these prohibitions were limited to the national preserves.³⁸

Evidently, the law did not provide the protections necessary for species facing extinction, so Congress attempted further protections in the 1969 Endangered Species Conservation Act.³⁹ The 1969 act extended the aforementioned protections to invertebrates.⁴⁰ Additionally, the act explicitly limited the importation of any species

³² *Id.*

³³ *Id.*

³⁴ JOHN R. BURCH JR., ENDANGERED SPECIES PRESERVATION ACT OF 1966 AND ENDANGERED SPECIES CONSERVATION ACT OF 1969, in *THE GREAT SOCIETY AND THE WARD ON POVERTY: AN ECONOMIC LEGACY IN ESSAYS AND DOCUMENTS* 80 (2017) (ebook).

³⁵ CZECH & KRAUSMAN, *supra* note 7, at 37-38.

³⁶ *Id.* at 38.

³⁷ PETERSEN, *supra* note 20, at 23.

³⁸ BURCH, *supra* note 33.

³⁹ PETERSEN, *supra* note 20, at 25.

⁴⁰ CZECH & KRAUSMAN, *supra* note 7, at 38.

determined to be endangered solely for the purposes of education, science, or zoology.⁴¹

Moreover, the act required the Secretary of the Interior to host an international convention.⁴² Congress sought to include the international community because the 1969 Act directly implicated international extinction issues, in addition to domestic issues.⁴³ The Secretary accomplished this duty through the Convention on International Trade in Endangered Species of Wild Fauna and Flora.⁴⁴ Upon the convention's completion, two major actions emerged.⁴⁵ The first was an agreement banning the international trade of recognized endangered species.⁴⁶ Second, it created an organizational system establishing a ranking among the endangered species with those determined to be most threatened acknowledged sooner than those in less dire situations.⁴⁷

C. The ESA and Its Iterations

Despite the efforts of the 1966 and 1969 statutes, it became evident that these laws were insufficient to combat the threats to endangered species.⁴⁸ A significant shortcoming of the previous acts was the failure to provide protection for plants found within endangered species habitats.⁴⁹ Not only was the protection of plants important

⁴¹ BURCH, *supra* note 33, at 80-81.

⁴² CZECH & KRAUSMAN, *supra* note 7, at 38.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ PETERSEN, *supra* note 20, at 27.

⁴⁹ BURCH, *supra* note 33, at 81.

to preserving the flora of the nation, but many endangered species relied on the vanishing plants for survival.⁵⁰ Ultimately, the ESA was enacted by President Nixon in 1973 because of the nation’s universal interest in endangered species protection.⁵¹

The ESA expressly provides that its purpose was to preserve threatened and endangered species through appropriate conservation.⁵² The act differentiates endangered species from threatened species based on the likelihood of their extinction.⁵³ Where a species is significantly in danger of extinction, it is endangered.⁵⁴ Conversely, a threatened species is simply a species likely to become endangered.⁵⁵ Learning from the errors of the past, Congress broadly defined the creatures it intended for the ESA to protect.⁵⁶ In addition, Congress provided an extensive definition of what it means to take an endangered species.⁵⁷ Under the ESA, to “take” includes “harass[ing], *harm[ing]*, pursu[ing], hunt[ing], shoot[ing], wound[ing], kill[ing], trap[ping], captur[ing], or collect[ing], or . . . attempt[ing] to engage in any such conduct.”⁵⁸ Persons found violating the ESA’s provisions may be subject to civil or criminal penalties.⁵⁹

The ESA continued to charge the Secretary of the Interior with identifying at risk species as either threatened or endangered from “scientific and commercial

⁵⁰ *Id.*

⁵¹ PETERSEN, *supra* note 20, at 30.

⁵² The Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, 885 (1973).

⁵³ M. LYNNE CORN, EUGENE H. BUCK & KRISTINA ALEXANDER, Cong. Rsch. Serv., *The Endangered Species Act: A Primer*, 4 (2008).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ The Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, 885 (1973).

⁵⁷ *Id.* at 886.

⁵⁸ *Id.* (*emphasis added*).

⁵⁹ *Id.* at 897-98.

data.”⁶⁰ The Secretary has the ability to promote or demote the status of a species, or remove it from the list entirely, all of which is subject to the scientific and commercial data requirement.⁶¹ These determinations are to be published in the Federal Register.⁶² Beyond the efforts of identifying threatened and endangered species, the ESA also charged the Secretary of the Interior with identifying “critical habitats.”⁶³ Critical habitats are deemed to be locations where endangered or threatened species are found, or locations where species could thrive based on the ecological features.⁶⁴ Finally, the Secretary may also obtain land for species conservation.⁶⁵

Given the global nature of the problem, the ESA required international participation.⁶⁶ Within the United States, the act empowers the President to help countries that the Secretary of the Interior finds in need of assistance in conserving wildlife.⁶⁷ It also insisted upon the United States continued interest and promotion of foreign programs that endeavored to conserve threatened or endangered species, or banned the importation of international species to the United States.⁶⁸

The ESA provided a comprehensive list of prohibited acts to effectively protect endangered and threatened species.⁶⁹ Such bans extended to animals taken domestically, as well as creatures taken from the “high seas.”⁷⁰ Threatened or

⁶⁰ M. LYNNE CORN ET AL., THE ENDANGERED SPECIES ACT: A PRIMER 6 (2008).

⁶¹ *Id.* at 6.

⁶² The Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, 887 (1973).

⁶³ M. LYNNE CORN ET AL., THE ENDANGERED SPECIES ACT: A PRIMER 6 (2008).

⁶⁴ *Id.*

⁶⁵ *Id.* at 7.

⁶⁶ The Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, 892-93 (1973).

⁶⁷ *Id.* at 892.

⁶⁸ *Id.* at 892-93.

⁶⁹ *Id.* at 893-94.

⁷⁰ *Id.*

endangered species could not be imported or exported, nor can a party sell, or even offer to sell, without violating the ESA.⁷¹ While the ESA provided numerous protections for endangered and threatened wildlife and fish species, it had fewer limitations for endangered and threatened plant species.⁷²

Although the initially enacted ESA provided significantly more protections for species, it has been amended multiple times.⁷³ Despite the changes to the ESA, the consistency of the statute's purpose is unwavering; conservation for threatened and endangered species to be achieved through necessary action.⁷⁴ Moreover, to this day, the ESA continues to recognize that harm is simply one definition of taking.⁷⁵

II. THE REGULATORY DEFINITION OF HARM AND THE ESA

A. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*

In 1996, the United States Supreme Court addressed the definition of harm under the ESA in the landmark *Sweet Home* decision.⁷⁶ At issue in the case was whether the Secretary of the Interior overextended the authority granted by the ESA defining harm in a 1975 regulation.⁷⁷

The Court utilized three methods of statutory interpretation to determine whether the regulatory definition of harm was reasonable.⁷⁸ It considered the plain meaning of the word *harm*, the legislator's intent in passing the ESA, and the theory

⁷¹ *Id.*

⁷² *Id.* at 894.

⁷³ M. LYNNE CORN ET AL., THE ENDANGERED SPECIES ACT: A PRIMER 4 (2008).

⁷⁴ 16 U.S.C.A. § 1531 (West).

⁷⁵ 16 U.S.C.A. § 1532 (West).

⁷⁶ *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 690 (1995).

⁷⁷ *Id.*

⁷⁸ *Id.* at 697.

that Congress intends for amendments to have legislative effect.⁷⁹ Moreover, the Court emphasized that where an agency's interpretation of the statute is reasonable, the Court must display a minimum level of deference.⁸⁰

The Court ultimately held that, for three reasons, the regulatory definition of harm was reasonable.⁸¹ First, it explained that the dictionary definition of harm encompasses injurious conduct, so under a plain language analysis, harm would include significant modifications to an endangered or threatened species' natural habitat that could ultimately injure or kill the species.⁸² Second, it emphasized that the ESA's statutory purpose supports a finding that harm encompasses habitat destruction.⁸³ Specifically, Congress intended the statute to have a wide breadth to ensure adequate protections for endangered and threatened species to avoid extinctions.⁸⁴ Third, the Court reasoned that because of the 1982 amendment, Congress knew the amendment would encompass habitat destruction when granting the Secretary the authority to issue permits for incidental takings.⁸⁵ Given the nature of an incidental taking, one could not incorporate such an action into a permit application.⁸⁶ By granting incidental permits, Congress acknowledged the likelihood of an incidental taking in addition to an intentional taking.⁸⁷ The Court recognized that when Congress enacts an amendment it is "to have real and substantial

⁷⁹ *Id.* at 697-701.

⁸⁰ *Id.* at 703-04.

⁸¹ *Id.* at 695.

⁸² *Id.* at 697.

⁸³ *Id.* at 698.

⁸⁴ *Id.* at 699.

⁸⁵ *Id.* at 700.

⁸⁶ *Id.* at 700-01

⁸⁷ *Id.* at 700.

effect.”⁸⁸ For those three reasons, the Court found that the regulatory definition of harm, including habitat destruction, was reasonable.⁸⁹ Furthermore, the Court generally cited *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* to emphasize that where the Secretary’s definition of harm was reasonable, agency deference applies.⁹⁰

Therefore, the Court upheld the definition established by the Secretary.⁹¹

B. FWS and NMFS Proposed Rule Narrowing the Regulatory Definition of Harm

On April 17, 2025, FWS and NMFS published in the *Federal Register* a proposed rulemaking, entitled “Rescinding the Definition of “Harm” Under the Endangered Species Act.”⁹² The agencies propose this new rule on the basis that the current regulatory definition of “harm” contradicts the definition of “take” within the statute. The proposed rule seeks to rectify this inconsistency to better comply with the ESA.⁹³

In its proposal to limit the definition of harm, the agencies first quote the statutory definition of take, which, as set forth above, is “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such

⁸⁸ *Id.* at 701.

⁸⁹ *Id.* at 708.

⁹⁰ *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 708 (1995); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (holding that agency’s reasonable interpretations of applicable statutes are due deference on account of the agency’s expertise and familiarity with its statute), overruled by *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 412 (2024).

⁹¹ *Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. at 708.

⁹² Rescinding the Definition of “Harm” Under the Endangered Species Act, 90 Fed. Reg. 16102 (proposed Apr. 17, 2025); 54 U.S.C.A. § 100101(b)(1)(C) (West 2014).

⁹³ Rescinding the Definition of “Harm” Under the Endangered Species Act, 90 Fed. Reg. 16102, 16103 (proposed Apr. 17, 2025).

conduct.”⁹⁴ Then, citing Justice Scalia’s dissent in *Sweet Home*, the agencies determined:

under the *noscitur a sociis* canon, the definition of “harm,” like the other nine verbs in the definition, should be construed to require an “affirmative act[] . . . directed immediately and intentionally against a particular animal—not [an] act[] or omission[] that indirectly and accidentally cause[s] injury to a population of animals.”⁹⁵

Relying on this canon, along with “over a thousand years of history,” the agencies determined that the inclusion of habitat destruction extends the meaning of harm beyond the statutory limits, which solely refer to killing or injuring wildlife.⁹⁶

Additionally, the agencies expressed concerns about the current regulatory definition of harm under the new *Loper Bright* standard.⁹⁷ The FWS and NMFS state that the Court’s recent decision in *Loper Bright* requires regulations promulgated by agencies to be authorized by the statute.⁹⁸ Here, they argue that the existing regulation does not coincide with the statute’s definition of take. Thus, the regulatory definition of harm must be rescinded.⁹⁹

Finally, despite rejecting the basis of *Sweet Home* due to the Court’s utilization of the recently overturned *Chevron* doctrine, FWS and NMFS rely on a different portion of *Sweet Home* to bolster their proposed rule.¹⁰⁰ The agencies explain that the

⁹⁴ Rescinding the Definition of “Harm” Under the Endangered Species Act, 90 Fed. Reg. 16102 (proposed Apr. 17, 2025).

⁹⁵ Rescinding the Definition of “Harm” Under the Endangered Species Act, 90 Fed. Reg. 16103 (proposed Apr. 17, 2025).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

Court in *Sweet Home* expressly recognized that its regulatory definition of harm is simply one permissible interpretation of the ESA, not the sole interpretation.¹⁰¹

The proposed rule was open for notice and comment until May 19, 2025.¹⁰² Upon the closing of the comment period, the agencies received 242,899 public comments pertaining to the proposed rule.¹⁰³ Ultimately, the FWS and NMFS state that should the proposed rule be accepted upon finalization it will be considered “an Executive Order 14192 deregulatory action.”¹⁰⁴ The classification indicates compliance with the executive’s request to “alleviate unnecessary regulatory burdens.”¹⁰⁵

III. COMMENT ANALYSIS

Given that endangered species protection has historically been viewed as a bipartisan issue, it is not surprising that although the agencies limited the comment submission period to slightly more than a month, substantial comments were received.¹⁰⁶ Commenters had the ability to publish under their name or anonymously. Published comments were received from many individuals, in addition to comments made by organizations.¹⁰⁷ Most comments opposed the proposed rule, though some

¹⁰¹ *Id.*

¹⁰² *Id.* at 16102.

¹⁰³ Rescinding the Definition of “Harm” Under the Endangered Species Act, 90 Fed. Reg. 16104 (proposed Apr. 17, 2025).

¹⁰⁴ Rescinding the Definition of “Harm” Under the Endangered Species Act, 90 Fed. Reg. 16104 (proposed Apr. 17, 2025); 54 U.S.C.SA § 100101(b)(1)(C) (West 2014).

¹⁰⁵ Exec. Order No. 14,192, 90 F.R. 9065 (2025).

¹⁰⁶ Russell McLendon, *supra* note 1.

¹⁰⁷ Kidd Biological, Inc., Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (May 19, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-150930>; Gwen Chamberlain, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (May 12, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-100099>; Bill Murrin, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (May 7, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-43570>.

were received in support as well.¹⁰⁸ The following is a summary of the most cited reasons either opposing or favoring the proposed rulemaking.

A. Arguments Supporting the Proposed Rule

The most common argument supporting the proposed rule was the restrictions placed on the agencies. Those who champion the proposed regulation emphasize that while they support wildlife, it seems as though agencies' actions have extended past the statutory authority granted by the ESA.¹⁰⁹ Some commenters went as far as to suggest that by promulgating such lofty rules, these agencies have abused their discretion.¹¹⁰ By promulgating a rule that rescinds the definition of harm, those in favor believe that the animals that are truly critical can be assisted, while species less critical to the ecosystems are not subject to extensive regulation.¹¹¹ Moreover, these commenters raise concerns about how the current wide-reaching definition of harm provides unnecessary protections that interfere with necessary projects on regulated lands.¹¹²

¹⁰⁸ Bill Murrin, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (May 7, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-43570>; Shirley Dodson, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0455>.

¹⁰⁹ Anonymous, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (May 19, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-149629>; Bill Murrin, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (May 7, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-43570>; Hudy Vredenburg, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (Apr. 21, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-7224>.

¹¹⁰ Bill Murrin, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (May 7, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-43570>.

¹¹¹ Hudy Vredenburg, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (Apr. 21, 2025)

¹¹² Gwen Chamberlain, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (May 12, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-100099>.

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Second, proponents argue that confusing regulation promotes bureaucratic inefficiency.¹¹³ In conjunction with the argument that habitat destruction extends harm beyond the statutory definition, such discrepancies may cause confusion within the agencies themselves.¹¹⁴ Confusion within the agencies would result in undue delays to any party attempting to conform to regulations.¹¹⁵ Additionally, providing a more comprehensive definition of harm causes delay because harm is not always applicable.¹¹⁶ Therefore, when an agency would consider if an action caused harm, it may not apply at all, even with the addition of habitat destruction.¹¹⁷

Additionally, commenters in support of the proposed regulation argue that it will benefit the American economy.¹¹⁸ Presumably, by removing the restrictions on habitat modification that could harm endangered species, these lands could be available for resource extraction.¹¹⁹ Rescinding restrictions on lands potentially rich in minerals and other resources could generate revenue and create jobs. As such, some commenters argue that the economic benefits made possible by this proposed rule warrant its acceptance as is.

Finally, proponents favor this rescission, as it lessens restrictions on property owners.¹²⁰ Given the restrictions the current regulatory definition of harm

¹¹³ Jared Meyers, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (May 9, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-84307>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Anonymous, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 25, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-24557>.

¹¹⁹ *Id.*

¹²⁰ Anonymous, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (May 19, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-149629>.

encompasses relating to habitat destruction, commenters celebrate that the agencies are granting more authority to private property owners.¹²¹ By acknowledging that habitat destruction is encompassed in the definition of harm, landowners are subjected to the applicable provisions of the ESA for violation. Thus, property owners are unduly restricted as to what they can do on their own property.¹²² Such challenges to the exclusive right of property ownership are lessened under this proposed rule.¹²³

All in all, despite the infrequent appearance of proponents for the proposed regulation in the public comment period, those that did comment tend to follow the traditional views of those who favor deregulation generally.

B. Arguments Opposing the Proposed Rule

Conversely, the volume of opponents to the proposed regulation was staggering. Through the thousands of comments received, opponents established a multitude of reasoned arguments that invalidating the current regulatory definition of harm as unwise as it relates to the purpose of the ESA and the future of endangered species in the United States.

First, a number of opponents indicated that this proposed rule not only contradicts the mission of both FWS and NMFS, but also the purpose of the ESA.¹²⁴ Indeed, the mission of FWS is “to conserve, protect, and enhance fish, wildlife, plants,

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* (stating also that the proposed rule benefited private property owners because they would not have endure costly litigation to receive adequate compensation from the government for interference with private property).

¹²⁴ Anonymous, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0541>.

and their habitats for the continuing benefit of the American people.”¹²⁵ Similarly, the mission of NMFS encompasses “the stewardship of the nation's ocean resources and their habitat.”¹²⁶ Commenters expressed concern at such a stark departure from these missions as the agencies endeavor to rescind the definition of harm, which currently provides protections against significant habitat modification.¹²⁷ Especially given that these agencies are charged with habitat conservation and protection, it is evident that habitat protection coincides with the agencies’ duties.¹²⁸ Therefore, rescinding the definition of harm is diametrically opposed to those missions, as well as the ESA’s purpose. Similarly, many commenters in opposition to the proposed rule turned to the statutory language and purpose of the ESA.¹²⁹ The ban on taking an animal in the statutorily defined manner was to effectuate the statute’s purpose of the conservation of endangered and threatened species.¹³⁰ When acknowledging the inconsistencies between the proposed rule and statutory purpose, opponents stated that it is scientifically proven that habitat destruction is a leading cause of extinction.¹³¹

¹²⁵ U.S. Fish and Wildlife Services, Mission and Vision, [fws.gov](https://www.fws.gov/about/mission-and-vision), <https://www.fws.gov/about/mission-and-vision> (last visited Nov. 7, 2025).

¹²⁶ NOAA Fisheries, About Us, [fisheries.noaa.gov](https://www.fisheries.noaa.gov/about-us), <https://www.fisheries.noaa.gov/about-us> (last visited Nov. 7, 2025).

¹²⁷ Shirley Dodson, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0455>.

¹²⁸ *Id.*

¹²⁹ Kidd Biological, Inc., Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (May 19, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-150930>.

¹³⁰ Karrigan Bork, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (May 21, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-231902>.

¹³¹ Shirley Dodson, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0455>.

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Second, an overwhelming number of opponents to the proposed rule emphasized the significant harm that habitat loss causes to endangered species.¹³² Many of these commenters likened the taking of a habitat to the taking of a person's home and access to food.¹³³ While it might not cause direct harm immediately, over time the harm that befalls a creature with no home or access to food is significant.¹³⁴ In drawing the comparison between the two, commenters sought to enlighten the agencies that the existing regulatory definition of harm, including habitat modification was necessary to safeguard animals.¹³⁵ Commenters argued that taking away protections is indeed a taking under the ESA.¹³⁶ By stripping the endangered species of their known habitat, predators can more readily seek out endangered species and their young.¹³⁷

Third, commenters opposing the proposed rule based their comments on the plain meaning of the word harm.¹³⁸ Citing the standard dictionary definition of harm,

¹³² Kelsey Yule, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (May 20, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-209657>; Gayle Marrs-Smith, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0316>; Anonymous, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0069>.

¹³³ Benjamin Cevasco, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0661>; Jeffrey Wolfthal, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0708>; Lawrence Afrin, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0467>.

¹³⁴ Gayle Marrs-Smith, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0316>.

¹³⁵ Ramona Hernandez, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0610>.

¹³⁶ Gayle Marrs-Smith, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0316>.

¹³⁷ Kelsey Yule, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (May 20, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-209657>.

¹³⁸ Anonymous, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0456>.

commenters emphasized it is evident that removing protections from endangered species habitats would result in harm.¹³⁹ One commenter traced the history of the term harm throughout time and across languages. Harm regularly encompassed, hurt, grief, and sorrow.¹⁴⁰ By providing this comprehensive definition of harm throughout the ages, as well as modern comprehension of the word harm, commenters argue that loss to a creature's habitat causes immense distress and pain, which harms endangered species.¹⁴¹ These commenters emphasize that there is more to living than simply staying alive.¹⁴² Therefore, the current regulatory definition does not extend beyond a common definition of harm.

Fourth, opponents also argued that the proposed rule would not only cause harm to endangered species, but it would also cause harm to all of mankind.¹⁴³ Americans derive great pride from their national landscapes, and prominent species within those landscapes help shape those iconic spaces. By infringing upon the endangered species habitats and removing protections that ensure the longevity of American species, the landscape loses significant value.¹⁴⁴ Furthermore, preserving these spaces for people can generate economic benefit in the form of ecotourism given

¹³⁹ Anonymous, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (May 16, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-124917>.

¹⁴⁰ Anonymous, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0456>.

¹⁴¹ *Id.*

¹⁴² Lawrence Afrin, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0467>.

¹⁴³ Dylan Reed, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0619>; Gina Robinson, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0071>; Jared Shorten, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0536>.

¹⁴⁴ Gina Robinson, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0071>.

the desire to explore such iconic landmarks.¹⁴⁵ Moreover, if these creatures lose their habitats, everyone suffers because they cannot experience these creatures among the natural wonders of their habitats.¹⁴⁶ Not only can people observe endangered species in their natural habitats, but humans derive benefits from the great outdoors too.¹⁴⁷ One commenter acknowledged the physical and mental health benefits provided to people when natural lands are preserved.¹⁴⁸ Current populations and future generations alike rely upon the protections established now. Such protections ensure that future generations can enjoy the majesty of the American landscape and all it has to offer, creatures included.¹⁴⁹

In conclusion, the authors of public comments present a range of arguments in the vehement disapproval of the proposed rule. The thousands of comments that emerged in such a short window offered numerous reasons opponents feared the rescission of the regulatory definition of harm because of the harm inflicted upon animals, as well as humankind.

¹⁴⁵ Anonymous, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 21, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-7069>.

¹⁴⁶ Dylan Reed, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0619>.

¹⁴⁷ Shirley Dodson, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0455>.

¹⁴⁸ Jared Shorten, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0536>.

¹⁴⁹ Gina Robinson, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0071>.

IV. THE FATE OF “RESCINDING THE DEFINITION OF “HARM” UNDER THE ENDANGERED SPECIES ACT”

The proposed regulation provoked over 200,000 responses from the public.¹⁵⁰ Other regulations by either agency have not received such traction. In comparison, a more recent rule promulgated by FWS about endangered and threatened species received a total of four commenters during the comment submission window.¹⁵¹ Although the tally of comments in favor and opposed is not decisive as to how an agency will rule, the sheer number of commenters should encourage the agencies to seriously consider whether it will promulgate this rule as is. Indeed, at the close of a public comment period, agencies “must respond to ‘relevant’ and significant public comments.”¹⁵²

When issuing its response to these comments, the agency will likely grapple with the comments challenging the proposed rule on the basis that it violates the statutory purpose of the ESA.¹⁵³ Many commenters noted that habitat modification is a leading cause of extinction.¹⁵⁴ Therefore, the current regulatory definition of

¹⁵⁰ Rescinding the Definition of “Harm” Under the Endangered Species Act, 90 Fed. Reg. 16104 (proposed Apr. 17, 2025).

¹⁵¹ Endangered and Threatened Wildlife and Plants; Regulations for Eleven Species Treated as Listed Due to Similarity of Appearance, 90 Fed. Reg. 46371 (proposed Sept. 26, 2025); See also Fishery Management Plans of St. Croix and St. Thomas and St. John; Queen Triggerfish Management Measures Endangered and Threatened Wildlife and Plants, 90 Fed. Reg. 47713 (proposed Oct. 2, 2025) (NMFS proposed rule about threatened species collecting three comments); Threatened Species Status With Section 4(d) Rule for Southern Hognose Snake, 90 Fed. Reg. 42151 (proposed Aug. 29, 2025) (FWS proposed rule about an endangered species which garnered 213 public comments).

¹⁵² James T. O’Reilly, §8:1: Impact of comments making alternative proposals in Administrative Rulemaking (2023).

¹⁵³ Karrigan Bork, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (May 21, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-23190>; Kimberly Nesbitt, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (May 21, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-225194>; Kidd Biological, Inc., Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (May 19, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-150930>.

¹⁵⁴ Kelsey Yule, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (May 20, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-209657>; Gayle Marrs-Smith, Comment to Rescinding the Definition of “Harm” Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025),

harm, which includes significant habitat modification, would achieve the purpose of the ESA by affording threatened and endangered species protections by extension from their environments.

Despite significant public outcry opposing the rule, and the agencies' obligation to consider comments raised during the public comment period, the agency faces political pressure to promulgate the rule.¹⁵⁵ During President Trump's first term in office, he sought to deregulate agency action.¹⁵⁶ Upon his reelection, he renewed his mission to deregulate.¹⁵⁷ On January 31, 2025, Trump issued an Executive Order encouraging deregulation in an effort to reduce financial burdens created by regulation.¹⁵⁸ Given the executive branch's significant efforts to invalidate regulatory actions, the agencies promulgating this rule may be inclined to carry through with its promulgation in an effort to comply with the new administration. Moreover, in the publication in the Federal Register, the agencies expressly provide that the rule would be considered a deregulation as identified in the executive order.¹⁵⁹ Thus, in the efforts to comply with the executive order promoting deregulation, the agencies may promulgate the rule.

<https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0316>; Anonymous, Comment to Rescinding the Definition of "Harm" Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-0069>.

¹⁵⁵ Aidan T. Kane, Eli Schrag, and Sanjay Patnaik, What will deregulation look like under the second Trump administration?, Brookings.edu, (Feb. 24, 2025), <https://www.brookings.edu/articles/what-will-deregulation-look-like-under-the-second-trump-administration/>.

¹⁵⁶ Nicholas W. Zeppos and Philip A. Wallach, Tracking deregulation in the Trump era, brookings.edu (Dec. 5, 2017), <https://www.brookings.edu/articles/tracking-deregulation-in-the-trump-era/>.

¹⁵⁷ Brookings, Tracking regulatory changes in the second Trump administration, brookings.edu (Oct. 22, 2025), <https://www.brookings.edu/articles/tracking-regulatory-changes-in-the-second-trump-administration/>.

¹⁵⁸ Exec. Order No. 14,192, 90 F.R. 9065 (2025).

¹⁵⁹ Rescinding the Definition of "Harm" Under the Endangered Species Act, 90 Fed. Reg. 16104 (proposed Apr. 17, 2025); 54 U.S.C.SA § 100101(b)(1)(C) (West 2014).

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On balance, to appease both the outraged commenters and current administration, the agencies may seek a compromise in the proposed rule.¹⁶⁰ Rather than strike this definition completely, the agencies can propose a new rule to expand upon what specifically constitutes significant habitat destruction. Thus, it is likely that Rescinding the Definition of “Harm” Under the Endangered Species Act will not be promulgated as it was published in the Federal Register on April 17, 2025, but an alternative rule could be proposed for notice and comment to safeguard species, while complying with the executive branch’s request to deregulate. Should this be the case, the public comment and response period will begin anew.

¹⁶⁰ Gretchen Gehrke and Alejandro Paz, What Happens to a Public Comment After It Is Submitted, Environmental Data and Governance Initiative, (last visited Jan. 27, 2026), <https://envirodatagov.org/what-happens-to-a-public-comment-after-it-is-submitted/>.