

The American Ornithological Society (AOS) submits these comments in regard to the proposed new rule from the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) that reinterprets the U.S. Endangered Species Act (ESA; U.S. Department of the Interior, Fish and Wildlife Service 50 CFR Part 17; U.S. Department of Commerce, National Oceanic and Atmospheric Administration 50 CFR Part 222 [Docket No. FWS-HQ-ES-2025-0034; FXES11110900000-256 FF09E23000; 250411-0064] RIN 1018-BI38; 0648-BN93).

The proposed new rule weakens the definition of ‘harm’ with respect to ‘take’ in the Endangered Species Act by only including the direct killing and injuring of listed wildlife and plants, and not including the destruction, degradation, and modification of their habitat. The AOS strongly challenges this change on scientific grounds because the proposed rule, in effect, clearly would result in an enormous increase in ‘take’ of ESA-listed animals and plants through destruction of their habitat.

The American Ornithological Society is the world’s largest professional organization for ornithologists and was formed in 2016 by the merger of the two largest ornithological societies in the Western Hemisphere: The American Ornithologists’ Union (AOU)¹ and the Cooper Ornithological Society (COS)². The mission of the American Ornithological Society (AOS) is “To connect ornithologists, science, and bird conservation by (1) Supporting science that advances the understanding and conservation of birds; (2) Promoting broad access to ornithological science; (3) Supporting ornithologists throughout their career paths; and (4) Fostering a welcoming, diverse, supportive, and dynamic ornithological community.”³ The AOS includes over 3,000 members, many of

whom have conducted research to remedy factors that have driven the declines of ESA-listed bird species and thereby contributed to their recovery.

The clear intent of Congress in passing the ESA in 1973 and subsequent amendments was to protect threatened and endangered species from extinction and to recover listed species sufficiently to warrant their removal from ESA protections. Regardless of which factors led to a species' decline, listed species cannot be protected or recovered without protecting the habitats on which they depend. Congress clearly recognized this critical importance of habitat conservation, as is reflected in the use of the word 'habitat' dozens of times in the ESA, including provision for designation of 'critical habitat.'

The vast majority of species listed under the ESA are threatened or endangered because of habitat destruction, degradation, and modification, not harvest or direct killing.⁴ Thirteen species of birds that were formerly listed under the ESA have recovered and been delisted, including our national bird, the Bald Eagle. Other well-known and charismatic bird species that have recovered and been delisted following protection under the ESA include the American Peregrine Falcon, Brown Pelican, Aleutian Canada Goose, Hawaiian Hawk, Interior Least Tern, Kirtland's Warbler, and Black-capped Vireo. None of these species would have recovered without protection of their habitat under the ESA.⁵ A number of other well-known listed bird species, such as the Whooping Crane, California Condor, Red-cockaded Woodpecker, and Western Snowy Plover have been stabilized and are progressing toward de-listing because of habitat protections afforded by the ESA. If the proposed new rule is adopted it would completely eliminate habitat protection and ultimately ensure these species and other listed species would remain so or go extinct.

In some cases, the major cause of a species' declines is an environmental factor such as contaminants. For example, the pesticide DDT greatly reduced the ability of Bald Eagles to reproduce. Once DDT was banned Eagles were able to reproduce again, but they could not have recovered had there not been habitat for them to expand into. The ESA's protection of the Bald Eagle's habitat, including nest trees and the area around nest trees, was critical to their recovery and remains fundamental to their continued survival.⁶ For other species such as Red-cockaded Woodpeckers, habitat alterations themselves are the major causes of decline. Its recovery has been driven solely by protection of its nest cavity trees, and protection and restoration of its southern pine forest habitat. Without these protections, instead of recently being down-listed from endangered to threatened, the Red-cockaded Woodpecker likely would be on the brink of extinction. The evidence is clear: No matter what specific threats listed species face, they cannot be protected and recovered without adequate habitat.

Multiple polls demonstrate widespread, deep support for the ESA across the country.⁷ Two-thirds of Americans believe that protecting biodiversity should be a national priority, and about 80% of Americans support the Endangered Species Act. That support is based on the perception that the ESA has been effective at preventing species extinction. And the federal agencies responsible for implementing the ESA have always recognized the critical role of habitat protection in restoring species threatened with extinction.⁸

We are compelled to point out that the Supreme Court has already weighed in on the question of whether Congress intended for 'harm' in the ESA to include the destruction, degradation, or modification of habitat that ESA-listed species rely on for feeding, sheltering, or reproducing. In *Babbitt v. Sweet Home* (1995), the majority opinion (6-3) upheld that the definition of 'harm' included destruction of

habitat, based on the text, structure, and legislative history of the ESA. In her concurrence, Justice Sandra Day O'Connor mentions the Piping Plover, a species of bird that is listed as endangered in part of its range and threatened in the remainder:

As an initial matter, I do not find it as easy as Justice Scalia does to dismiss the notion that significant impairment of breeding injures living creatures. To raze the last remaining ground on which the piping plover currently breeds, thereby making it impossible for any piping plovers to reproduce, would obviously injure the population (causing the species' extinction in a generation).

Justice O'Connor, although not an ornithologist, makes a basic, common-sense point that bird species will not survive long without adequate habitat, regardless of whether they are directly killed or injured by the hand of man. There is no greater guarantee of 'harm' to a threatened species than the act of destroying its habitat.

In summary, the current interpretation of 'harm' within the ESA is well-founded and the relevant science clearly indicates that altering it will have adverse effects on endangered and threatened species. The proposed new rule is inconsistent with the statute's stated goals, specific definitions, long-term legal practice, and established conservation theory and practice. We strongly oppose the proposed new rule and encourage the USFWS and NMFS not to adopt it.

Signed,

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Footnotes

¹ The AOU was founded in 1883 to promote bird conservation and the development of ornithology in North America. Early AOU efforts led to formation of the U.S. Biological Survey, which is now known as the U.S. Fish and Wildlife Service.

² The COS was founded in 1893 and grew into an internationally recognized scientific society committed to advancing the conservation and management of bird species by applying high-quality science to our understanding of avian biology.

³ [https://americanornithology.org/about/history/#:~:text=The%20American%20Ornithologists'%20Union%20\(AOU,are%20housed%20at%20several%20institutions](https://americanornithology.org/about/history/#:~:text=The%20American%20Ornithologists'%20Union%20(AOU,are%20housed%20at%20several%20institutions)

⁴ <https://www.usgs.gov/faqs/why-do-animals-and-plants-become-endangered>

⁵ National Research Council. 1995. The role of habitat conservation and recovery planning. Pp. 71-93 *In* Science and the Endangered Species Act. Washington, DC: The National Academies Press. <https://doi.org/10.17226/4978>.

⁶ <https://www.fws.gov/program/eagle-management/#:~:text=Habitat%20protection%20afforded%20by%20the,eagles%20make%20a%20remarkable%20recovery>

⁷ Bruskotter, J.T., Vucetich, J.A., Slagle, K.M., Berardo, R., Singh, A.S., and Wilson, R.S. 2018. Support for the U.S. Endangered Species Act over time and

space: Controversial species do not weaken public support for protective legislation. *Conservation Letters*, e12595.

⁸Schwartz, M.W. 2008. The performance of the Endangered Species Act. *Annual Review of Ecology, Evolution, and Systematics* 39: 279-299.