

U.S. Fish and Wildlife Service 1849 C Street NW Washington, DC 20240

National Marine Fisheries Service NOAA Fisheries 1315 East-West Highway Silver Spring, MD 20910

May 7, 2025

## **Re:** The Xerces Society opposes rescission of the definition of "Harm" under the ESA, Docket No. FWS-HQ-ES-2025-003.

The Xerces Society for Invertebrate Conservation respectfully submits the following comments in strong opposition to the proposed rule that would rescind the regulatory definition of "harm" under the Endangered Species Act (ESA). As a science-based nonprofit organization dedicated to the conservation of invertebrates and their habitats, we are deeply concerned about this proposal. If enacted, this action could undermine implementation of the ESA by creating confusion about its protections and weakening deterrents to habitat destruction.

## The role of "harm" in protecting habitat:

For more than four decades, the Services have reasonably interpreted "harm" to include significant habitat modification or degradation that results in the injury or death of listed species. This interpretation - affirmed by the Supreme Court in *Babbitt v. Sweet Home* - has enabled effective enforcement of the ESA and played an important role in preventing take of species when activities destroy or impair the habitat they depend on to shelter, to feed, and to reproduce.

For species with small or declining populations, habitat loss and degradation are the most immediate and significant threats to survival. The ESA itself continues to prohibit "harm" as a form of take, and the proposed rule leaves in place the adverse modification standard under Section 7 of the ESA. However, rescinding the "harm" definition in Section 9 introduces ambiguity that could impede species conservation and recovery efforts. We are concerned that land managers may misinterpret the removal of this regulatory definition to mean that habitat destruction on private land is no longer regulated under Section 9.

More than half of ESA-listed species have more than 80% of their range on private lands (USFWS). These areas are essential for species conservation and recovery and have, in fact, contributed to successful efforts to recover notable species such as the bald eagle (delisted in 2007), Kirtland's Warbler (delisted in 2019), and Fender's blue butterfly (downlisted from endangered to threatened in 2023). Nevertheless,



habitat loss occurs at higher rates on private lands compared to federal lands. Eliminating the definition of "harm" in Section 9 of the ESA would create confusion and could undermine enforcement of habitat destruction that imperils listed species.

## Impact of proposed rule on invertebrates and their habitats:

Many ESA-listed species are highly vulnerable to habitat loss and degradation, relying on specific microhabitats, soil conditions, or plant communities that can be eliminated or significantly reduced in quality by activities like clearing, mowing, draining, or pesticide use. The current regulatory definition of "harm" has been an essential tool in addressing these threats.

Under Section 10 of the ESA, incidental take permits (ITPs) are required for activities that may result in the take of a listed species. These permits provide a mechanism for non-federal entities, such as landowners, developers, and pesticide users, to avoid liability by planning for and minimizing harm to listed species. The regulatory definition of "harm" has played an important role in clarifying that habitat destruction can constitute take, triggering the need for an ITP.

The proposed rule would create confusion that would likely lead to reduced compliance with the ESA. Without regulatory clarity, fewer applicants may seek permits for incidental take, resulting in unpermitted take and the loss of opportunities to implement conservation measures through the permitting process. These actions could still constitute violations of the ESA, opening up legal liability that land managers may not realize they are incurring.

Resulting changes in habitat management would likely disproportionately harm imperiled invertebrates and other small, cryptic, or short-lived species that are difficult to detect or monitor in real time. Requiring direct evidence of mortality or injury as a prerequisite for enforcement means that harmful activities could go unchecked. The proposed rescission places species at risk by fostering noncompliance and potentially hindering timely and science-based enforcement.

## Specific examples where recovery is only possible with habitat protection:

Many species require strong habitat protections to survive and recover. The following are a few examples of how the rescission could lead to confusion and harmful outcomes for invertebrates, including many of our nation's essential pollinators, as well as other invertebrates:

- Poweshiek skipperling depends on intact native prairie. Without clear regulatory guidance, landowners may assume that plowing or converting prairie to other uses can be conducted without consideration of its impacts on this butterfly, leading to further permanent loss of this already diminished habitat.
- Freshwater mussels are vital for sustaining healthy aquatic ecosystems. Yet, more than 90 species of freshwater mussels have been listed as endangered, threatened, or already extinct under the



ESA. They are among the most endangered animal groups because of their sensitivity to habitat conditions. Activities that change water quality and quantity, including some types of instream construction activities, can destroy mussel beds.

- Karner's blue and Fender's blue butterflies require high quality habitat with specific host plants to survive. Fender's blue populations in the Willamette Valley of Oregon have improved since concerted efforts were taken to protect and restore its wet prairie habitat. Ambiguity about habitat protections could lead to harmful practices, such as broadcast herbicide applications within sensitive habitat, that would stall recovery and potentially diminish the gains that have been made as a result of ESA protections.
- American burying beetles are important carrion decomposers that require contiguous, undisturbed grassland habitat to survive. Actions such as grassland conversion and urban development remove American burying beetle breeding habitat, leaving them unable to reproduce and for populations to persist.
- The rusty patched bumble bee, an important pollinator, was once abundant across the eastern U.S. It has experienced a nearly 90% reduction over a 20-year period, starting in the late 1990s. Conversion of tallgrass prairie used by the rusty patched bumble bee to development or row crops would eliminate important forage and nesting sites, and may prevent this species from recovering.

This is a non-exhaustive list of federally listed invertebrate species that require strong habitat protections afforded by the ESA to avoid extinction. The proposed change threatens to undermine the mission of the Endangered Species Act: "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."

The Services' long-standing definition of harm is grounded in sound science, legal precedent, and practical experience in implementing the ESA. Rescinding it would weaken species protections, create uncertainty around compliance, and limit the ability of the Services to prevent extinction.

We at the Xerces Society, along with the undersigned individuals, urge you to withdraw this proposed rule.

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