



May 19, 2025

VIA ELECTRONIC SUBMISSION

Ms. Maureen Foster  
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Ms. Laura Grimm  
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Washington, D.C. 20230

**Re: Rescinding the Definition of “Harm” Under the Endangered Species Act, Docket No.  
FWS-HQ-ES-2025-0034, RIN 1018 BI38; 0648-BN93**

Dear Ms. Foster and Ms. Grimm:

On April 17, 2025, the U.S. Fish and Wildlife Service (FWS) and National Oceanic and Atmospheric Administration (NOAA) published a proposed rule *Rescinding the Definition of “Harm” Under the Endangered Species Act* (ESA).<sup>1</sup> This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the agencies’ proposal. Advocacy supports the agencies’ proposed redefinition of “harm” under the ESA and stands ready to help develop the proposed rule’s final regulatory flexibility analysis (FRFA).

The proposed rule would provide clarity for small entities impacted by the ESA by holding parties responsible only for actions which directly impact an endangered species, as opposed to actions impacting the habitat of those species. A species-centered approach is targeted and clean while focusing on habitat is ambiguous, undefined and conveys massively misaligned incentives that artificially constrain small businesses. Additionally, the agencies should add information to their initial regulatory flexibility (IRFA) analysis to better illustrate the proposed rule’s benefits for small entities.

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<sup>1</sup> 90 Fed. Reg. 16102 (Apr. 17, 2025).

## **I. Background**

### **A. The Office of Advocacy**

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>2</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.<sup>3</sup> If a rule is not expected to have a significant economic impact on a substantial number of small entities, agencies may certify it as such and submit a statement of the factual basis to Advocacy for such a determination that adequately supports its certification.<sup>4</sup>

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>5</sup> The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.<sup>6</sup>

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."<sup>7</sup>

### **B. The Proposed Rule**

The proposed rule rescinds the current definition of "harm" under the ESA.<sup>8</sup> The FWS's current definition of "harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."<sup>9</sup> The National Marine Fisheries Service's (NMFS) definition is nearly identical and includes "spawning, rearing, and migrating."<sup>10</sup>

By rescinding the definition of "harm," the agencies would rely on the ESA's existing definition of "take," which means to "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or

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<sup>2</sup> Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

<sup>3</sup> 5 U.S.C. § 603.

<sup>4</sup> *Id.* § 605(b).

<sup>5</sup> Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

<sup>6</sup> *Id.*

<sup>7</sup> Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

<sup>8</sup> 90 Fed. Reg. 16102 (Apr. 17, 2025).

<sup>9</sup> 50 CFR § 17.3.

<sup>10</sup> 50 CFR § 222.102.

collect, or to attempt to engage in any such conduct.”<sup>11</sup> These are all actions which focus on the species itself, and not its habitat. The agencies explain that they are proposing this rule to “adhere to the single, best meaning of the ESA.”<sup>12</sup> The changes made would be prospective in nature and not impact any permits granted before the rule is finalized.<sup>13</sup>

The agencies prepared an IRFA concluding that the proposed rule, if adopted, would benefit small entities by relieving regulatory burdens imposed by the ESA’s definition of “harm.” The agencies have stated they will work with Advocacy to estimate the number of small entities benefitting from the proposed rule in the FRFA.<sup>14</sup>

## **II. Advocacy’s Small Business Concerns**

The ESA directly impacts small entities. Even the possible presence of an endangered species on a small business’ property can lead to additional regulatory responsibilities, changing what that business is allowed to do on their property and deter business activities. Additionally, small governments can be impacted by ESA-related regulatory obligations, causing delays and cost increases to construction projects within their jurisdictions.

Advocacy supports the agencies’ rescission of the definition of harm. It will reduce the ESA’s regulatory burdens by providing increased clarity and predictability for small entities. Advocacy also supports the agencies conducting an IRFA. In past ESA regulations, the agencies have improperly bypassed the IRFA process and refused to consider the direct impact of their actions on small entities. Advocacy is ready to work with the agencies to include additional information which will help small entities to better understand the benefits of the proposed rule in the FRFA.

### **A. The Agencies Proposed Rule will Reduce Regulatory Burdens on Small Entities**

Re-examining and rescinding the current definition of harm complies with Executive Order (EO) 14219, *Ensuring Lawful Governance and Implementing the President’s “Department of Governmental Efficiency” Initiative*,<sup>15</sup> which instructs agencies to specifically identify “regulations that impose undue burdens on small business and impede private enterprise and entrepreneurship.”<sup>16</sup>

Regulations promulgated under the ESA can impact how a small entity uses the land they operate on and how they conduct their day-to-day activities. ESA regulations can also delay infrastructure or other public works projects that small entities help to build and benefit from. Advocacy has repeatedly commented on the various impacts individual ESA habitat regulations have on small entities.<sup>17</sup>

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<sup>11</sup> 16 U.S.C. § 1532(19).

<sup>12</sup> 90 Fed. Reg. 16102 (Apr. 17, 2025).

<sup>13</sup> *Id.* at 16103.

<sup>14</sup> *Id.* at 16104.

<sup>15</sup> 90 Fed. Reg. 10583 (Feb. 25, 2025).

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., U.S. Small Bus. Admin., Off. Of Advoc., Comment Letter on Updates to the Endangered Species Act (Aug. 22, 2023), <https://advocacy.sba.gov/2023/08/22/advocacy-files-comments-on-updates-to-the-endangered->

The proposed rule will rescind the definition of “harm” which includes “significant habitat modification” which kills or injures wildlife by “impairing essential behavioral patterns including breeding, spawning, rearing, migrating, feeding or sheltering.”<sup>18</sup> Small entities do not typically employ wildlife biologists or other such habitat experts on staff. For this reason, the current definition of “harm” presents challenges for small entities because they do not possess the necessary expertise to properly define where a habitat begins and ends nor the ability to properly assess if an activity has impaired breeding, spawning, rearing, migrating, feeding or sheltering. This can lead to costly scenarios where small entities can violate the ESA unintentionally and/or stop economic activity and forego opportunities out of fear of triggering vague ESA requirements.

By rescinding the definition of “harm,” the ESA will be triggered by the already established definition of “take,” which prohibits harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing and collecting endangered or threatened species.<sup>19</sup> This definition provides additional clarity for small entities because the activities described require intent. A small businesses owner cannot unknowingly hunt, pursue, or shoot an endangered or threatened species. If a small entity knows that a species is endangered, they can avoid actions which will “take” that species. Additionally, all the activities described in the definition of “take” focus on the species itself, which is much easier for a small entity to recognize than the habitat or habitats it may exist in throughout its entire life cycle.

Advocacy supports the agencies’ proposed rule because it will reduce regulatory burdens for small entities by bringing much needed clarity to the scope of the ESA. Rescinding the definition of “harm” will help to prevent scenarios where small entities are held responsible for ESA violations that they had no knowledge of or intent to cause.

## **B. The Agencies Can Better Illustrate the Benefits of the Proposed Rule**

Advocacy appreciates the agencies including an IRFA in the proposed rule. An IRFA forms the basis for public engagement on the proposed regulation. Specifically, it allows small entities and the public to comment meaningfully on the impacts of the rule on small entities and possible regulatory alternatives. It can also help identify small business alternatives that could make the regulation more cost-effective. The IRFA of this proposed rule is an improvement over prior regulatory definitions of “harm,” which were incorrectly certified under the RFA as not having a

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[species-act/](#); U.S. Small Bus. Admin., Off. of Advoc., Comment Letter on Proposed Designation of Critical Habitat for Gunnison Sage-Grouse (Dec. 2, 2013), <https://www.regulations.gov/comment/FWS-R6-ES-2012-0108-0636>. See also, U.S. Small Bus. Admin., Off. of Advoc., Comment Letter on Proposed Designation of Critical Habitat for the New Mexico Jumping Mouse (July 15, 2013), <https://www.regulations.gov/comment/FWS-R2-ES-2013-0014-0005>; U.S. Small Bus. Admin., Off. of Advoc., Comment Letter on Proposed Revisions to the Regulations for Impact Analysis for Critical Habitat (Jan. 31, 2013), <https://www.regulations.gov/comment/FWS-R9-ES-2011-0073-0085>; U.S. Small Bus. Admin., Off. of Advoc., Comment Letter on Proposed Designation of Revised Critical Habitat for Southwestern Willow Flycatcher (Oct. 11, 2011), <https://www.regulations.gov/comment/FWS-R2-ES-2011-0053-0021>.

<sup>18</sup> 90 Fed. Reg. 16102, 16103 (Apr. 17, 2025).

<sup>19</sup> 12 U.S.C. §1532(19).

significant impact on a substantial number of small entities.<sup>20</sup> However, the agencies' IRFA lacks important details.

In the IRFA, the agencies have appropriately described the purpose and need for the rule and confirmed the rule would not impose any recordkeeping and compliance requirements on small entities.<sup>21</sup> The agencies have also stated that no existing rules overlap or conflict with the proposed rule.<sup>22</sup> The agencies have also committed to work with Advocacy to develop an estimate of the number of small entities impacted by the rule in the FRFA.<sup>23</sup>

Finally, the agencies note that the alternative to their proposed rule would be to leave the existing definition of "harm" in place,<sup>24</sup> but a status quo alternative does not qualify as a significant alternative under the RFA.<sup>25</sup> The agencies should consider alternatives which go beyond the current change that will allow increased benefits for small entities. Specifically, the agencies should instead consider alternative provisions that would further increase cost savings for small entities.

Advocacy suggests the agencies include additional information about the proposed rule's benefits to the IRFA where possible. Specifically, the agencies should describe the types of small businesses impacted using North American Industry Classification System (NAICS) codes,<sup>26</sup> and estimate the number of small entities potentially impacted by the change. Advocacy recommends identifying the primary affected sectors and estimating the number of small entities in those sectors. For example, small entities are likely to be affected in the agriculture, oil and gas, construction, mining, and logging industries. Additionally, small entities in all sectors looking to expand their physical footprint could also be impacted. Small governmental jurisdictions are affected as well. Advocacy can assist with the estimate the number of affected small entities.

The agencies should attempt to quantify the regulatory relief the proposed rule will provide. Currently, the FWS and NOAA have almost \$91.4 million just in active paperwork requirements.<sup>27</sup> The agencies should assess if there are paperwork burdens that could be relieved by the proposed rule. Also, the agencies could quantify the direct costs relieved by the rule, such as reducing the need for habitat consultants or reduced project delays. Additionally, the agencies

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<sup>20</sup> See 46 Fed. Reg. 29490 (June 2, 1981); 63 Fed. Reg. 24148, 24149-50 (May 1, 1998).

<sup>21</sup> 90 Fed. Reg. at 16,104.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See U.S. SMALL BUS. ADMIN, OFF. OF ADVOCACY, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT 37-40 (Nov. 2018).

<sup>26</sup> See U.S. SMALL BUS. ADMIN, TABLE OF SMALL BUSINESS SIZE STANDARDS: MATCHED TO NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODES, [https://www.sba.gov/sites/default/files/2023-06/Table%20of%20Size%20Standards\\_Effective%20March%2017%2C%202023%20%282%29.pdf](https://www.sba.gov/sites/default/files/2023-06/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%282%29.pdf) (effective Jan 1, 2022) for SBA's current Table of Small Business Size Standards.

<sup>27</sup> See Off. of Info. & Regul. Aff., Information Collection Review, <https://www.reginfo.gov/public/do/PRAMain> (last accessed May 13, 2025).

could assess the “opportunity costs” which would be relieved by the proposed rule, such as removing barriers to small entities to expanding their businesses. The more the agencies can quantify the benefits of their proposed rule, the easier it will be for small entities to understand its impact and the agency can make better decisions on providing regulatory relief for small entities.

### **III. Conclusion**

Advocacy supports the agencies’ proposed rescission of the ESA’s definition of “harm.” This proposed rule will reduce regulatory burdens on small entities by adding clarity and predictability to the ESA’s requirements. Advocacy also suggests the agencies better illustrate how the proposed rule will benefit small entities and is ready to help the agencies in this effort.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Nick Goldstein at (202) 772-6948 or [nick.goldstein@sba.gov](mailto:nick.goldstein@sba.gov).

Sincerely,

/s/

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/s/

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Copy to: Mr. Jeffrey B. Clark, Sr. Acting Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget