



Save the Sound[®]

Action for our region's environment.

May 19, 2025

Federal eRulemaking Portal

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Docket: FWS-HQ-ES-2025-0034

Re: Proposed Rulemaking Rescinding the Definition of “Harm” under the Endangered Species Act: 90 Fed. Reg. 16102 (April 17, 2025)

Dear Secretary Burgum and Secretary Lutnick:

Save the Sound respectfully submits the following comments in opposition to the proposed rule rescinding the long-standing regulatory definition of “harm” as used in the definition of “take” under the Endangered Species Act (“ESA” or “the Act”). Habitat loss is the leading cause of wildlife population decline and extinction; conservation of endangered species is therefore inextricable from conservation of the habitats they need for shelter, feeding, breeding, rest, and other essential behaviors. The proposal to remove from the ESA regulations the explicit prohibition on killing or injuring endangered species through significant habitat modification or degradation contradicts the plain language of the Act, congressional intent, and sound science. Habitat conservation measures have been instrumental in the recovery of many species, including in the delisting of iconic species such as the bald eagle, Brown Pelican, and Stellar sea lion (Eastern DPS); the suggestion that habitat protection is not fundamental to the ESA’s central purpose “to provide a means where by the ecosystems upon which endangered species and threatened species depend may be conserved”¹ is plainly false. We strongly urge you to not finalize the proposed rule.

Save the Sound is a nonprofit organization representing over 4,400 member households. Our mission is to protect and improve the land, air, water, and wildlife of the entire Long Island Sound region. We use legal and scientific expertise and bring people together to achieve results that benefit the environment for current and future generations.

We have joined comments to be submitted on this docket by Earthjustice and reiterate our support for the concerns and arguments expressed therein. We write now to emphasize the harm the proposed rulemaking would have on our region and offer as examples three species likely to experience catastrophic consequences if the proposed rule is finalized: the Roseate Tern, Piping Plover, and Kemp’s ridley sea turtle. As explained in Earthjustice’s comments, the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) (collectively, “the Services”) have repeatedly over the more than 50-year life of the ESA recognized the inextricable link between habitat loss and species loss. The species we describe here are but a few of the innumerable such examples where the Services have correctly equated harm to habitat with harm to species.

¹ 16 U.S.C. § 1531(b).

1. Roseate Tern (*Sterna dougalli dougalli*)

The northeastern North American population of the Roseate Tern has been listed as “endangered” since 1987.² The species’ initial decline was primarily caused by hunting for the feather trade in the late 1800s, but despite a later hunting ban and protection of many breeding colonies, the population has remained small due to loss of suitable breeding colony habitat from human development, sea level rise, and predation.³ The northeast population has only three remaining major breeding colonies, the largest of which is Great Gull Island in eastern Long Island Sound, where 95% of New York’s Roseate Terns breed.⁴

Scientists, including those at FWS, have suggested that habitat restoration is essential for the long-term survival of this species,⁵ and habitat conservation measures were a major focus of FWS’s “Recommendations for Future Actions” in the 2020 5-Year Review for the species.⁶ The 5-Year Review also noted that erosion of low-lying nesting habitat is increasingly affecting breeding colonies, with these impacts potentially exacerbated by a lack of sand deposition to naturally restore habitat due in part to beach hardening.⁷ Further, Roseate Terns prey primarily on sand lance, which may be impacted by sand mining.⁸ Without intervention, sand mining in the vicinity of roseate tern breeding colonies could impact sand lance productivity, subsequently impacting roseate tern populations.⁹ All of these threats to the Roseate Tern are exacerbated by sea level rise and climate change which impact habitat and prey availability.

The Roseate Tern’s species range has contracted in the last 15 years, spurred in part by the loss of several small breeding colonies on Long Island.¹⁰ These sorts of colonies are essential for maintaining the genetic viability of the species, and FWS has stated that continued losses could prevent the species from ever recovering.¹¹ With suitable breeding habitat already so limited, removing the explicit regulatory protections for habitat under the ESA could be catastrophic for the survival of the Roseate Tern.

2. Piping Plover (*Charadrius melodus*)

The Atlantic coast population of the Piping Plover has been listed as “threatened” since 1985.¹² Hunting nearly extirpated the population in the early 1900s, but with the help of the Migratory

² Determination of Endangered and Threatened Status for Two Populations of the Roseate Tern, 52 Fed. Reg. 42064 (Nov. 2, 1987).

³ *Roseate Tern*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/species/roseate-tern-sterna-dougallii-dougallii> (last visited May 16, 2025).

⁴ *Roseate Tern*, NEW YORK NAT. HERITAGE PROGRAM, <https://guides.nynhp.org/roseate-tern/> (last visited May 16, 2025).

⁵ *See id.*

⁶ U.S. FISH & WILDLIFE SERV., ROSEATE TERN NORTHEASTERN NORTH AMERICAN POPULATION (*STERNA DOUGALLII DOUGALLII*) 5-YEAR REVIEW: SUMMARY AND EVALUATION 35–36 (Aug. 2020), available at https://ecos.fws.gov/docs/tess/species_nonpublish/3063.pdf.

⁷ *Id.* at 17.

⁸ *Id.* at 32.

⁹ *Id.*

¹⁰ *Id.* at 34.

¹¹ *Id.*

¹² Determination of Endangered and Threatened Status for the Piping Plover, 50 Fed. Reg. 50726 (Dec. 11, 1985).

Bird Treaty Act it had recovered by the 1920s,¹³ only to decline in abundance again mid-century from shoreline development, recreational activities, and disturbance by off-road vehicles damaging and destroying breeding habitat.¹⁴ More recent population increases in the Atlantic coast breeding population have been attributed to management and protection of nesting beaches.¹⁵ Nevertheless, FWS noted in the December 2024 5-Year Review for the Piping Plover that sandy beach development and modification and functional loss of habitat resulting from insufficient protection from human disturbance are continuing threats to Atlantic coast Piping Plover survival.¹⁶

In addition to the numerous references to the threat of habitat loss to the Piping Plover in species status review and recovery documents, FWS unequivocally recognized the connection between take of Atlantic coast Piping Plovers and habitat destruction or modification in a 2019 Biological Opinion and Incidental Take Statement on a U.S. Army Corps of Engineers coastal storm risk management project in Queens.¹⁷ There, FWS noted that the project's potential effects to individual Piping Plovers included habitat modification and loss, and that populations would potentially be affected by permanent or temporary habitat modification from construction. FWS therefore concluded that populations were "likely to experience effects that may contribute to reductions in their fitness" because the species "need[s] naturally functioning habitats with access to suitable nesting, foraging, and growing habitats, and minimal human disturbance and predation pressure to achieve reproductive success. This project will not contribute to those needs."¹⁸ The Incidental Take Statement thus "anticipates incidental take of three pairs of Piping Plovers" over the course of the 50-year project "due to the quantitative and qualitative loss of habitat from these activities, which significantly impairs essential behavioral patterns, including breeding, feeding, or sheltering."¹⁹

3. Kemp's Ridley Sea Turtle (*Lepidochelys kempii*)

The Kemp's ridley sea turtle has been listed as endangered across its range since 1970, having been listed under the Endangered Species Conservation Act, the predecessor to the 1973 ESA.²⁰ The Kemp's ridley is generally regarded as the world's most seriously endangered sea turtle,²¹ an unfortunate status due in part to the species having one primary nesting area near Rancho Nuevo,

¹³ *Id.*

¹⁴ *Piping Plover*, NEW YORK STATE DEP'T OF ENV'T CONSERVATION, <https://dec.ny.gov/nature/animals-fish-plants/piping-plover> (last visited May 16, 2025).

¹⁵ Final Determination of Critical Habitat for Wintering Piping Plovers, 66 Fed. Reg. 36038, 36039 (July 10, 2001).

¹⁶ U.S. FISH & WILDLIFE SERV., PIPING PLOVER (*CHARADRIUS MELODUS*) 5-YEAR REVIEW: SUMMARY AND EVALUATION 120, 122 (Dec. 2024), available at https://ecosphere-documents-production-public.s3.amazonaws.com/sams/public_docs/species_nonpublish/21330.pdf.

¹⁷ U.S. FISH & WILDLIFE SERV., BIOLOGICAL OPINION ON THE EFFECTS OF THE U.S. ARMY CORPS OF ENGINEERS' EAST ROCKAWAY INLET TO ROCKAWAY INLET COASTAL STORM RISK MANAGEMENT PROJECT (April 5, 2019), available at <https://ecos.fws.gov/tails/pub/document/13352631>.

¹⁸ *Id.* at 50, 53, 54.

¹⁹ *Id.* at 57.

²⁰ List of Endangered Foreign Fish and Wildlife, 35 Fed. Reg. 18309, 18322 (Dec. 2, 1970).

²¹ See *Rarest Sea Turtle Nests on Queens Beach*, NAT'L PARK SERV., <https://www.nps.gov/gate/learn/news/rarest-sea-turtle-nests-on-queens-beach.htm> (Oct. 1, 2018).

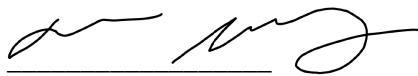
Mexico, though Kemp's ridleys can be found as far north as Nova Scotia.²² New York waters have been documented as an important foraging ground for juveniles.²³

The Services' 2015 5-Year Review of the Kemp's ridley sea turtle's status noted that its singular primary nesting beach makes it "particularly susceptible to habitat destruction by natural (e.g., hurricanes) and human caused events," especially oil spills due to the high density of offshore oil exploration and extraction in the Gulf of Mexico.²⁴ The 5-Year Review also noted Kemp's ridley habitat, particularly foraging habitat, may be destroyed by activities that directly impact bottom habitats, such as bottom trawling, dredge fishing, dredging of channels, and dredging associated with beach nourishment activities. The Review concludes that "the Kemp's ridley sea turtle remains in danger of extinction because of ongoing and threatened destruction, modification, and curtailment of their habitat."²⁵

Conclusion

The roseate tern, piping plover, and Kemp's ridley sea turtle are just three of likely hundreds of listed species whose continued survival is seriously threatened by the proposed rule. Each species lost is a tragedy, but if finalized, the proposed rule will also have cascading effects on the broader ecosystem, harming many other species, including humans. To avoid this, and for the reasons described above and in Earthjustice's comment letter which we have joined, the Services must not finalize the proposed rule.

Sincerely,



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²² U.S. FISH & WILDLIFE SERV., KEMP'S RIDLEY SEA TURTLE (*LEPIDOCHELYS KEMPII*) 5-YEAR REVIEW: SUMMARY AND EVALUATION 10, 25 (July 2015), available at https://ecos.fws.gov/docs/tess/species_nonpublish/2303.pdf.

²³ NEW YORK STATE DEP'T OF ENV'T CONS., KEMP'S RIDLEY SEA TURTLE SPECIES STATUS ASSESSMENT (Sept. 2024), available at <https://dec.ny.gov/sites/default/files/2024-04/seaturtlesstatusassessments.pdf>.

²⁴ Kemp's Ridley Sea Turtle 5-Year Review, *supra* n. 22 at 25.

²⁵ *Id.* at 27.