Definition of Harm/Endangered Species Act: United States Fish and Wildlife Service Proposed Rule

Jordan Wimpy
jwimpy@mwlaw.com
(501) 688-8872

Grace Fletcher
gfletcher@mwlaw.com
(501) 688.8815

04/21/2025

The United States Fish and Wildlife Service and the National Marine Fisheries Service (collectively, "Service") is proposing to rescind the regulatory definition of "harm" in the Endangered Species Act ("ESA") regulations arguing the existing regulatory definition of "harm", which includes habitat modification, runs contrary to the best meaning of the statutory term "take".

The ESA was enacted in 1973 with the objective of protecting and recovering imperiled species and the ecosystems of which they depend. The United States Fish and Wildlife Service has primary responsibility for terrestrial and freshwater organisms, while the National Marine Fisheries Service has primary responsibility for marine wildlife.

The ESA provides opportunities for species to be listed as either endangered or threatened. "Endangered" means that a species is in danger of extinction throughout all or a significant portion of its range. *See* § 16 U.S.C. 1532(6). "Threatened" means a species is likely to become endangered within the foreseeable future. *See* § 16 U.S.C. 1532(20).

Under the ESA it is unlawful for a person to "take" a listed animal without a permit. 16 USCA § 1539. The statute defines "take" to include a broad range of actions that include:

…harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. See 16 U.S.C. § 1532(19).

Consequently, violation of the prohibition on an unauthorized take of a listed animal can subject one to civil and criminal penalties.

The Service's proposed rule would change the definition of what has been considered "harm" to threatened and endangered species under the ESA. This harm had been interpreted by the Service as including significant habitat modification or degradation which kills or injures wildlife by significantly impairing essential behavioral patterns. 50 C.F.R. § 17.3. An understanding of "harm" upheld by the U.S. Supreme Court some thirty years ago in *Babbit v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). Notably, the Supreme Court upheld the Service's interpretation under the Court's now defunct *Chevron* doctrine of deference to an agency's reasonable interpretation of an ambiguous statute.

In the Notice of Proposed Rulemaking, the Service states that it has concluded that its existing regulations which contains the definition of "harm" does not match what it describes as:

…the single, best meaning of the statute.

According to the Service, the current definition of “harm” is inconsistent with the structure of the ESA, and further states:

…Nor is any replacement definition needed. The ESA itself defines ‘‘take,’’ and further elaborating on one subcomponent of that definition — ‘‘harm’’ — is unnecessary in light of the comprehensive statutory definition.

Interestingly, in reaching its current understanding of “take” under the ESA, and its new interpretation of “harm” in relation to the same, the Service cites directly to the Supreme Court’s recent decision in *Loper Bright Enterprises v. Raimondo*, 369 U.S. 400 (2024), which overruled the Chevron decision and ended the decades’ old deference doctrine. The Service recognized the Court’s provision that “prior cases that relied on the *Chevron* framework . . . are still subject to statutory *stare decisis*[,]” 369 U.S. at 412, but, nevertheless, concluded that its new reading of the ESA now reflects the “single, best meaning of the statutory text.” 90 Fed. Reg. at 16,103.

A copy of the notice of proposed rulemaking can be downloaded here.