Definition of Harm/Endangered Species Act: EarthJustice Comments Addressing U.S. Fish and Wildlife Service Proposed Rule

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05/22/2025

The environmental organization Earthjustice submitted May 19th comments to the United States Fish and Wildlife Service and National Marine Fishery Service (collectively, "Services") addressing their proposed rescission of the regulatory definition of "harm" in the Endangered Species Act ("ESA") regulations. (See Jordan Wimpy and Grace Fletcher's earlier Blog Post addressing the proposed rule here).

The Services argued in the proposed rule that the existing regulatory definition of "harm", which includes habitat modification, runs contrary to the best meaning of the statutory term "take".

Harm has been interpreted by the Services as including significant habitat modification or degradation which kills or injures wildlife by significantly impairing essential behavioral patterns. According to the Services, 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.

Earthjustice opposes the change contemplated by the proposed rule, stating by way of introduction:

…For fifty years, federal regulations have recognized that "harm" in this context must include a prohibition on killing or injuring endangered species through significant habitat modification or degradation, such as by destroying the resources that members of endangered species need for feeding, breeding, or sheltering. This definition appropriately reflects that habitat protection was a paramount concern when Congress enacted the ESA, as demonstrated in both the legislative history and the text of the statute itself.

The components of Eartjustice's arguments include:

- HABITAT LOSS IS THE SINGLE GREATEST THREAT TO BIODIVERSITY WORLDWIDE.
- Habitat Loss Drives Extinctions.
- Habitat Loss, Fragmentation, Isolation, and Degradation Disrupts Species' Breeding, Feeding, and Sheltering.
- Habitat Destruction Can Signify "Time-Delayed" Extinction.
- THE SERVICES HAVE LONG UNDERSTOOD AND ACKNOWLEDGED THAT HABITAT MODIFICATION AND DEGRADATION HARM MEMBERS OF LISTED SPECIES.
- Florida Manatee.

- Grizzly Bear.
- Marbled Murrelet.
- Hawaiian Monk Seal.
- Golden-Cheeked Warbler.
- Pacific Coast Salmon and Steelhead.
- Canada Lynx.
- Northern Spotted Owl.
- Red Knot.
- Insect Pollinators.
- PROTECTION OF HABITAT IS CENTRAL TO THE PURPOSE AND GOALS OF THE ESA.
- The Supreme Court Upheld the Current Definition of "Harm" and Rejected the Definition in the Proposed Rule.
- The Services Cannot Justify the Proposed Rule on the Basis of *Loper Bright*.
- The Services Cannot Justify Rescinding the Definition of "Harm" on the Basis of the *Sweet Home* Dissent.
- The historical understanding of "take" and habitat degradation.
- Noscitur a sociis.
- Structure of the ESA.
- The Services Have Not Explained Their Change in Position.
- Legislative History Supports the Current Definition of "Harm."
- The Services' "Take Care" Clause Reasoning Is Specious.
- THE SERVICES MUST COMPLY WITH NATIONAL ENVIRONMENTAL POLICY ACT.
- The Proposed Rule Is Not a Nondiscretionary Action.
- The Proposed Rule Does Not Qualify for a Categorical Exclusion under NEPA.
- The Services Must Analyze Cumulative Impacts of the Rule Alongside Their Forthcoming Changes to ESA Implementing Regulations.
- THE SERVICES MUST COMPLY WITH ESA SECTION 7(a)(2)
- Legal Framework.
- The Services' Failure to Consult on the Harm Rule Rescission, Which "May Affect" Threatened and Endangered Species and Adversely Modify Their Designated Critical Habitat, Violates Section 7(a)(2).

A copy of the comments can be downloaded here.