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



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The United States Fish and Wildlife Service and the National Marine Fisheries Service (collectively, "Service") recently finalized a rule 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, does "not match the single, best meaning of the [Endangered Species Act] statute." 91 Fed. Reg. 43,300, 43,301 (Jul. 14, 2026)

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.

We previously reported on the Service's proposed rule. As now finalized, the rule changes 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 final rule, the Service formally rescinds "the regulatory definition of 'harm' from the Code of Federal Regulations in Title 50 parts 17 and 222." 91 Fed. Reg. at 43,300. According to the Service, the

current definition of "harm" is inconsistent with the structure of the ESA, and further states "no replacement definition is needed." *Id*. at 43,302

Notably, in reaching its current understanding of "take" under the ESA, and its new interpretation of "harm" in relation to the same, the Service relies on two trains of thought.

First, referring back to *Babbitt v. Sweet Home*, the Service focused not on the majority opinion but, instead, the dissenting opinion of Justice Scalia arguing the "FWS's definition of 'harm' does not fit the use of 'take" throughout the [ESA]" and does not "work with the 'broader structure of the [ESA]." *Id*. at 43,301 (citing *Babbitt v. Sweet Home*, 515 U.S. at 724 (Scalia, J. *dissenting*). In short, the Service adopted "Justice Scalia's rationale as articulated in *Sweet Home* to conclude its regulatory definitions are unlawful." *Id.*

Second, the Service bent the knee to the Supreme Court's more 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, intuited that the "the Court left open the possibility that the executive branch could itself depart from [past] regulations" and concluded its new reading of the ESA now reflects the "single, best meaning of the statute" 91 Fed. Reg. at 43,302.

The Service's actions on the definition of "harm" drew intense scrutiny and several thousand comments—from supporters and detractors. Likewise, the Service's finalization of the rule drew immediate legal action from wildlife conservation organizations like the Center for Biological Diversity, Conservation Law Foundation, Sierra Club, and others.

A copy of the notice of final rule can be downloaded here.

A copy of the legal complaint challenging the final rule can be downloaded here.