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ESA "Harm" Rescission: Implications Far Beyond Habitat

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On Friday, July 10, 2026, the U.S. Fish and Wildlife Service and National Marine Fisheries Service (collectively, the Services) announced that they have finalized their proposed rescission of the definition of “harm” for purposes of “take” under the Endangered Species Act (ESA). The Federal Register version of the final rule will be issued on July 14, with an effective date of September 12. While the headline-grabbing ramification of this final rule is that the Services will no longer deem habitat degradation or modification to be a form of “take” under the ESA, the Services' reasoning for rescinding the definition will result in a narrowing of the scope of the ESA's take prohibition well beyond the habitat context. If the final rule, which is certain to be challenged, ultimately stands, it will fundamentally change how the ESA is implemented.

Overview of the Rescission Decision. The Services originally proposed to rescind the harm definition in April 2025. They received approximately 358,000 public comments on the proposal, which underscores the significance of this action. As in the proposed rule, the Services have declined to provide a replacement definition in the final rule, opting instead to rely on the statutory definition of “take” without further defining any of the ten verbs in the ESA's definition of take¹ (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect).

In rescinding the definition, the Services expressly state they are “making clear that habitat modification or degradation does not qualify as ‘take.’” This outcome alone would be significant. But the Services' justification for the rescission will result in wide-reaching effects beyond elimination of the harm definition.

The Services' final rule relies heavily on two high-profile U.S. Supreme Court cases. First, they cite to the Court's *Loper Bright* decision, which overturned *Chevron* deference and held that the proper focus is on “the single, best reading of a statute.”² Using that framework, they then rely on Justice Scalia's dissent in *Sweet Home* to conclude that the single, best meaning of “take” is an “affirmative act directed immediately and intentionally against a particular animal—not an act or omission that indirectly and accidentally causes injury to a population of animals.”³ They conclude that the regulatory definition of “harm” does not accord with this single, best meaning.

Implications of the Rescission Decision. The obvious implication of the final rule is that habitat degradation and modification will no longer be a source of take requiring incidental take coverage. Thus, going forward, a biological opinion issued under Section 7 may conclude the listed species

are likely to be adversely affected by the proposed action's impacts to habitat, but the Services will not issue an incidental take statement for such habitat impacts, which eliminates the Services' ability to impose reasonable and prudent measures or terms and conditions for those effects. Likewise, impacts to listed species' habitat by a project that lacks a federal nexus (i.e., state or private action) would not warrant a Section 10 incidental take permit (ITP).

The Services emphasize, though, that “nothing in this final rule is intended to require that any prior permit or incidental take statement issued by the Services that relied on the prior definition of 'harm' be reevaluated on the basis of this final regulation.” They leave open the possibility that a current permittee may choose to return an existing permit if it is mitigating for habitat impacts that are no longer considered prohibited take under the new definition.

However, there is more to this story. By limiting “take” to affirmative acts directed immediately and intentionally against an animal or animals, the Services appear to be eliminating the need for incidental take coverage for virtually all proposed actions that will *directly* kill or injure ESA-listed species. Because, for instance, pipelines, transmission lines, mines, housing developments, highways, and timber sales, do not involve affirmative acts directed immediately and intentionally against animals, any death or injury caused by these projects—such as through collision, crushing, or exposure to hazardous materials—may not be deemed to be “take” under the final rule.

Several statements in the Services' final rule support the conclusion that even direct injury or death of a listed species will not be considered a take for the vast majority of proposed actions.

- “The rescission of the regulatory definition of 'harm' does not eliminate the Services' ability to issue ITPs or [enhancement of survival] permits *where there is an affirmative conduct intentionally directed against a particular animal or animals.*” (emphasis added).
- “Section 10 then creates an incidental-take regime for when such take is nonetheless inevitable in the pursuit of some other activity, as when fishing for a non-endangered species of fish will, inadvertently but inevitably, lead to the catch of an endangered species of fish.”
- “We do not find persuasive the argument that the 1982 amendments to the ESA, which allowed the Secretary of the Interior to issue incidental take permits, suggests that Congress understood section 9 to prohibit indirect as well as deliberate takings. Habitat modification is not the only activity that might incidentally cause a prohibited taking. For example, fishing for unprotected salmon may inadvertently but unavoidably cause takes of an endangered species of salmon (515 U.S. at 729).”

Thus, this rule marks a sea change in the ESA. But because legal challenges are inevitable, and because it remains to be seen how this interpretation of “take” will be implemented in practice by Service biologists, there is still some uncertainty about how far and wide the ripple

effects of this rule will be.

¹ 16 U.S.C. § 1532(19).

² *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

³ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 719-20 (1995) (Scalia, J., dissenting) (cleaned up).

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