

Rescission of the Harm Definition: Is a New Day Dawning?

WRITTEN BY

Andrea W. Wortzel | M. Benjamin Cowan | Shawn J. Zovod | Josh Kaplowitz | Morgan Gerard

KEY POINTS

- The U.S. Fish and Wildlife Service and National Marine Fisheries Service issued a final rule rescinding the definition of “harm” from ESA regulations at 50 C.F.R. § 17.3 and 50 C.F.R. § 222.102, eliminating the long-standing regulatory interpretation that habitat modification resulting in death or injury of listed species constitutes prohibited take.
- The rescission narrows the scope of ESA take, streamlining the Section 7 consultation process and reducing the instances where an incidental take permit is required under Section 10 — though whether this plays out in practice remains to be seen.
- The Services assert the harm definition is unlawful and that rescinding it is a nondiscretionary constitutional duty, and on that basis have determined the rule is not subject to NEPA review or its own Section 7 consultation.
- The “harass” definition — which remains in FWS regulations and covers intentional or negligent acts that significantly disrupt normal behavioral patterns including breeding, feeding, or sheltering — may be broad enough to partially fill the gap left by the harm definition’s removal, and the Services have signaled additional regulatory changes may follow.
- Supreme Court review of *Sweet Home v. Babbitt* — which previously upheld the harm definition under *Chevron* deference — is highly likely given the inevitable legal challenges to this rule, particularly in light of the 2024 *Loper Bright* decision reversing *Chevron* deference.

On Friday, July 10, 2026, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services) released the [prepublication version of their final rule](#) rescinding the definition of harm from the Endangered Species Act (ESA) regulations. While the change itself is simple — the definition of harm is removed from the regulations found at 50 C.F.R. § 17.3 and 50 C.F.R. § 222.102 — the effect of this change is anything but.

The ESA prohibits “take,” which is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” While none of the terms within the take definition are further defined in the ESA, the Services had long adopted a definition of harm that includes habitat modification that results in the death or injury of listed species..

The rescission of the harm definition significantly narrows the scope of take, and thus will streamline the ESA Section 7 consultation process and the instances where an incidental take permit (ITP) is needed under ESA Section 10. At least that is the Services’ intent. Whether that plays out in practice remains to be seen.

In their final rule, the Services explain that applications for ITPs will no longer need to (a) articulate the impact to species' habitat, (b) explain how they will "minimize and mitigate" habitat modification or degradation, or (c) consider alternatives in service of mitigating habitat modification or degradation in their conservation plans. Similarly, although Section 7 biological opinions will still assess impacts to habitat for the purpose of determining whether there is destruction or adverse modification of designated critical habitat, incidental take statements (ITSs) attached to biological opinions will now be limited only to affirmative actions directed at any species that are likely to kill or injure a listed species. ITSs will no longer include terms and conditions requiring federal permittees to take into account habitat modification and degradation.

Notably, the Services assert that the definition of harm is "unlawful." Accordingly, the Services purport to have a nondiscretionary duty to rescind it, as part of their constitutional responsibility to "take care that the laws be faithfully executed." Accordingly, the Services have determined that this regulatory change, despite the significance of its impact, is not subject to review under the National Environmental Policy Act or to its own Section 7 consultation. Additionally, the Services dismissed out of hand the economic impact of the rule on conservation and mitigation activities, stating that such businesses are in effect extracting "regulatory rents" that are "inherently illegitimate." In asserting that the plain language and structure of the ESA demonstrate that take does not encompass impacts from habitat modification, the Services also rely heavily on Justice Scalia's dissent in the *Sweet Home v. Babbitt* decision (which invoked *Chevron* deference to uphold the definition of harm), as well as the 2024 *Loper Bright* decision that reversed *Chevron* deference to agency interpretations of federal statutes. It is highly likely that the Supreme Court will be asked to revisit *Sweet Home* as part of the inevitable lawsuits challenging this rule.

One outstanding question is whether the "harass" definition, which remains a part of the FWS ESA regulations (and which NMFS has adopted through guidance), undermines the Services' intent with the removal of the harm definition. "Harass" is defined at 50 C.F.R. § 17.3 as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." Although habitat is not specifically referenced, intentional acts that annoy protected wildlife may be broad enough to encompass habitat modification. The Services note that additional regulatory changes may be forthcoming to ensure alignment with the rescission of the harm definition. Removal of the "harass" definition may be one such change.

RELATED INDUSTRIES + PRACTICES

- [Environmental + Natural Resources](#)