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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 222

[Docket No. FWS–HQ–ES–2025–0034; FXES11110900000-256 FF09E23000; 250411-0064]

RIN 1018–BI38; 0648–BN93

Rescinding the Definition of "Harm" under the Endangered Species Act

AGENCY: U.S. Fish and Wildlife Service, Interior; National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the Services or we) are proposing to rescind the regulatory definition of "harm" in our Endangered Species Act (ESA or the Act) regulations. The existing regulatory definition of "harm," which includes habitat modification, runs contrary to the best meaning of the statutory term "take." We are undertaking this change to adhere to the single, best meaning of the ESA.

DATES: Comments must be received by [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: A plain language summary of this proposed rule is available at https://www.regulations.gov in Docket No. FWS–HQ–ES–2025–0034. You may submit comments by one of the following methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal:

https://www.regulations.gov. In the Search box, enter FWS–HQ–ES–2025–0034, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment."

(2) *By hard copy*: Submit by U.S. mail to: Public Comments Processing, Attn: FWS–HQ–ES–2025–0034, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. Comments must be submitted to https://www.regulations.gov before 11:59 p.m. (Eastern Time) on the date specified in **DATES**. We will not consider mailed comments that are not postmarked by the date specified in **DATES**.

We will post your entire comment—including your personal identifying information—on https://www.regulations.gov. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. We cannot guarantee, however, that we will be able to do so. Anonymous comments will be considered. Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on https://www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Gina Shultz, Acting Assistant Director, Ecological Services, at 703–358–2171 or ADEcologicalServices@fws.gov with a subject line of "1018–BI38." Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. For a summary of the proposed rule, please see the proposed rule summary document in Docket No. FWS–HQ–ES–2025–0034 on https://www.regulations.gov.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act (ESA) prohibits the "take" of endangered species.[1] Under the ESA, "[t]he term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[2] This makes sense in light of the well-established, centuries-old understanding of "take" as meaning to kill or capture a wild animal.[3] Regulations previously promulgated by FWS expanded the ESA's reach in ways that do not reflect the best reading of the statute, to prohibit actions that impair the habitat of protected species: "Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[4] NMFS' definition is materially identical: "Harm in the definition of 'take' in the Act means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering."[5]

In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), the Supreme Court upheld FWS' regulation under *Chevron* deference.[6] Justice Scalia dissented, joined by Chief Justice Rehnquist and Justice Thomas, and would have held that even under *Chevron* this interpretation was unsustainable.[7] As Justice Scalia observed, "[i]f 'take'

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[1] 16 U.S.C. 1538(a)(1)(B)-(C).
[2] 16 U.S.C. 1532(19).
[3] *See*, *e.g.,* 11 Oxford English Dictionary (1933); Webster's New International Dictionary of the English Language (2d ed. 1949); *Geer* v. *Connecticut,* 161 U.S. 519, 523 (1896); 2 W. Blackstone, Commentaries 411 (1766).
[4] 50 CFR 17.3.
[5] 50 CFR 222.102.
[6] 515 U.S. at 703. Although *Sweet Home* concerned FWS's regulation at 50 CFR 17.3, it applies equally to 50 CFR 222.102 given the definitions are substantially the same.
[7] *Id*. at 715. The D.C. Circuit also rejected the Secretary's definition. *See Sweet Home Chapter of Communities for a Great Oregon* v. *Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994); *id.* at 1472 (Sentelle, J., concurring); *but see id.* at 1473 (Mikva, C.J., dissenting).

were not elsewhere defined in the Act, none could dispute what it means, for the term is as old as the law itself. To 'take,' when applied to wild animals, means to reduce those animals, by killing or capturing, to human control."[8] In addition, under the *noscitur a sociis* canon, the definition of "harm," like the other nine verbs in the definition, should be construed to require an "affirmative act[] … directed immediately and intentionally against a particular animal—not [an] act[] or omission[] that indirectly and accidentally cause[s] injury to a population of animals."[9]

The Supreme Court, nearly 30 years after *Sweet Home*, overruled the *Chevron* doctrine in *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369, 400 (2024). Under *Loper Bright*, "the question that matters" is whether "the *statute* authorizes the challenged agency action."[10] In other words, does the agency's regulation match the single, best meaning of the statute?[11]

We have concluded that our existing regulations, which still contain the definition of "harm" contested in *Sweet Home*, do not match the single, best meaning of the statute. As Justice Scalia's dissent in *Sweet Home* explains, the regulations' interpretation of the statutory language violates the *noscitur a sociis* canon, did not properly account for over a thousand years of history, and is inconsistent with the structure of the ESA. Nor is any replacement definition needed. The ESA itself defines "take,"[12] and further elaborating on one subcomponent of that definition—"harm"—is unnecessary in light of the comprehensive statutory definition.

We recognize that the Supreme Court held in *Loper Bright* that its "prior cases that relied on the *Chevron* framework … are still subject to statutory *stare decisis*."[13] But under the then-prevailing *Chevron* framework, *Sweet Home* held only that the existing regulation is a permissible reading of the ESA, not the only possible such reading. Our rescission of the regulation definition on the ground that it does not reflect the best reading of the statutory text

[8] 515 U.S. at 717.
[9] *Id*. at 719-20.
[10] 603 U.S. at 406 (emphasis added).
[11] *Id*. at 400.
[12] 16 U.S.C. 1532(19).
[13] 603 U.S. at 412.

thus would not only effectuate the Executive Branch's obligation to "take Care that the Laws be faithfully executed,"[14] but would also be fully consistent with *Sweet Home*.

Accordingly, because our regulations do not accord with the single, best meaning of the statutory text, we propose to rescind the regulatory definition of "harm" and rest on the statutory definition of "take." This revision would be prospective only and would not affect permits that have been granted as of the date the regulation becomes final.

No Reliance in Unlawful Regulations

In proposing to rescind our regulatory definitions of harm, we are considering whether there are legitimate reliance interests on the regulations under reexamination. *Dep't of Homeland Sec.* v. *Regents of the Univ. of California*, 591 U.S. 1, 30 (2020). However, because it is the President's duty to see that the laws are faithfully executed, in all but the most unusual cases, we believe that reliance interests likely will be outweighed by the constitutional interest in repealing regulations that do not reflect the best reading of the statute.[15]

We are aware that there are parties who are likely to provide comments concerning their reliance interests on environmental and aesthetic grounds, even as we are aware there are property owners and regulated entities who are likely to provide comments regarding interests in not being subject to a regime Congress may never have authorized. We therefore solicit public comment on reliance interests.

Regulatory Planning and Review–Executive Orders 12866 and 14192

This proposed rule has been determined to be significant for purposes of Executive Order 12866. This proposed rule, if finalized as proposed, is expected to be an E.O. 14192 deregulatory action.

Regulatory Flexibility Act

[14] U.S. Const. art. II, § 3.
[15] See *Regents,* 591 U.S. at 30-32.

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 et seq.), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). No regulatory flexibility analysis is required if the head of an agency or an appropriate designee certifies that the rule will not have a significant economic impact on a substantial number of small entities. Here, if adopted as proposed, this rulemaking may have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

This proposed rule seeks comment on rescission of the definition of "harm" for both NMFS and FWS. In the proposed rule seeking to codify the redefinition of the FWS regulations defining harm, the Department of the Interior noted its determination that the rule would not have a significant economic impact on a substantial number of small entities under the RFA. See 46 FR 29490 (June 2, 1981). As for NMFS, in the preamble to the proposed rule that proposed to codify NMFS's then-current interpretation of "harm," the Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities because "NMFS is not implementing a new policy or definition. NFMS [sic] definition of harm would remain the same whether or not it is codified. . . ." 63 FR 24148 at 24149–24150 (May 1, 1998).

In response to public comments at that time, NMFS developed a final regulatory flexibility analysis that analyzed the rule's potential effects on agriculture, residential or commercial construction, mining, and municipal water, sewer, and waste management. NMFS concluded that the analysis "indicates that this regulation may pose some incremental cost for

some small entities; however it remains uncertain whether these costs constitute a significant economic impact on a substantial number of small entities."

Because this proposed rule would rescind that definition of "harm" for both NMFS and FWS, it is expected that incremental costs on small entities imposed by that prior definition will be relieved, and this rulemaking, if adopted as proposed, may have a significant economic impact by reducing burden on a substantial number of small entities relative to the previous rulemaking. As a result, an initial regulatory flexibility analysis has been prepared and is provided as follows.

The reasons for this deregulatory action are set out above, along with a succinct statement of the objectives and legal basis for the proposed rule. *See* 5 U.S.C. 603(b)(1)–(2). An estimate of the potentially large number of small entities that could be impacted by this deregulatory action is unknown at this time because the 1981 rulemaking record does not contain that information and because the proposed rule will impact any small entity complying with the Endangered Species Act. *See* 5 U.S.C. 603(b)(3). As part of the public comment process and for its final regulatory flexibility analysis under 5 U.S.C. 604, the Services will undertake that estimation process in consultation with the Office of Advocacy. This deregulatory action would not impose projected reporting, recordkeeping, or other compliance activities. *See* 5 U.S.C. 603(b)(4). No other agency actions duplicate, overlap, or conflict with this deregulatory action. *See* 5 U.S.C. 603(b)(5). Finally, by eliminating a legally incorrect definition of "harm" under the Endangered Species Act, this proposed rule, if adopted, would be deregulatory and would benefit small entities impacted by the Endangered Species Act. The alternative to this proposed deregulatory action is the status quo, which does not need to be analyzed. *See* 5 U.S.C. 603(c).

National Environmental Policy Act

We are analyzing this proposed rule in accordance with the National Environmental Policy Act (NEPA, 42 U.S.C. 4321 et seq.), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), the

Department of the Interior Manual (516 DM 8), the NOAA Administrative Order 216-6A, and the NOAA Companion Manual (CM), "Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities" (effective January 13, 2017).

We are proposing to undertake this revision because we believe it is compelled by the best reading of the statutory text. As such, we believe that "the proposed agency action is a nondiscretionary action with respect to which such agency does not have authority to take environmental factors into consideration in determining whether to take the proposed action" (42 U.S.C. 4336(a)(4); *see Dep't of Transp.* v. *Pub. Citizen*, 541 U.S. 752, 766–70 (2004)).
In the alternative, we believe that the proposed regulation changes are within a category of actions that the Department of the Interior and NOAA have each found have no significant individual or cumulative effect on the quality of the human environment and are therefore excluded from the requirement to prepare an environmental assessment or an environmental impact statement, specifically, the Department of the Interior categorical exclusion for "Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case" (43 CFR 46.210(i)), and the NOAA categorical exclusion for "[P]reparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature, or for which the environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or on a case-by-case basis" (CM Appendix E, G7).

In this regard, we note that the two recent proposed and final rulemakings addressing a regulatory definition of "habitat" under the Endangered Species Act found that these categorical exclusions applied. *See Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat*, 87 FR 37757, June 24, 2022; *Endangered and Threatened Wildlife and Plants; Regulations for Listing*

Endangered and Threatened Species and Designating Critical Habitat, 86 FR 59353, October 27, 2021; *Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat*, 85 FR 81411, December 16, 2020); *Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat*, 85 FR 47333, August 5, 2020).

We are continuing to consider the extent to which our proposed regulation changes may have a significant effect on the human environment or fall within one of the categorical exclusions for actions that have no individual or cumulative significant effect on the quality of the human environment. We invite the public to comment on these or any other aspects of the NEPA analyses of these revisions. We will complete our analysis in accordance with NEPA and applicable regulations before finalizing this proposed rule.

Endangered Species Act

In developing this proposed rule, the Services are acting in their unique statutory role as administrators of the Act and are engaged in a legal exercise of interpreting the standards of the Act. The Services' promulgation of rules that govern their implementation of the Act is not an action that is in itself subject to the Act's provisions, including section 7(a)(2). The Services have a historical practice of issuing their general implementing regulations under the ESA without undertaking section 7 consultation. Given the plain language, structure, and purposes of the ESA, we find that Congress never intended to place a consultation obligation on the Services' promulgation of implementing regulations under the Act. In contrast to actions in which we have acted principally as an "action agency" in implementing the Act to propose or take a specific action (e.g., issuance of section 10 permits and actions under statutory authorities other than the ESA), here the Services are carrying out an action that is at the very core of their unique statutory role as administrators—promulgating general implementing regulations or revisions to those regulations that interpret the terms and standards of the Act.

Authority

We issue this proposed rule under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 *et seq*.).

List of Subjects

50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

50 CFR Part 222

Administrative practice and procedure, Endangered and threatened species, Exports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

For the reasons set out in the preamble, we hereby propose to amend part 17 of chapter I and part 222 of chapter II, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

Subpart A—Introduction and General Provisions

§ 17.3 [Amended]

2. Amend § 17.3 by removing the definition for “Harm”.

PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES

3. The authority citation for part 222 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*; 16 U.S.C. 742a *et seq.* Section 222.403 also issued under 16 U.S.C. 1361 *et seq.*

Subpart A—Introduction and General Provisions

§ 222.102 [Amended]

4. Amend § 222.102 by removing the definition for “Harm”.

Maureen Foster,

Chief of Staff,

Exercising the Delegated Authority of the Assistant Secretary for Fish and Wildlife and Parks,

Department of the Interior.

Laura Grimm,

Chief of Staff,

Exercising the Delegated Authority of the Under Secretary of Commerce for Oceans and

Atmosphere and NOAA Administrator,

Department of Commerce.

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