



Submitted via www.regulations.gov

May 19, 2025

Acting Director Paul Souza
U.S. Fish & Wildlife Service
MS PRB/3W
5275 Leesburg Pike
Falls Church, Virginia 22041-3803

RE: Rescinding the Definition of Harm Under the Endangered Species Act, FWS-HQ-ES-2025-0034

Dear Acting Director Souza:

For too long, oil and natural gas projects have been stopped or curtailed through an expansive definition of taking that harmed the economic vitality of communities across the West without delivering additional protections for species. Western Energy Alliance (Alliance) appreciates that the U.S. Fish & Wildlife Service and the National Marine Fisheries Service (collectively the services) are addressing the definition of “harm” that not only adheres to the plain English language, but also to recent U.S. Supreme Court precedent. Thank you for this sensible modification to ensure Endangered Species Act (ESA) regulation serves as a means to protect truly threatened and endangered species rather than as a weapon to stop productive development.

Working with a vibrant membership base for over 50 years, Western Energy Alliance stands as a credible leader, advocate, and champion of independent oil and natural gas companies in the West. Our expert staff, active committees, and committed board members form a collaborative and welcoming community of professionals dedicated to abundant, affordable energy and a high quality of life for all. Most independent producers are small businesses, with an average of fourteen employees.

The services have used definitions of “harm” in the definition of “take” to prohibit actions that impair habitat since the 1980s. In *Babbitt v. Sweet Home* the Supreme Court upheld the services’ expansive definition based on *Chevron deference*. With the Supreme Court recently upending *Chevron* via the *Loper Bright* ruling, the services are rightly redefining a regulation that relied on that deference. We encourage the services to modify other regulations that likewise have relied heavily on the *Chevron* standard. We agree with the services that the current definitions of harm do not match the single best plain language meaning of ESA.

However, we recommend, rather than rescinding the definition of harm altogether, that the services maintain a definition of harm that removes the problematic sentences on habitat modification and degradation while retaining the first sentences of the definitions that deal with killing and injuring wildlife. By so revising and maintaining the definitions, the services will ensure that moving forward, ESA will not be used to prohibit productive human activities such as energy development that may affect habitat but do not actually result in the taking of species, while at the same time encouraging due diligence in planning and executing projects to avoid take. We propose that the services retain and revise the definitions thus:

FWS definition: “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.~~”

NMFS definition: “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.~~”

Similarly, we recommend the services also consider reviewing the definition of “harass” within the definitions. “Harass” similar to “harm” has been used to stop responsible projects near habitat that do not result in take.

ESA has been weaponized as a means to stop oil, natural gas, and other energy projects, particularly on federal lands. With revised definitions, only the expansive reach of government is harmed, not listed species. The revised definitions would thereby retain the essential element of the definition, to prohibit the taking of species, while enabling energy development and other activities that create jobs and economic prosperity. Revised definitions are fully in line with President Trump’s energy agenda, as articulated in Executive Order 14154 Unleashing American Energy and several others.

Oil and natural gas development is entirely compatible with the protection of endangered, threatened, sensitive, and other species. Companies are committed to reducing impacts to habitats, often adjusting development plans to avoid areas essential for brooding, rearing, winter forage, migration, and other wildlife needs. They often engage in projects to mitigate impacts, when

necessary, or participate in voluntary conservation programs. Further, industry's technological innovation has steadily reduced habitat fragmentation and other impacts. For example, advanced hydraulic fracturing combined with horizontal drilling has reduced footprint on the land by as much as 70%.¹

We fully support a definition of harm based on an affirmative action that directly kills or captures an animal, not on hypothetical impairment of habitat. Thank you for promulgating these definitional changes.

Sincerely,



Kathleen M. Sgamma
Outgoing President

¹ [“Oil and gas impacts on Wyoming’s sage-grouse: summarizing the past and predicting the foreseeable future,”](#) Dave H. Applegate and Nick L. Owens, *Human-Wildlife Interactions Vol. 8 No 2*, 2014, p. 284-290; [“New drilling reduces impacts to Greater Sage-Grouse habitat,](#) *Oil & Gas Journal*, March 19, 2025.