



Initial Analysis of FWS Memo Reinterpreting “Take” under the ESA

On September 14, 2026, the U.S. Fish and Wildlife Service (“FWS”) issued a new [internal guidance memo](#) drastically reinterpreting what constitutes “take” under the Endangered Species Act (“ESA”). The new memo comes on the very day the Trump Administration’s rescission of the longstanding regulatory “harm” definition takes effect.

Background on “Take” under the ESA

The ESA generally prohibits “take” of protected species, and defines “take” as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” For nearly 50 years, the federal government defined “harm” to include “significant habitat modification or degradation.” This definition has helped limit the severity of impacts to protected species’ habitats from logging, mining, dam construction, and other activities, and it was expressly upheld by the U.S. Supreme Court in 1995.

The ESA contemplates some degree of “incidental take” from such activities, but incidental take may only occur after thorough consultation and analysis by federal agencies like FWS or the National Marine Fisheries Service (“NMFS”) to ensure listed species’ continued existence will not be jeopardized.

FWS’s New Interpretation of “Take”

According to FWS’s new interpretation, only “affirmative acts” *intentionally* aimed at a particular protected animal or animals would constitute prohibited “take.” FWS’s memo specifically asserts that “[f]elling a tree is not a take of the bats roosting in it unless the tree is felled for the purpose of killing or capturing them.” In other words, even if you *know* there are protected bats or spotted owls nesting or roosting in a tree, it can be cut down without “take” liability so long as the purpose of cutting the tree down is to reap its commercial timber value, not to target the animals that are living in it.

The same “logic” could be applied to construction of a new dam on a stream that supports a listed run of coho salmon: If the purpose of the dam is to store water for irrigation, FWS would not consider completely blocking spawning grounds to be “take.”



Disconnect from the ESA's Own Text

As noted, the ESA specifically contemplates “incidental take,” *i.e.*, take that is incidental to and not the purpose of the action that is carried out. It makes zero sense to reinterpret “take” to *only* include the direct targeting of protected animals when the statute itself acknowledges that take is not always intentional but often *incidental* to other actions.

This new memo also contradicts the express Congressional purposes of the ESA: “to provide a means whereby the *ecosystems* upon which endangered species and threatened species depend may be conserved,” and “to provide a program for the conservation of such endangered species and threatened species.” By abandoning prohibitions against habitat removal that harms listed species, the Trump Administration is willfully ignoring the main reason Congress enacted the ESA in the first place—to prevent habitat loss.

Relationship to Management Plans Changes Underway

FWS’s new “take” interpretation arrives as the Bureau of Land Management (“BLM”) and the U.S. Forest Service are proposing major changes to management plans governing Oregon’s forests. BLM intends to eliminate old-growth reserves and drastically shrink riparian buffers in order to quadruple logging from current levels across 2.5 million acres of Western Oregon.

The Forest Service, meanwhile, aims to triple logging on the Blue Mountain National Forests (Malheur, Umatilla, and Wallowa-Whitman) by eliminating longstanding protections for large old trees and streams. In addition, the agency intends to increase logging throughout the Cascades and Western Oregon by upending the framework of the Northwest Forest Plan, which encompasses the Mt. Hood, Willamette, Siuslaw, Umpqua, and Rogue-River Siskiyou National Forests, as well as portions of the Deschutes and Fremont-Winema National Forests.

FWS’s new “take” interpretation appears designed to facilitate these dramatic changes by removing limits on logging in habitat for listed species like spotted owls and marbled murrelets—even the very trees they nest in—and by ignoring impacts to salmon, steelhead, and bull trout streams from sediment run-off and roads associated with this increased logging.



Final Takeaways

The ESA remains a broadly popular and successful statute that has prevented the extinction of nearly every species that has been listed as threatened and endangered since 1973. This new interpretation of “take,” however, is yet another step by the Trump administration to dismantle the ESA and other protections for wildlife and habitat nationwide.

This attempt to redefine “take” to exclude its most common forms is clearly aimed at accommodating the Trump Administration’s express goal of maximizing logging, mining, drilling, and other extraction on both public and private lands. Litigation is already underway by Oregon Wild and others to challenge the rescinded “harm” definition, and this new memo signals more legal challenges will likely follow once federal agencies begin implementing this new guidance regarding “take” under the ESA.