United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington D.C. 20240

DATE: September 14, 2026

TO: FWS Directorate

FROM: Brian Nesvik, Director, U.S. Fish and Wildlife Service

SUBJECT: Scope of the Endangered Species Act's "take" prohibition following the Harm Rule (91 Fed. Reg 43300)

I. Introduction

The Harm Rule rescinded the Services' regulatory definitions of "harm," 50 C.F.R. §§ 17.3, 222.102, and adopted Justice Scalia's interpretation of "take" set out in the dissent in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). *See* 91 Fed. Reg. 43300, 43302 (July 14, 2026) (effective Sept. 14, 2026).

Under Justice Scalia's interpretation, "take" reaches only an affirmative act that is intentionally and purposefully directed at a particular animal. The action thus reaches an animal without an intervening link, although the consequences of the act might arrive later (as with baiting or poisoning). The intentionality element describes the action itself and is separate from the ESA's mens rea, which arises only for criminal and enhanced civil penalties. 16 U.S.C. § 1540(a)(1), (b)(1). The ESA's mens rea attaches to the animal's biological identity.

II. Background—the Harm Rule's and Justice Scalia's Interpretation of "take."

The Harm Rule adopts Justice Scalia's construction of "take" as the best reading of the statute. 91 Fed. Reg. at 43302. "Take" is "a term of art deeply embedded in the statutory and common law concerning wildlife" and it "describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals)." 515 U.S. at 718. The ten verbs of § 1532(19) "are all affirmative acts . . . directed immediately and intentionally against a particular animal—not acts or omissions that indirectly and accidentally cause injury to a population of animals." *Id.* at 719–20; 91 Fed. Reg. at 43301, 43305. What they share "is the sense of affirmative conduct intentionally directed against a particular animal or animals." 515 U.S. at 720. They are "verbs of purpose" that "denote action directed at animals," *id.* at 732, and "only action directed at living animals constitutes a 'take,'" *id*. at 735.

"Take" is therefore a term of art with a specialized common-law meaning. When Congress borrows a term carrying accumulated legal content, it "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); *accord Sekhar* v. *United States*,

570 U.S. 729, 733 (2013); *George* v. *McDonough*, 596 U.S. 740, 746, 753 (2022). Neither the 1973 ESA nor the legislative history preceding its enactment establishes a departure from the common-law "take" prohibition. While Congress expanded the common law definition slightly to include "harm," it did so without an expressed intent to displace the common-law meaning of "take." Congress's decision to list nine verbs, every one of which describes a person acting on an animal, thus confirms the borrowed common-law meaning; it does not displace it. *Yellen* v. *Confederated Tribes of the Chehalis Rsrv.*, 594 U.S. 338, 354–55 (2021) ("Ordinarily . . . this Court reads statutory language as a term of art only when the language was used in that way at the time of the statute's adoption.").

In sum, Justice Scalia's interpretation begins with one fundamental point: did the actor intend to act on the animal itself. This factor guides interpretation and application of the ESA's "take" prohibition.

Element	**What it requires**
Affirmative act	Conduct, not an omission. 515 U.S. at 716, 718.
Intentionally directed at an animal	The animal is the object of the act. The actor deliberately acts on an animal—either because the act is by nature one done to animals (shooting, netting, trapping, poisoning, harassing) or because he intends to "get at" the animal (felling the tree or draining the pond to get at particular animals). *Id.* at 720–22.
Directly and immediately	The act itself operates on the animal; the injury does not arrive through an intervening link or change in conditions. Delay in the consequence is not relevant (e.g., with poisoning or baiting). *Id.* at 715, 719, 732–33.
Particular animals	Living individuals—not populations, future occupants, or unoccupied habitat. *Id.* at 716, 735.

III. Discussion

This section addresses specific aspects of Justice Scalia's interpretation. to inform the application and administration of the "take" provision following the Harm Rule.

A. "Intentionally" describes the object of the act.

"Take," including the word "harm" in the statutory definition, requires "affirmative conduct intentionally directed against a particular animal or animals." *Babbitt*, 515 U.S. at 720 (Scalia, J., dissenting). This means the person must intend to act on an animal and must do so for the purpose of affecting the animal. The "intent" consideration goes to an intent to act on the animal, not merely an intent to engage in the activity. The means employed to take, by contrast, are immaterial: conduct aimed at an animal is a take whether or not the actor lays hands on the animal or applies any force to it. As Justice Scalia explained, "[t]o feed an animal poison, to spray it with mace, to chop down the very tree in which it is nesting, or even to destroy its entire habitat in order to take it (as by draining a pond to get at a turtle), might neither

wound nor kill, but would directly and intentionally harm." *Id*. at 721. What makes the felled tree or the drained pond a take in those examples is that the actor acted to reach the animal. When that purpose is absent, there is no take, however serious the resulting injury may be. A vessel that inadvertently strikes a whale has not taken it, because the vessel's course was not set against the whale. Felling 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 each instance the conduct is directed at the water or at the timber and reaches the animal only "indirectly and accidentally." *Id*. at 719–20.

B. "Directed immediately" is part of intentional direction, not a separate causation test.

The dissent's objection to the prior harm regulation was that it required "no more than the cause-in-fact of death or injury," reaching conduct "regardless of whether that result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury." 515 U.S. at 715. An act aimed at an animal that reaches the animal, by contrast, has no gap or causal chain to connect the act to the injury. Thus, under the dissent's interpretation, directness is not an independent limitation on "take"; it is a feature of an act directed at an animal.

One clarification—Justice Scalia's use of "immediately" refers to the absence of an intervening step (or cause), not a temporal limitation on "take." Setting out poison to kill a wolf constitutes a take when the poison is set, even though the wolf dies later, because the act of setting out poison is intentionally and purposefully directed at the wolf. *See id.* at 721 ("To feed an animal poison . . . might neither wound nor kill, but would directly and intentionally harm.").

C. "Against particular animals" means living individuals.

This element is a core part of intentional direction: an act must be directed at living individual animals not at populations of animals or animals that might have existed in the future. The dissent's "third and most important" objection to the harm regulation was that it reached "injury inflicted, not only upon individual animals, but upon populations." 515 U.S. at 716. "[O]nly action directed at living animals constitutes a 'take,'" so destroying habitat "essential . . . for the breeding, of butterflies, would not violate the Act, since it would not harm or kill any living butterfly." *Id.* at 735. Modification of unoccupied habitat is never a take, however certain its eventual effect on the species.

D. The Act's mens rea is a separate inquiry: it attaches to the animal's biological identity and matters only for criminal and enhanced civil penalties.

After identifying a take, the inquiry turns to the statutory mens rea. Section 1540(a)(1) imposes civil penalties on anyone who "otherwise violates" Section 9, that is, unknowingly. Strict liability removes the mental element. But "a defendant must

still commit the act to be liable," *CITGO*, 801 F.3d at 488–89, and the act carries its intentional direction with it.

Section 1540(b)(1) criminalizes a "knowing" violation. Knowledge attaches to the facts that make the conduct unlawful, or "the crucial element separating legal innocence from wrongful conduct," *Elonis v. United States*, 575 U.S. 723, 737 (2015) (quoting *United States v. X-Citement Video, Inc*., 513 U.S. 64, 73 (1994)); *see also Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009); *McFadden v. United States*, 576 U.S. 186, 192–94 (2015). Under Section 9, the "crucial element" of the offense is the animal's biological identity. Acting on an animal is unlawful because the animal is one the ESA protects, so the "knowing" violator must know what the animal is.[1]

The *Sweet Home* dissent draws the same line: "it is quite possible to take protected wildlife purposefully without doing so knowingly." 515 U.S. at 722. The hunter who shoots an elk believing it a mule deer has "committed a purposeful taking"—an act directed at an animal. But the hunter has not committed a "knowing" violation, "not because he does not know that elk are legally protected . . . but because he does not know what sort of animal he is shooting." *Id.* In this context, *United States v. International Minerals & Chem. Corp*., 402 U.S. 558 (1971), is illustrative. The Court found that "knowingly" defeats a mistake-of-law defense but preserves a mistake-of-fact one, so the shipper who believed his acid was distilled water is not liable. *Id.* at 563–64. The mens rea questions arose only because he had intended to and did ship a liquid; once shipped, the question turned to whether he took the action "knowingly." Likewise, an actor must first have acted on an animal to establish a "take," after which the inquiry turns to whether the actor did so "knowingly."

[1] "Biological" identity in this context could have different meanings, from a general understanding (a dog versus a cat) to specific taxonomic distinctions (*e.g.*, distinctions between *Bison bison bison* versus *Bison bison athabascae*). We do not address or resolve this question here.