Taking Aim at “Take”: What the Endangered Species Act Changes Mean for Defense and Tribal Clients



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November 19, 2026 | **CLIENT ALERTS**

Key Takeaways

- The U.S. Fish and Wildlife Service and National Marine Fisheries Service rescinded the Endangered Species Act’s regulatory definition of “harm,” effective September 14, 2026, and now read “take” to reach only acts intentionally directed at a particular animal.
- Existing permits and incidental take statements remain valid, and Section 7 jeopardy and adverse-modification duties are unchanged, but future incidental take statements will likely be narrower.
- These Endangered Species Act changes face active legal challenges, and a new Section 7 rule is pending, so defense and tribal clients should plan for the resulting uncertainty until the framework is fully settled.

Since August 2026, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together, “the Services”) have altered the reach of the Endangered Species Act (ESA). The ESA defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such

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conduct" (16 U.S.C. § 1532(19)). In a final rule published July 14, 2026 (91 Fed. Reg. 43,300), and effective September 14, 2026, the Services rescinded the regulatory definition of "harm" that for decades treated significant habitat modification as prohibited take. The Services adopted Justice Scalia's dissent in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon (515 U.S. 687 (1995)) as the best reading of the statute and declined to write a replacement. On the day the rule took effect, both agencies issued matching internal memoranda that went further: take now requires an affirmative act, intentionally directed at a particular animal, with a direct and immediate effect. Neither memorandum explains how incidental take will be authorized under Sections 7 and 10.

Related Endangered Species Act Rules and Pending Lawsuits

Those changes follow two FWS-only rules, effective August 20, 2026, that end the " blanket" 4(d) rule for newly listed threatened species and adopt a new critical habitat exclusion framework at 50 C.F.R. § 17.90. At least seven lawsuits challenge the harm rescission, including suits brought by a coalition of states and by tribal nations, and the Department of Justice moved for summary judgment in four of them on October 7, 2026. No court has stayed the rule.

How the Harm Rule Change Affects Section 7 Consultation for Defense Installations

For defense installations and contractors, the most immediate effect is on Section 7 consultation. The Services state that jeopardy and adverse-modification obligations are unaffected (91 Fed. Reg. at 43,304). But habitat modification alone can no longer support an incidental take statement, and under the memoranda, incidental mortality from training, testing, or construction may not count as take at all. Installations should expect narrower incidental take statements while still planning for reasonable and prudent measures. Existing statements and permits need not be reevaluated (91 Fed. Reg. at 43,302), and sustained compliance with their terms preserves the Section 7(o)(2) safe harbor if a court vacates the rescission and habitat-based take returns. The memoranda do not bind courts, however, and are themselves being challenged. Citizen suits remain available, and on October 8, 2026, the Eleventh Circuit vacated a habitat-based take judgment and remanded in light of the rescission in Bear Warriors United, Inc. v. Secretary, Florida Department of Environmental Protection (2026 WL 3026754). For new activities, project proponents should continue to seek incidental take coverage where the Services will provide it rather than rely on the memoranda alone.

Mitigation, Critical Habitat, and the National-Security Exemption

Mitigation records also deserve attention. On March 30, 2026, the court in Center for Biological Diversity v. Department of the Interior (No. 4:24-cv-04651-JST (N.D. Cal.)) vacated four Section 7 provisions and reinstated pre-2019 standards, so mitigation relied on in a biological opinion must now be binding or reasonably certain to occur. The government has appealed to the Ninth Circuit. On critical habitat, an approved Integrated Natural Resources Management Plan (INRMP) continues to preclude designation on Department of Defense lands where FWS finds it benefits the species (16 U.S.C. § 1533(a)(3)(B)). Elsewhere, FWS will rely on the Department of War's judgment on national-security impacts and will exclude any area where the benefits of exclusion outweigh those of designation, unless exclusion would result in extinction (91 Fed. Reg. at 45,673, 45,676). Marine Mammal Protection Act authorizations are unaffected because that statute defines take on its own terms. And the Endangered Species Committee, often called the "God Squad," granted its first-ever Section 7(h) national-security exemption on March 31, 2026, for Gulf of Mexico oil and gas activity; that decision, now under review in the Fifth Circuit, shows that the exemption is no longer theoretical.

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What the Narrower Take Reading Means for Tribal Treaty Rights

For tribal nations, the rescission removes a federal backstop long used to protect treaty-reserved fish and wildlife from habitat loss. Responding to tribal comments, the Services reaffirmed treaty rights but described ESA requirements as "separate and distinct from treaty rights" (91 Fed. Reg. at 43,312). Where a project has a federal nexus, such as a dam license, a U.S. Army Corps of Engineers permit, or a federal land action, tribes can still press jeopardy and adverse-modification concerns through Section 7 consultation. Projects without a federal nexus may now advance without federal take review of their habitat impacts.

FWS's new critical habitat exclusion framework cuts both ways for tribes. It lists impacts on Tribes as a relevant factor, gives weight to nonbiological impacts that Tribes identify, and favors excluding areas covered by permitted conservation plans and partnerships (91 Fed. Reg. 45,662, 45,667, 45,674, 45,682). Tribes seeking exclusion of lands under tribal management should build that record early, and tribes seeking designation should be prepared to rebut exclusion requests. Other legal tools for protecting tribal resources remain in place. The Services describe the federal rule as a floor that states may exceed (16 U.S.C. § 1535(f)), and Maryland has already codified the former definition. Tribal wildlife codes, co-management agreements, and the consultation commitments in Secretarial Order 3206 are unaffected. For tribes pursuing energy or infrastructure development, the narrower reading may lower permitting costs, though the same litigation risk counsels keeping existing authorizations in place.

What Endangered Species Act Changes Are Coming Next?

More change is coming. The joint Section 7 final rule has been under White House review since July 22, 2026, and, as proposed, would restore the provisions the Northern District of California vacated. Summary judgment briefing in the harm cases is underway. Lippes Mathias' Environment & Energy and Indian Law teams regularly advise defense installations, contractors, and tribal governments on Endangered Species Act consultation, permitting, and critical habitat matters. Contact Lippes Mathias Environment & Energy team member Chip Shaw (tshaw@lippes.com) for questions related to the content of this client alert.

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