

## ESA Developments Continue to Shape Agriculture

Roger McEowen ([roger.mceowen@washburn.edu](mailto:roger.mceowen@washburn.edu)) – Washburn University School of Law

Roger McEowen's Blog: <https://agriculturallaw.lawprofessorsblogs.com/>

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### Overview

The Endangered Species Act (ESA) remains one of the most powerful—and controversial—federal environmental statutes affecting agriculture. While the Act was enacted in 1973 with the laudable objective of preventing the extinction of plant and animal species, decades of expansive regulatory interpretation have transformed the ESA into a far-reaching land-use statute. Farmers, ranchers, foresters, and rural landowners have often found themselves subject to significant restrictions even when they never directly harmed a protected species.

Three recent developments illustrate the ongoing struggle over the proper scope of the ESA. One represents a welcome return to the statutory language adopted by Congress. Another provides states with greater authority to manage one of the nation's most controversial predators. The third, however, demonstrates how litigation continues to expand regulatory burdens on agriculture.

### Narrowing the Definition of "Harm"

On July 14, 2026, the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) finalized a rule rescinding the long-standing regulatory definition of "harm" that had dramatically expanded the reach of the ESA.<sup>1</sup>

For decades, the agencies interpreted "harm" to include not only actions that directly injured or killed protected wildlife, but also significant habitat modification that allegedly impaired essential behavioral patterns such as breeding, feeding, or sheltering. That interpretation originated in agency regulations and ultimately received judicial approval in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.<sup>2</sup>

The new rule rejects that expansive interpretation. Instead, the agencies return to a more straightforward reading of the statutory text by focusing on actions that directly injure or kill listed species. Habitat modification standing alone will no longer constitute prohibited "harm."

That distinction is significant.

Congress prohibited the "take" of endangered species, and "take" includes "harm." But nowhere does the statute define harm as any activity that merely alters habitat. The agencies now conclude that the prior interpretation stretched the statutory language well beyond its ordinary meaning.

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<sup>1</sup> Rescinding the Definition of "Harm" Under the Endangered Species Act, 91 Fed. Reg. 43,300 (July 14, 2026).

<sup>2</sup> 515 U.S. 687 (1995).



From the perspective of agricultural producers, this change restores a measure of predictability. Ordinary farming, grazing, timber harvesting, brush management, ditch cleaning, fencing, and other routine land management activities have frequently carried the risk that someone could later argue they indirectly modified habitat in a manner constituting prohibited "harm."

Reducing that uncertainty benefits both landowners and conservation. Private landowners manage enormous portions of America's wildlife habitat. If routine management becomes legally hazardous, landowners have less incentive to voluntarily improve habitat. Regulatory overreach often discourages cooperation rather than encouraging it.

This rule should not be interpreted as eliminating ESA protections. Direct injury or killing of listed species remains prohibited. Rather, the agencies are drawing a clearer line between actual injury to wildlife and generalized concerns about habitat changes. That approach more closely reflects the language Congress enacted instead of decades of regulatory expansion.

### **Grizzly Bear Management Moves Closer to the States**

Another important ESA development involves grizzly bears. On July 17, 2026, USFWS proposed revisions to the special ESA Section 4(d) rule governing grizzly bears in the lower forty-eight states.<sup>3</sup>

The proposal does **not** remove grizzly bears from the threatened species list. Instead, it modifies management authority by allowing states and tribes greater flexibility to respond when bears threaten public safety, livestock, or private property.

The proposal recognizes an important practical reality.

Federal wildlife officials cannot effectively manage every encounter between expanding grizzly populations and rural communities. State wildlife agencies possess considerably greater local expertise and can respond much more quickly when conflicts arise.

For ranchers, this issue is far from theoretical.

As grizzly populations have increased in portions of the West, livestock depredation has likewise increased. Ranchers often bear substantial economic losses while navigating lengthy federal approval processes before action may be taken.

Giving states greater management flexibility does not eliminate federal protections. Grizzly bears remain listed as threatened, and the ESA continues to apply. The proposal simply recognizes that wildlife conservation and human safety are not mutually exclusive objectives.

Conservation success should eventually permit management flexibility.

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<sup>3</sup> *Endangered and Threatened Wildlife and Plants; Grizzly Bear Listing...*, 91 Fed. Reg. 44,780 (July 17, 2026).

Indeed, one of the stated goals of the ESA is recovery—not perpetual federal control. If species populations improve, regulatory approaches should evolve accordingly.

The proposal also reflects broader principles of federalism. Wildlife management has traditionally been a state responsibility except where Congress clearly directs otherwise. Allowing states and tribes to exercise greater authority recognizes both constitutional structure and practical experience. The public comment period remains open through August 17, 2026, before a final rule is issued.

### **Federal Court Reinstates Older ESA Regulations**

Unfortunately for agricultural producers, another recent development moves in the opposite direction. In *Center for Biological Diversity v. U.S. Department of the Interior*,<sup>4</sup> environmental organizations challenged six ESA regulations adopted during 2019 and 2024.

The district court concluded that four of those regulations conflicted with the ESA or were arbitrary and capricious under the Administrative Procedure Act. As a result, the court vacated those provisions while leaving two regulations intact. The practical consequence is significant. By invalidating those regulations, the court effectively reinstated the broader pre-2019 regulatory framework governing critical habitat designations and federal agency consultation. That means more projects involving federal permits, federal funding, or federal approvals may require extensive ESA consultation before proceeding.

For agriculture, those requirements extend well beyond large infrastructure projects. Activities involving irrigation improvements, stock ponds, drainage systems, grazing management, water storage, conservation practices, fencing, culverts, stream crossings, and numerous other projects can require federal involvement through USDA programs, the Army Corps of Engineers, or other agencies.

Once federal involvement exists, ESA consultation frequently follows. Consultation is not merely paperwork. It often entails biological assessments, agency coordination, additional studies, project modifications, delays, and the ever-present possibility of litigation. Even projects designed to improve conservation may become trapped in years of administrative review.

### **Regulatory Uncertainty Carries Real Costs**

Perhaps the greatest burden imposed by expansive ESA regulation is uncertainty. Agriculture operates on seasonal timelines. Crops cannot wait indefinitely while federal agencies complete consultation. Livestock operations require dependable water supplies. Conservation improvements often must occur during narrow construction windows. Lengthy regulatory review increases costs while reducing flexibility. Moreover, litigation remains an ever-present concern.

Environmental organizations have demonstrated remarkable success using citizen-suit provisions to challenge agency decisions and project approvals. Even when producers ultimately prevail, defending litigation consumes substantial time and financial resources. The result is often regulatory paralysis. Some landowners simply

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<sup>4</sup> No. 24-cv-04651-JST, 2026 U.S. Dist. LEXIS 68386 (N.D. Cal. Mar. 30, 2026).

abandon worthwhile conservation or infrastructure improvements because the permitting process becomes too uncertain or expensive. Ironically, that outcome frequently harms both agriculture and conservation.

### **Congress Intended Balance**

The ESA undoubtedly serves an important purpose. Protecting species from extinction represents a legitimate national objective. But Congress did not enact the statute to prohibit every land-use activity that might indirectly affect habitat. Nor did Congress intend federal agencies to exercise virtually unlimited authority over private land through expansive regulatory definitions. The recent "harm" rule reflects an effort to restore that balance by tying enforcement more closely to actual injury of protected species. Similarly, the proposed grizzly bear rule recognizes that conservation success should permit greater state involvement and practical wildlife management. The California district court's decision, however, illustrates that regulatory expansion remains alive and well through litigation.

### **Looking Ahead**

The ESA will undoubtedly remain a battleground between competing visions of conservation and private property rights. One vision assumes federal regulators should possess broad discretion to manage land use whenever protected species may be affected. The other recognizes that successful conservation often depends upon cooperation with private landowners rather than increasingly expansive federal control. Most endangered species habitat exists on private lands. Conservation therefore succeeds best when landowners become willing partners instead of reluctant regulatory targets.

The recent narrowing of the "harm" definition represents a welcome move toward statutory fidelity and regulatory certainty. The proposed grizzly bear rule similarly acknowledges that states deserve a larger role in managing recovered wildlife populations. Unfortunately, the federal court's reinstatement of broader ESA regulations reminds us that litigation continues to push implementation in the opposite direction.

### **Conclusion**

For farmers and ranchers, the lesson is familiar: ESA compliance remains an evolving area of law that demands close attention. While recent administrative actions provide reasons for cautious optimism, judicial decisions continue to create uncertainty that affects everyday agricultural operations. Ultimately, lasting reform will likely require Congress - not regulators or courts - to clarify the proper balance between species conservation, private property rights, and the continued productivity of American agriculture.

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K-State Agricultural Economics | 342 Waters Hall, Manhattan, KS 66506-4011 | [www.ageconomics.k-state.edu](https://www.ageconomics.k-state.edu)

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