

Endangered Species Act Section 9: Take

This fact sheet was prepared by the National Sea Grant Law Center as part of the Agricultural and Food Law Consortium.



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Congress passed the Endangered Species Act (ESA) in 1973 to protect both imperiled species and their ecosystems. The ESA is administered by the U.S. Fish & Wildlife Service (FWS) for terrestrial species and the National Marine Fisheries Service (NMFS) for designated marine species. Section 9 prohibits the “take” of endangered species of fish or wildlife. The ESA defines take to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” (16 U.S.C. § 1532(19)).

The take prohibition:

- Protects against actions by *any person*, including businesses and governmental entities.
- Protects *individual members* of fish or wildlife species. Does not apply to plants.
- Applies to *endangered* species by statute. *Threatened* species can be protected by regulation.

Both lethal and non-lethal actions can constitute a take. The agencies have defined both “harass” and “harm” through regulation to include activities that interrupt a creature’s essential life functions of breeding, feeding, or sheltering.

- Harass- an intentional or negligent act or omission which creates the likelihood of injury to wildlife.
- Harm- an act which actually kills or injures wildlife.

4(d) Rules

4(d) Rules are one of the tools the agencies can use to protect species listed as threatened. This type of rule gets its name from section 4(d) of the ESA, which directs the agencies to issue regulations deemed “necessary and advisable to provide for the conservation of threatened species.” (16 U.S.C. § 1533(d)). This includes issuing regulations to apply the take prohibition to threatened species.

FWS

Adopted a blanket rule extending the take prohibition to all threatened species. FWS can adopt a species-specific 4(d) rule removing all or part of the blanket take prohibition for a particular threatened species.

*In Summer 2018, the Trump Administration proposed a rule that would rescind this blanket 4(d) rule.

NMFS

Applies the take prohibition on a case by case basis.

Species Specific 4(d) Rule- Streaked Horned Lark and Agriculture

FWS issued a special 4(d) rule for the streaked horned lark, which is a small, ground-dwelling bird with black feathers on its head that look like horns. The bird uses fallow or recently burned agricultural fields and grass seed farms as habitat. However, while agricultural fields in Oregon are crucial for the species’ survival, some agricultural activities would result in the take of the bird. Thus, when the FWS listed the bird as threatened, the agency also issued a special 4(d) rule exempting certain accepted farming practices from the take prohibition.

Incidental Take

Under the ESA there can be what are known as incidental takes – that is, a take that is an unintended consequence of an otherwise legal activity.

Incidental Take Statement (ITS)

Issued when the action has a federal governmental nexus that requires Section 7 consultation, such as where an agency issues a permit for an activity.

An ITS is included in a Biological Opinion and allows a certain amount of take for the activity at a level that will not jeopardize the species.

Incidental Take Permit (ITP)

Issued under Section 10 of the ESA when the activity is private.

An ITP is the type of permit a landowner would get if an activity on his or her property will take a listed species, but the activity does not have a federal action that involves Section 7 consultation.

ITS Case Study- The Red Knot and Aquaculture

The lower Delaware Bay shoreline in Cape May County, New Jersey, serves as the center of a recovering oyster aquaculture industry. Delaware Bay is also an important stopover location for migratory shore birds, including the red knot. A little shorebird with a 20-inch wingspan that weighs less than a cup of coffee, red knots fly more than 9,300 miles from south to north every spring and repeats the trip in reverse every autumn, making this bird one of the longest-distance migrants in the animal kingdom.

The FWS listed the red knot as threatened in 2015, and when the state of New Jersey sought a U.S. Army Corps of Engineers permit for structural aquaculture in the Delaware Bay area, Section 7 consultation was triggered. The resulting Biological Opinion (BiOp) considered the potential impacts of the Corps permit on the red knot.

The BiOp contained an ITS that allows the structural aquaculture industry to impact the red knots up to a certain allowable extent. Thus, certain activities that would otherwise make the aquaculture industry liable for takes under Section 9 are allowed under the ITS. The ITS distinguished between lethal and non-lethal takes, allowing 315 lethal takes and 1285 non-lethal takes over the ten-year life of the BiOp.

However, for actions not covered by the ITS, the farmers could be liable for a take, even if the take was incidental to the day to day operations of the farm. This means that the farmers could be liable for penalties under Section 10 of the ESA if a farming activity not covered by the ITS results in the take of a red knot.