

ESA Overview Module 5 – Section 9 Prohibited Acts Text

Section 9 Prohibited Acts - Wildlife (Slides 10 – 16)

In an earlier lesson, we defined “take” to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct.”

“Take” encompasses many activities ... some of which may be purposeful, some of which may be incidental to other lawful activities. The Section 7 discussion in Module 4 will give you a good refresher on the concept of incidental take.

Section 9 prohibitions automatically extend to newly-listed endangered species. For threatened species, the Fish and Wildlife Service applies the same prohibitions in regulation as it does to endangered species.

The National Marine Fisheries Service goes through a Section 4(d) rulemaking process to extend, or turn on, prohibitions for newly-listed threatened species. And they do this on a species-by-species basis. Conversely, the Fish and Wildlife Service can turn off the take prohibition using that same 4(d) rule process.

The term “harm” brings under the umbrella of prohibited acts those activities that modify a species’ habitat to the extent that individual members of the species actually are killed or injured, particularly when essential behaviors are modified. The Fish and Wildlife Service’s regulatory definition of harm is “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, and behavioral patterns are behaviors such as breeding, feeding, or sheltering.”

For example, if a migration corridor between a listed wildlife species and its breeding grounds is so altered that it is no longer usable by the species, individuals may have been harmed because an essential behavior, in this case breeding, has been impaired.

The National Marine Fisheries Service’s regulatory definition of harm is a little different. It adds three essential behaviors – spawning, rearing, and migrating. In practice, there’s really little difference in the definitions of these two agencies in how they define harm.

The second term that is useful to understand is “harass.” Harassment overlaps with the general definition of take, but it does not have to result in actual death or injury to be considered harassment. An act of harassment creates the likelihood of injury to wildlife.

For example, disturbing a threatened piping plover that is brooding chicks may be harassment if the disturbance is at a time of day or is sufficiently long that the mother leaves the nest unattended for so long that the chicks are susceptible to overheating or predation. That creates a likelihood of injury to those birds.

Section 10 of the Act, discussed in more detail in the next module, allows for exemptions from the “take” prohibitions. There are a series of permits for Federal and non-Federal applicants that provide exemptions to these prohibitions.

Other exemption processes exist under Section 7. The special exemption committee (sometimes called the God Squad), has been occasionally used in the past, and another exemption is the Presidentially-declared disaster area. It is almost never used.