

## **Marine Scientific Research and the Endangered Species Act of 1973, 16 U.S.C. §§1531-1544**

The purpose of the Endangered Species Act (ESA) is to protect endangered and threatened species and the ecosystems upon which they depend. 16 U.S.C. §1531(b).<sup>1</sup> Except as otherwise provided, the ESA prohibits the unauthorized “take” of any endangered or threatened species of fish or wildlife, by any person subject to the jurisdiction of the United States, in the U.S. territorial sea and on the high seas. 16 U.S.C. §1538(a)(1)(B) & (C). Because the ESA was enacted at a time when the high seas began at the seaward limit of the territorial sea, NOAA interprets and applies high seas to include the U.S. EEZ.

“Person” is expansively defined in the ESA to include an individual, corporation, partnership, trust, association, or any other private entity; or any officer employee agent, department, or instrumentality of the Federal Government, of any State, municipality or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States. 16 U.S.C. §1532(13). “Take” means 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).

Any person or entity who conducts marine scientific research in the U.S. EEZ or U.S. territorial sea would fit within the ESA definition of “person” and thus would be prohibited from taking ESA-listed species in those maritime zones unless an exception applies.

- For take of ESA-listed species that is incidental to marine scientific research and that does not include a U.S. federal agency authorizing, funding or carrying out the activity,<sup>2</sup> the applicable provision of the ESA is 16 U.S.C §1539(a)(1)(B). Section 1539(a)(1)(B) provides that the Secretary of Commerce (or the Secretary of the Interior, depending on the species) may permit the otherwise prohibited taking of an ESA-listed species so long as the taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity in waters subject to U.S. jurisdiction.<sup>3</sup>
- For marine scientific research that involves intentional “direct” take of ESA-listed species, the applicable provision is 16 U.S.C. §1539(a)(1)(A). Permits under this provision may be issued only for scientific purposes or enhancement of the species’ propagation or survival.<sup>4</sup> 16 U.S.C.

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<sup>1</sup> The ESA requires all Federal agencies, in consultation with and with the assistance of the Secretary [of Commerce in this instance], to utilize their authorities in furtherance of the purposes of the ESA. 16 U.S.C. §1536(a)(1). It also requires each Federal agency, in consultation with and with the assistance of the Secretary [of Commerce in this instance], to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species. 16 U.S.C. §1536(a)(2).

<sup>2</sup> If a U.S. federal agency is authorizing, funding, or carrying out, in whole or in part, the marine scientific research and there is federal discretionary involvement or control, the ESA Section 7 consultation requirements apply and that federal “action” agency must consult with NOAA if the action “may affect” a listed species or critical habitat. 50 C.F.R. §402.14. If take of an ESA species is likely, the National Marine Fisheries Service would issue an incidental take statement that would exempt the take from the take prohibitions. Such a statement would be issued only if NOAA concludes the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.

<sup>3</sup> Unlike the MMPA’s analogous provision for incidental take of marine mammals, the language of the ESA in section 16 U.S.C. §1539(a)(1)(B) does not limit its availability solely to U.S. citizens.

<sup>4</sup> “Scientific purposes” is not defined in the statute or implementing regulations of the National Marine Fisheries Service. 50 C.F.R. §222.308(b) sets forth the application requirements, which include a description of the project or program, including any formal research proposal. Issuance criteria to be considered under the regulation include whether the permit would further a *bona*

§1539(d) allows the Secretary of Commerce to grant exceptions under 16 U.S.C. §1539(a)(1)(A) if certain findings are made.

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*fide* and necessary or desirable scientific purpose or enhance the propagation or survival of the endangered species, taking into account the benefits anticipated to be derived on behalf of the endangered species. 50 C.F.R. §222.308(c).