

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).¹ Except under a permit issued by the Secretary², as described below, the ESA prohibits the “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 or on the high seas. 16 U.S.C. §1538(a)(1)(B) & (C). Because the ESA was enacted at a time when international law defined the high seas to mean all parts of the sea not included in the territorial sea or in the internal waters of a State,³ NOAA interprets and applies the term “high seas” in the ESA to include the Exclusive Economic Zone (EEZ) of the United States and the EEZs of foreign States.

“Person” is 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).

A person or entity conducting marine scientific research in waters under the jurisdiction of the United States (which includes the U.S. EEZ and the U.S. territorial sea) would be prohibited from taking any ESA-listed species, unless that person or entity obtains authorization to take ESA-listed species. The ESA allow the Secretary to authorize take of ESA-listed species in waters under the jurisdiction of the United States by persons irrespective of their citizenship during marine scientific research provided certain findings are made:⁴

- 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,⁵

¹ 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 or result in the destruction or adverse modification of critical habitat designated for the species. 16 U.S.C. §1536(a)(2).

² “Secretary” means the Secretary of Commerce or Secretary of the Interior, depending on the species.

³ 1958 Convention on the High Seas, Art. 1, [13 U.S.T. 2312, T.I.A.S. No. 5200 \(entered into force Sept. 30, 1962\)](#).

⁴ Unless authorized by the Secretary, U.S. citizens and U.S. flagged vessels are prohibited from taking any ESA-listed species not only in waters subject to U.S. jurisdiction but also on the high seas and in foreign EEZs.

⁵ 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, NOAA would issue an incidental take statement that would exempt the take from the take prohibitions. Such a statement

the applicable provision of the ESA is 16 U.S.C §1539(a)(1)(B). Section 1539(a)(1)(B) provides that the Secretary 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.⁶

- 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.⁷

Additional Information:

NOAA Fisheries, [Scientific Research and Enhancement Permits](#)

NOAA Fisheries, [Permits for the Incidental Taking of Endangered and Threatened Species](#)

NOAA Fisheries, [Consultations: Endangered Species Act Consultations](#)

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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. In addition to activities in waters under the jurisdiction of the United States, ESA Section 7 consultation requirements extend to activities U.S. federal agencies authorize, fund, or carry out on the high seas and in foreign EEZs.

⁶ Unlike the MMPA's analogous provision for incidental take of marine mammals, section 1539(a)(1)(B) does not limit its availability solely to U.S. citizens.

⁷ "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 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).