

*This is the third post in a series. For the first post, see [here](#). For the second, post, see [here](#). The regulations I am analyzing in this post are available [here](#).*

Section 9 of the ESA prohibits any person from “taking” a listed species – take is defined in the statute rather broadly, to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” The agencies have in turn issued long-standing regulations that define “harm” to include certain forms of modification of habitat for a listed species – a regulatory provision that probably is the single-most significant driver of habitat protection for species under the Act.

However, there is a key limitation to Section 9 take prohibitions under the Act. They only automatically apply to species listed as endangered – the agencies can apply Section 9 take prohibitions to threatened species by issuance of a special rule under Section 4(d) of the Act. Historically, the two agencies that implement the Act, the National Oceanic and Atmospheric Administration (NOAA, which manages marine species) and the Fish and Wildlife Service (FWS, which manages terrestrial species), have taken different approaches under 4(d). NOAA has always made a species-by-species decision about what take protections to apply to threatened species, while FWS has a default rule that threatened species get full Section 9 take protections unless FWS writes a special 4(d) rule reducing those protections. The new regulations change that default rule for FWS for threatened species, adopting the NOAA approach: no Section 9 take protections for threatened species unless FWS writes a special 4(d) rule providing those protections.

This change is a big deal, at least for species that are listed as threatened in the future. While FWS has provided assurances in the explanations for the proposed and final rule that it will consider what 4(d) rule to issue for species when it first lists them, FWS’s listing budget has always been overstretched (mostly because FWS has asked Congress to limit its listing budget!). It’s not implausible that FWS might start listing threatened species because of the deadlines under the Act require it to act on listing decisions – the agencies may then argue that they do not have resources to issue 4(d) rules for those species, leaving them without some of the most important protections under the Act, especially habitat protection.

However, there is an important limitation to this change – it is only prospective. Currently listed threatened species continue to receive full Section 9 take protections unless a special rule is written. In addition, a future administration might easily reverse this rule, and then apply blanket take protections to all threatened species again. (Though there is a long-term risk of a yo-yo of different

administrations changing the rule here, which could in the long-run really undermine species conservation, as habitat destruction that occurs when the protections are not in place will have more or less permanent effects.)