

The take prohibition applies to a broad group, including any private entities such as corporations, along with the federal government—even via vicarious liability by authorizing activities that result in a take.²⁷³ Furthermore, in *Center for Biological Diversity v. Marina Point Development Associates*, the court stated that to “[t]o obtain injunctive relief [in the case of an alleged take], a plaintiff need only show that the defendants’ activities are likely to cause a take in the future. This standard recognizes that the balance of hardships and the public interest tip sharply in favor of endangered species.”²⁷⁴

One particularly relevant form of take with respect to Twin Pines is “harassment.” “Harass... means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.”²⁷⁵ Even the Service has acknowledged that harassment by noise, light, and human activity could amount to a take of species of birds.²⁷⁶

Mining activities are accompanied by a significant amount of human disturbances that create noise, light, and dust, among other things, that can amount to a take of individual species in the form of harassment. First, actual mining activities themselves are accompanied by such disturbances. The Site Layout Map in the application shows other sources of disturbances, as well, including rail loading, truck loading, railway use, and roadway use.²⁷⁷ Disturbances will also stem from a significant amount of construction, including construction of a magnetic separation plant, offices, labs, a large safety berm, sediment basins, fuel storage, a fuel tank, a pre-concentration plant, a parking area, and recycle water ponds.²⁷⁸ Moreover, the mine will result in a significant amount of habitat loss, which can amount to a “take” for individual species. The extent of how much habitat will be destroyed remains undetermined, however, because the incomplete application fails to provide information on the impacts on hydrology. A change in the hydrological regime could alter a devastating amount of habitat; impact breeding, feeding, sheltering; and destroy habitat connectivity.

Another form of take that is relevant is “harm,” which is defined by regulation to mean “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”²⁷⁹

²⁷³ 16 U.S.C. § 1532(13); see *Loggerhead Turtle* 148 F.3d 1231 (determining that a county can be vicariously liable for take of ESA-listed turtles).

²⁷⁴ 434 F. Supp. 2d 789, 795 (C.D. Cal. 2006) (citations omitted).

²⁷⁵ 50 C.F.R. § 17.3(c).

²⁷⁶ See *Sweet Home*, 515 U.S. 687, 704–05 (1995); *Ctr. For Biological Diversity v. Marina Point Dev. Co.*, 434 F. Supp. 2d 789, 795–96 (C.D. Cal. 2006), *rev’d due to delisting of species* 566 F.3d 794.

²⁷⁷ Permit Application, App. F, Fig. 5

²⁷⁸ *Id.*

²⁷⁹ 50 C.F.R. § 17.3(c).