October 22, 2008

Department of the Interior Wind Turbine Guidelines Advisory Committee

WHITE PAPER

The Charter for the U.S. Department of the Interior ("DOI") Wind Turbine Guidelines Advisory Committee (the "Committee") directs the Committee to provide advice and recommendations to the Secretary of the Interior (the "Secretary") concerning wind turbine guidelines that "avoid and minimize impacts to wildlife and their habitat related to land-based wind energy facilities." The Charter describes the authority of the Committee to act in furtherance of the Migratory Bird Treaty Act ("MBTA"),[1] the Bald and Golden Eagle Protection Act ("BGEPA"),[2] the Endangered Species Act ("ESA"),[3] and the National Environmental Policy Act ("NEPA").[4] The Charter also directs the Committee to consider wildlife impacts, costs of information acquisition, scientific approaches, and compliance with State and Federal laws. In order to assist the Committee with regard to these directives, the Legal Subcommittee has prepared and the full Committee has unanimously adopted[5] this memorandum summarizing: (1) the authority under the above-noted environmental laws to protect wildlife and habitat and regulate the impacts of land-based wind energy facilities; (2) the consequences of noncompliance with these laws; and (3) the means by which a person or entity may avoid or reduce liability and avoid, minimize, and mitigate adverse effects on wildlife or habitat under these laws.

I. SCOPE OF AUTHORITY TO PROTECT WILDLIFE AND HABITAT UNDER FEDERAL LAW AND CONSEQUENCES OF NONCOMPLIANCE

A. Endangered Species Act

By delegation of authority from the respective Secretaries of the Interior and Commerce, the ESA is administered by the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS"), with the former having primary responsibility for terrestrial and freshwater species and the latter having primary responsibility for marine life. The purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of [certain] treaties and conventions . . . ."[6] In furtherance of this purpose, Sections 7 and 9 of the ESA contain independent provisions that may set species- and habitat-related standards relevant to wind energy projects.

1. Section 7(a)(2) Requirements

Section 7(a)(2) requirements relate to Federal agency actions. Section 7(a)(2) requires that:

> each Federal agency shall, in consultation with . . . the Secretary, insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat of such species.[7]

The broad statutory description of agency action means that the Section 7(a)(2) standards apply to private actions that require Federal permits, licenses, or other forms of authorization, or that receive federal grants or other forms of federal funding.

Section 7(a)(2) contains two relevant standards: the "jeopardy standard" and the "critical habitat standard." FWS has defined both standards in terms of "survival and recovery" of the endangered species or threatened species ("listed species").[8] However, several courts have described as invalid the regulatory definition of the critical habitat standard.[9] Critical habitat—as with listed species—is designated by rulemaking under Section 4 of the ESA. Section 3 defines critical habitat in terms of conservation ("features" or "areas" that are "essential to the conservation of the species").[10] Section 3 also defines "conservation" in terms of recovery of the listed species to the point that it no longer needs the protection of the ESA.[11] Based on those statutory definitions, some courts have opined that the way in which the regulation defining the critical habitat standard uses "survival" in the critical habitat standard is inappropriate. Although the courts have not provided a substitute definition for the standard, they have determined that, where a listed species' critical habitat is involved in an agency action,[12] the FWS must at least consider the effect of the action on conservation (and not just survival) of that species (even though, when designating critical habitat, the FWS can exclude all habitat for economic or other reasons up to the point that extinction would result from a failure to designate).[13] The FWS also has not adopted a new or modified definition of the critical habitat standard; instead, it has declared it will not use its existing regulatory definition of the standard and will apply the standard solely in accordance with the statutory wording (*i.e.*, "destruction or adverse modification").[14]

2. Section 9 Requirements

Section 9 sets a standard applicable to all persons, whether they are subject to any Federal agency action.[15] Section 9(a)(1)(B) prohibits the "take" of endangered species of fish and wildlife within the United States or its territorial waters.[16] A "take" is defined with extraordinary breadth to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[17] In addition, as discussed below in Section II.B.9, Section 4(d) authorizes the FWS to apply the Section 9 prohibitions to threatened species. The FWS has by regulation applied those prohibitions to most threatened species.[18] Therefore, a "take" of individual members of a listed endangered or threatened species of fish or wildlife ("wildlife") constitutes a violation of the ESA.

With regard to the impacts of habitat modification on listed species covered by the Section 9 take prohibition, the FWS has by regulation defined "harm" as "an act which actually kills or injures wildlife," which "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."[19] Injury or death to a listed wildlife species can be the direct or indirect result of habitat modification or degradation, such that the act "impair[s] essential behavioral patterns, including breeding, feeding or sheltering."[20] To be actionable, habitat modification or degradation must be "significant,"[21] and land use activities that result in habitat modification or degradation are not sufficient in themselves to constitute a "take" of listed wildlife under Section 9 and the "harm" regulation.[22] Instead, only a land use activity that "actually kills or injures wildlife" will constitute a "take" of a listed wildlife species.[23] Accordingly, "harm" requires proof of actual injury—the mere potential for injury to listed

wildlife is not "harm."[24] Moreover, the regulation determines "harm" by reference to an individual member of a listed wildlife species.[25]

The FWS also by regulation defined "harass," but has—unlike the regulatory definition of "harm"—excluded consideration of habitat modification in the context of "harass."[26] While "harm" requires "actual" injury to wildlife, the definition of "harass" includes a "negligent act or omission which creates the likelihood of injury to wildlife by annoying it" to a significant extent. Under the regulatory intent, instead of covering physical modifications of habitat, the "harass" rule addresses the annoying effects of persistent noise, light, or motion. In promulgating the definition, the FWS stated:

> The concept of environmental damage being considered a "taking" has been retained but is now found in a new definition of the word "harm" . . . . By moving the concept of environmental degradation from the proposed definition of "harass" to the definition of "harm," potential restrictions on environmental modifications are expressly limited to those actions causing actual death or injury to a protected species of fish or wildlife.[27]

The only role that habitat modification might play in the "harass" form of take might be the *act* of habitat modification (where the presence of, and noise from, heavy equipment and construction crews are involved). However, courts have been extremely reluctant to find violations of the "harass" form of take.

There are three notable differences between the standards of Section 9 and Section 7(a)(2). Unlike the Section 7(a)(2) jeopardy standard, the Section 9 take standard only considers injuries to an individual member of a listed species. The take standard applies only to listed wildlife species, while the Section 7(a)(2) standards apply to all listed species, plants as well as wildlife. Moreover, the Section 9 standard applies to any habitat of listed wildlife species, while the Section 7(a)(2) critical habitat standard applies only to designated critical habitat of listed species.

As discussed in Section II, because most methods of compliance—or securing immunity for noncompliance—with the Section 9 take standard require at least some form of permit from, or agreement with, the FWS, and because that FWS permit or agreement itself constitutes a Federal agency action subject to Section 7(a)(2), the standards of Section 9 and Section 7(a)(2) are often applied together when private land uses or projects are involved.[28]

3. Enforcement

Three general types of enforcement actions are available under Section 11 for violations of the ESA. First, Section 11(a) authorizes the government to pursue civil penalties against violators, and Section 11(b) authorizes the government to seek criminal penalties.[29] Second, Section 11(e)(6) authorizes the government to bring suits to enjoin violations.[30] And third, Section 11(g) authorizes private citizens to bring actions to enjoin violations of the ESA by any person and to force certain compliance with the ESA by the Secretary.[31] The ESA provides significant penalties only for "knowing" acts,[32] but it is a general intent statute which requires only that a violator knew that it was taking a particular action and not that the action was illegal.[33] Anyone who violates the ESA generally may be fined up to $25,000 for a civil

violation and up to $100,000 ($200,000 for an organization) and/or imprisoned for not more than one year for a criminal violation.[34]

B. Migratory Bird Treaty Act

The MBTA is a criminal environmental law which implements four international treaties that the United States has entered into in order to protect over eight hundred species of birds that migrate across the United States and its territories.[35] The MBTA states as follows:

> Unless and except as permitted by regulations . . . it shall be unlawful at any time, by any means, or in any manner to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell . . . offer to purchase, purchase . . . ship, export, import…transport or cause to be transported…any migratory bird, any part, nest, or eggs of any such bird, or any product . . . composed in whole or in part, of any such bird or any part, nest, or egg thereof.[36]

FWS regulations broadly define "take" to mean "pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect."[37] An unauthorized "take" of any one of the protected bird species constitutes a violation of the MBTA. By delegation of authority from the Secretary, the FWS administers the MBTA.

The MBTA's applicability to habitat modification and destruction is unclear. Unlike the ESA, the definition of "take" in the MBTA does not include "harm" (or "harass"). And the MBTA itself is silent in regard to habitat modification and destruction. In *Seattle Audubon Society v. Evans,*[38] which involved a claim that the MBTA prohibited the U.S. Forest Service from logging activities that may provide habitat for a protected bird, the Ninth Circuit Court of Appeals concluded that the MBTA covers only direct, though unintended, bird deaths, and that habitat destruction leading indirectly to bird deaths was not a take for purposes of the MBTA.[39] In contrast to this and similar cases involving timber activities, there are several cases which have found MBTA liability in connection with the discharge of extra-hazardous materials or the misapplication of pesticides.[40]

Reconciling these cases or determining what may constitute prohibited direct harm to migratory birds from habitat modification or destruction is not easy.[41] A case which attempted to provide some order to the evaluation of claims under the MBTA is *United States v. Moon Lake Elec. Ass'n,*[42] which is noteworthy for the wind energy industry because the court found the defendant electrical association liable under the MBTA and the BGEPA for the killing of protected birds resulting from its failure to install inexpensive protective equipment on its power poles. In *Moon Lake*, the district court disagreed with the distinction in *Seattle Audubon* between direct and indirect take, finding that the MBTA's misdemeanor provision may apply to unintended bird deaths which are a probable consequence of a defendant's actions. The court also ruled that the MBTA is not limited simply to physical conduct associated with hunting or poaching.[43] Although *Moon Lake* did not involve habitat modification, the court's extensive analysis of incidental take under the MBTA could influence subsequent decisions. Based on the case law and other precedent,[44] it appears that incidental take of a protected bird can subject one to liability under the MBTA in some contexts, but the precise scope of the MBTA in connection with habitat modification or destruction and wind energy projects remains to be determined.

Unlike the ESA, the MBTA has no provision which expressly authorizes the issuance of permits by the FWS authorizing incidental take. The MBTA does authorize the Secretary to determine when, to what extent, if any, and by what means it is compatible with the terms of the related treaties "to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any . . . [protected] bird, or any part, nest, or egg thereof" and to adopt regulations governing the same.[45] Pursuant to this authority the FWS has promulgated regulations which set forth requirements for the issuance of permits for a wide variety of specific purposes, including falconry, scientific collecting, conservation education, taxidermy, and waterfowl sale and disposal, as well as for the hunting of migratory waterfowl.[46] To date, however, the FWS has not issued rules expressly providing for a permitting program for incidental take (although the FWS, in very limited circumstances, has granted individual permits). As discussed in Section I(C), the FWS recently began—and has partially completed—a rulemaking under a similar statute, the BGEPA, which authorizes incidental takes of bald and golden eagles in certain circumstances. As discussed in Section II(C)(2), the FWS believes it has the authority to do the same under the MBTA.

The MBTA is enforced by the FWS through the U.S. Department of Justice ("DOJ") and there is no private cause of action enabling others to bring suit to enforce this law.[47] The MBTA imposes only criminal penalties on those who violate the MBTA. The general misdemeanor provision of the MBTA is likely to be the most applicable provision in a wind energy context. Under this provision, a violator may be fined up to $15,000 and/or imprisoned for up to six months for an unauthorized take of a protected bird, regardless of intent. Under the felony provision of the MBTA, anyone who "shall knowingly (1) take by any manner . . . any protected bird with intent to sell, barter or offer to barter such bird, or (2) sell, offer for sale, barter or offer to barter, any protected bird" is subject to a felony violation and may be fined up to $250,000 ($500,000 for organizations) and/or imprisoned for up to two years. Neither this provision, nor a misdemeanor provision which imposes fines and/or penalties for placing or directing the placement of bait for a protected bird, is expected to be applicable in a wind energy context.[48]

To date no actions under the MBTA or the BGEPA have been brought against the developer of a wind energy project. The FWS has stated that it carries out its mission to protect migratory birds through investigations and enforcement and by fostering relationships with individuals, companies, and industries that have programs to minimize their impacts on migratory birds.[49] Because, the FWS has not promulgated regulations expressly providing for the issuance of permits for unintentional take, the FWS exercises enforcement discretion and focuses on those individuals, companies, or agencies that take migratory birds without regard for their actions and the law, especially when conservation measures have been developed and not implemented.[50] Although two authors recently questioned whether the exercise of enforcement discretion and lack of enforcement by the FWS and State agencies effectively results in an exemption from the MBTA for wind energy developers,[51] it is possible that in the appropriate circumstances the FWS would pursue an action against a wind energy developer under the MBTA or the BGEPA.[52]

C. Bald and Golden Eagle Protection Act

The BGEPA provides specific protections to bald and golden eagles. Under the BGEPA, it generally is unlawful for anyone to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle . . . or any

golden eagle, alive or dead, or any part, nest, or egg thereof . . . ."[53] As defined in the BGEPA, "take" for this purpose includes "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb."[54] Recently, the FWS clarified the meaning of the word "disturb" in the BGEPA in anticipation of the ultimate removal of the bald eagle from the list of threatened species and thus loss of protection under the ESA.[55] Under the new regulation, "disturb" means

> to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.[56]

Although there are differences in the meaning of these terms, as noted by the FWS, the term "disturb" in the BGEPA significantly overlaps with the terms "harm" and "harass" in the ESA.[57] An unauthorized "take" of any one of the protected eagles constitutes a violation of the BGEPA and MBTA. By delegation of authority from the Secretary, the FWS administers the BGEPA.

The United States Supreme Court has described BGEPA as both "exhaustive" and "consistently framed to encompass a full catalog of prohibited acts."[58] Relying on this language, one court has held that the BGEPA prohibits electrocutions of eagles.[59] Such a decision suggests that the "taking" of a bald or golden eagle by a wind turbine could be prosecutable under the BGEPA.

Unlike the ESA—but like the MBTA—the definition of "take" in the BGEPA does not include "harm" or any other term that has been interpreted by the FWS to encompass death or injury arising from habitat modification.[60]

The BGEPA provides that the Secretary may authorize certain otherwise prohibited activities through promulgation of regulations. Specifically, the Secretary is authorized to prescribe regulations permitting the

> taking, possession, and transportation of [bald and golden eagles] . . . for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the religious purposes of Indian tribes, or . . . for the protection of wildlife or agricultural or other interests in any particular locality [provided such permits are] compatible with the preservation of the bald eagle or the golden eagle.[61]

Unlike the ESA but like the MBTA, the BGEPA does not contain an express incidental take permit program. In connection with the removal of the bald eagle as a listed species under the ESA, however, the FWS recently adopted regulations that authorize incidental takes of eagles under the BGEPA which had previously been or in the future are authorized under the ESA, and has indicated that it intends to adopt an additional regulation that would provide for authorization of certain incidental takes of eagles under BGEPA.[62]

Like the MBTA, the FWS enforces the BGEPA through the DOJ and there is no private cause of action enabling others to bring suit to enforce this law. The BGEPA imposes both civil and criminal penalties on those who violate the BGEPA. In order to be criminally liable, a violator "shall knowingly, or with wanton disregard for the consequences of his act take, possess,

sell, purchase, barter . . . transport . . . at any time or in any manner any [eagle] . . . or any part, nest, or egg thereof." If convicted of a criminal violation under the BGEPA, the first offense is a misdemeanor for which the violator may be fined up to $100,000 ($200,000 for an organization) and/or imprisoned for up to one year, and in the case of a second or subsequent conviction for such a violation the offense becomes a felony for which the violator may be fined up to $250,000 ($500,000 for an organization) and/or imprisoned up to two years. Civil penalties may be imposed regardless of intent up to a maximum of $5,000 for each violation.[63]

D. National Environmental Policy Act

NEPA and its implementing rules require that before any discretionary major Federal agency action with significant environmental consequences can be adopted, an environmental impact statement ("EIS") that assesses the environmental effects of the proposed action and alternatives must be prepared.[64] Additionally, NEPA rules require an environmental assessment before a Federal agency can take many actions that do not rise to the level of environmental significance requiring an EIS.[65] NEPA is an information-disclosure law that is procedural only, and does not limit the agency's substantive range of decision.[66] But NEPA compliance process, by obtaining and disclosing environmental impact information and allowing public comment, often affects the substance of the agency's decision. If a wind power project needs any federal permit (such as a Clean Water Act Section 404 permit, a permit for use of federal lands, or an ESA incidental take permit), this can trigger NEPA analysis duties. NEPA can be useful in analyzing the impacts of a proposed wind power project, and potential alternatives, on species and habitat, and in providing mitigation recommendations. That is, NEPA can add to the analytic rigor in considering wind power impacts.

E. Laws Relating to Native Americans

In contrast to the straightforward application of Federal and State wildlife laws to private land or public (State or Federal) land, the application of such laws to Indian land is more complex. Not only are the general rules applicable to jurisdiction in Indian country different, but Congress has also passed specific legislation for particular reservations or States that change even those general rules. Federal law applies everywhere in Indian country just as it does across the rest of the United States. State regulatory law generally does not apply on land held by the United States in trust for Indian tribes or individual Indians, unless Congress has provided otherwise. The major exceptions are in portions of Oklahoma and lands of certain tribes in the Northeast, especially in Maine. If a State is administering Federal law elsewhere, *e.g.*, a delegated program under the Clean Water Act, the Federal agency will generally still administer that law on trust land within the State. Tribal law applies within the boundaries of the tribe's reservation (which is not necessarily the same as the land held in trust for the tribe or individuals). Tribal law also applies to non-Indians doing business with the tribe (*e.g.*, lessees), and to air and water flowing across the reservation.

II. METHODS FOR COMPLIANCE OR AVOIDANCE/REDUCTION OF LIABILITY FOR NON-COMPLIANCE

The Committee charged the Legal Subcommittee with identifying all existing methods for compliance and avoidance or reduction of liability for noncompliance with these four statutes. For each of the primary wildlife statutes identified in the Committee's Charter—the

ESA, MBTA, and the BGEPA—we have identified all potentially relevant statutory, regulatory, judicial, and informal techniques.

A. Compliance with Section 7(a)(2) of the Endangered Species Act

Except in the extremely rare circumstance where a specially convened committee of cabinet members excuses compliance,[67] there is no method for avoiding compliance with Section 7(a)(2), although typically only the relevant Federal agencies are liable for noncompliance. As noted above, Section 7(a)(2) addresses Federal agency actions, but private landowners or project proponents frequently encounter Section 7(a)(2)'s requirements in the context of federal permitting or licensing actions, particularly "wetland permits" issued under Section 404 of the Clean Water Act.

Regulations establish three different processes for compliance with Section 7(a)(2) based on the degree of impact the Federal agency action may have on listed species or designated critical habitat. The FWS and NMFS also have published comprehensive guidance on the Section 7(a)(2) processes in the form of a detailed handbook.[68] If the Federal agency finds that the proposed agency action (in the case of federal permits, both the permit issuance and the private land use or project authorized by the permit) will not affect a listed species or critical habitat, the action may proceed without involvement of the FWS in a consultation process.[69] Otherwise, the Federal agency typically prepares a biological assessment to determine the effects of the proposed agency action. If the Federal agency finds that the action is "not likely to adversely affect" a listed species or critical habitat, the action may proceed if the FWS concurs in writing (termed "informal consultation").[70] If the Federal agency determines that the action is likely to affect adversely a listed species or critical habitat (or the FWS does not concur in the agency's not-likely-to-adversely-affect determination), the Federal agency and the FWS engage in what is termed "formal consultation" as prescribed in Section 7(b).[71] The formal consultation process begins with submission of the biological assessment to the FWS and proceeds under statutory and regulatory deadlines.[72]

The initial product of formal consultation is a biological opinion issued by the FWS. If the FWS finds that the proposed action passes the Section 7(a)(2) standards (jeopardy to the species or adverse modification of critical habitat is not likely), it will so advise the Federal agency in the biological opinion and then typically suggest "reasonable and prudent measures" to minimize any impacts of "takes" that might occur. Unlike the voluntary mechanisms for avoidance of take liability discussed below, the FWS is limited under Section 7(a)(2) to proposing measures to "minimize" take impacts and may not propose measures to mitigate for those impacts.[73] If the FWS finds instead that the action would result in jeopardy or adverse modification, it will suggest to the Federal agency "reasonable and prudent alternatives" to the proposed agency action.[74] FWS regulations limit the degree to which the reasonable and prudent measures or alternatives may alter the agency action.[75]

Federal agencies engaged in formal consultation are not required to follow the biological opinions and reasonable and prudent measures or alternatives;[76] however, the agencies seldom depart significantly from them. If the Federal agencies incorporate reasonable and prudent measures or a reasonable and prudent alternative in permits, licenses, and the like, then the authorized parties and certain other affected parties (*e.g.*, the owner of land leased to a permitted

project) are also covered (including, as discussed below, granted immunity from certain possible take of listed species).[77]

Regulations require reinitiation of the Section 7(a)(2) process for a Federal agency action in certain circumstances.[78] The principal circumstances calling for reinitiation occur: (1) when the scientific understanding of the action's impacts on listed species or critical habitat covered by the original Section 7(a)(2) process changes significantly and results in harsher impacts than those analyzed in that process; (2) when a new species is listed or new critical habitat is designated that would be impacted by the agency action; or (3) when (described in Section II(B)(1) below) the amount of incidental take allowed by an incidental take statement is exceeded. The reinitiation of the Section 7(a)(2) process may lead to the FWS proposing new reasonable and prudent measures or alternatives for the proposed agency action.

B. Avoidance of Liability for Noncompliance with the Section 9 "Take" Prohibition in the Endangered Species Act

The ESA has a well-developed array of techniques for avoidance of liability for certain types of "take" otherwise prohibited under Section 9. Because the Section 9 standard is violated if an agency action or private land use or project takes even a single member of a listed wildlife species, it is quite stringent. Because the standard applies to all persons, it is also quite pervasive. In 1982 Congress enacted amendments to the ESA that established the basis for these take-liability-avoidance techniques. In so doing, Congress recognized that few agency actions or private land uses or projects that occur in the vicinity of a listed wildlife species could be designed to avoid entirely the possibility of take of even a single member of that species. The FWS has developed several additional techniques by regulation or practice. These statutory provisions, regulations, and practices apply to takes that are "incidental" to an otherwise lawful activity—commonly referred to as an "incidental take."[79] In the following ten subsections, the subcommittee has described one technique under Section 7(b)(4) for avoiding take liability in connection with Federal agency actions and multiple techniques under Sections 10(a)(1)(A) and (B) for avoiding take liability for private land uses or projects.

1. Incidental Take Statements

The single technique for take liability avoidance for Federal agency actions under Section 7 is limited to those actions that undergo formal consultation (*i.e.*, actions for which a no effect or "not likely to adversely affect" listed species or critical habitat finding cannot be made). Section 7(b)(4) provides that, if the biological opinion issued by the FWS concludes that the proposed Federal agency action complies with the Section 7(a)(2) jeopardy and critical habitat standards, the FWS will issue an incidental take statement ("ITS") to the agency.[80] The ITS will allow a specified amount of incidental take (stated either in number of species members or in acreage or other measurement of occupied or suitable habitat) over a specified term, if the Federal agency complies with the reasonable and prudent measures recommended by the FWS. Should the biological opinion find that the Federal agency action would violate either the jeopardy standard or the critical habitat standard, the FWS may still issue an ITS if the agency adopts a reasonable and prudent alternative offered by the FWS. In the case of federal permits, licenses, or other authorizations, the ITS will grant immunity for the specified incidental takes not only to the applicable Federal agencies, but also to the permittees, licensees, and certain other associated parties (*e.g.*, the owner of land leased to the permitted or licensed project).[81]

The principal differences between the ITS for Federal agency actions under Section 7(b)(4) and the permits and agreements with private landowners or project proponents under Section 10(a)(1)(A) and (B) of the ESA described in the next sections below, are that: (1) the latter techniques provide critical "No-Surprises" assurances (also described below) and the ITS does not; (2) the ITS has statutory and regulatory deadlines and the latter techniques do not; and (3) the Federal agencies assume more of the costs in the formal consultation process that produces the ITS (even when private land or projects are involved) than in the latter techniques.

2. Habitat Conservation Plans and Incidental Take Permits

Section 10(a)(1)(B) of the ESA[82] authorizes the Secretary to issue an Incidental Take Permit ("ITP") that will authorize take of a listed wildlife species by a non-federal landowner engaged in an otherwise lawful activity covered by a Habitat Conservation Plan ("HCP"). The ITP will allow a specified amount of incidental take (stated either in number of wildlife species members or in acreage or other measurement of occupied or suitable habitat) over a specified term, if the permittee continues to comply with the ITP. The incidental taking of a listed species must be covered by the HCP and identified in the ITP. An HCP must be included in every application for an ITP.

In approving an HCP and issuing an ITP, the FWS or NMFS, as applicable, must find that the taking will be incidental, that the applicant will minimize and mitigate to the maximum extent practicable the impacts of the taking, that the applicant will ensure proper funding for the plan, and that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.[83] The FWS and NMFS have published comprehensive guidance on HCPs and the incidental take permitting process in the form of a detailed handbook, including an addendum which sets forth a five-point policy that provides clarifying guidance of these agencies for those applying for an incidental take permit under Section 10 of the ESA.[84] The so-called "No-Surprises" rule allows a permit holder to negotiate assurances that additional mitigation in the form of land, property interests, or financial compensation will not be required beyond the level of mitigation provided for under the HCP, regardless of a change in circumstance during the period covered by the ITP.[85] However, the trade-off for these regulatory assurances is that the ITP/HCP application process is lengthy. Because granting an ITP is a final Federal agency action subject to the Section 7 consultation requirement and NEPA, the FWS must consult with itself and comply with NEPA.[86] This may add significant time to the period it takes for a landowner to submit a HCP and obtain an ITP.

3. General Conservation Plans

A general conservation plan ("GCP") allows the FWS to develop a Section 10(a)(1)(B) conservation plan suitable for the needs of a local area, complete all NEPA requirements for a Section 10(a)(1)(B) ITP issuance, and then issue individual permits to landowners who wish to apply for an ITP and demonstrate compliance with the terms and conditions of the GCP. The development of a GCP is undertaken by the FWS, rather than an individual applicant, and is ideally based upon a conservation strategy for the species and addresses the needs of the local community. Basically, the GCP has everything that is contained in a traditional HCP, including No-Surprises assurances, except the names of the applicant and future permittees. The GCP is not a substitute for a regional multiple action HCP which a county or other jurisdiction may use.

Such a large-scale effort would be better developed using the traditional HCP approach because of the complexity of fully analyzing all activities under a regional multiple action HCP.[87]

4. Safe Harbor Agreements

A safe harbor agreement is a voluntary agreement in which a non-federal landowner works with the FWS to develop management actions that will contribute to the recovery of a listed species for an agreed-upon time period.[88] Management actions can include habitat maintenance and reintroduction of listed species onto the land. In exchange for implementing these management actions, the FWS provides regulatory assurance to the landowner by issuing an enhancement of survival permit pursuant to Section 10(a)(1)(A) of the ESA.[89] This permit provides that property that is part of a safe harbor agreement can be altered and returned to agreed-upon baseline conditions at the end of the agreement time period, even if it involves the taking of listed species.[90] This permit also may include No-Surprises assurances similar to those discussed under Section II(B)(2).[91]

5. Candidate Conservation Agreements

A candidate conservation agreement is a formal agreement between a non-federal landowner and the FWS that addresses the conservation needs of candidate or at-risk species.[92] The goal of candidate conservation agreements is to prevent the listing of these species. A non-federal landowner that enters into a candidate conservation agreement with the FWS typically receives certain regulatory assurances.[93] In the case of a candidate conservation agreement with assurances, the agreement provides incentives for the non-federal landowner to voluntarily implement conservation measures for candidate or at-risk species. In exchange for implementing conservation measures that will remove or reduce the threat to candidate or at-risk species, the FWS provides regulatory assurances (similar to the No-Surprises assurances) to the landowner by issuing an enhancement of survival permit pursuant to Section 10(a)(1)(A) of the ESA.[94] This permit provides that no additional conservation measures will be required of the landowner if the species becomes listed in the future, even if it involves the taking of listed wildlife species.[95] In addition, this permit allows permit holders to take wildlife species and modify habitat conditions to those baseline conditions agreed upon and specified in the agreement.[96]

6. Conservation Agreements and Memoranda of Understanding

A few FWS Regions have experimented with a basic contract between the FWS and a landowner—called a "conservation agreement" or memorandum of understanding ("MOU")—which describes land use activities the landowner intends to take and methods the landowner will use to provide protection for potentially affected listed species. The FWS' signing of a conservation agreement or MOU constitutes an agency action which permits the FWS to issue a biological opinion and ITS which provides incidental take immunity to the landowner as well as the FWS.[97] This technique to secure incidental take immunity was found valid by the Ninth Circuit Court of Appeals in a citizen suit challenge to the Plum Creek conservation agreement.[98] Recently, as a matter of practice, Region 8 of the FWS has settled on the "net conservation benefit" standard for conservation agreements identical to the standard applied by rule to safe harbor agreements.[99] This technique benefits the landowner by requiring significantly less time and fewer procedural steps to secure the incidental take immunity than does an ITP, but it lacks the No-Surprises assurances landowners obtain with an ITP.

7. Conservation Banking

Conservation banks are lands that are permanently protected and managed for listed or at-risk species, with the concept modeled on the concept of wetland mitigation banking.[100] The FWS approves these banks to sell mitigation credits to developers who need to offset adverse environmental impacts elsewhere. Thus, conservation banking utilizes traditional concepts of supply and demand to facilitate the buying and selling of mitigation credits. By selling mitigation credits, landowners can generate income, preserve their property, and participate in conservation management plans. Developers who purchase these habitat or species mitigation credits are able to offset their negative environmental impacts in one simple transaction.

One instance in which conservation banking can be utilized is to assist in the obtainment of incidental take permits pursuant to Section 10 of the ESA. In applying for an incidental take permit, a landowner must submit an HCP that reports actions that will be taken to minimize and mitigate any adverse impacts on listed species. This mitigation may involve the purchase of mitigation credits from a conservation bank.[101]

8. Section 6 State Cooperative Agreements

Section 6 of the ESA provides for substantial federal funding of State conservation programs benefiting listed species. Section 6(c) of the ESA authorizes the Secretary to enter into a cooperative agreement with any State or territory which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species.[102] States with cooperative agreements approved by the FWS are eligible to receive funds from the Cooperative Endangered Species Conservation Fund ("CESCF") established pursuant to Section 6 of the ESA up to specified limits.

The "adequate and active programs" established by the States to secure funding under the CESCF are usually skeletal in substance and do not contain provisions for the protection of any specific listed species. These State programs provide no basis for securing take liability immunity. However, Section 6(c) does provide for cooperative agreements with States when "plans are included under which immediate attention will be given to those resident species of fish and wildlife [and, in a similar provision, for resident species of plants] which are determined by the Secretary [of the Interior] or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs."[103] If such a species-specific cooperative agreement is developed, the State, and private landowners or project proponents who enroll in the program, can secure incidental take immunity through an incidental take statement issued by the FWS. The FWS' decision to approve the species-specific cooperative agreement is a Federal agency action that is subject to the Section 7(a)(2) process; if that process includes formal consultation, the FWS issues an ITS. For example, the State of Idaho and the Federal government (the FWS and NMFS) are working on a cooperative agreement specific to listed salmonids in the Snake River basin in which irrigators and private timberland owners could voluntarily enroll and obtain certificates of inclusion that would secure for them the immunity of the ITS if they abide by the agreement's salmon protection provisions.

9. Section 4(d) Rules

Section 4(d) of the ESA gives the Secretary authority to issue regulations to conserve threatened species or apply in whole or in part the take prohibition to threatened species. As

previously mentioned, this authority has been delegated to the FWS and NMFS. While the FWS has adopted a general blanket rule that extends the Section 9(a)(1) take prohibition to all threatened wildlife species, it has also retained the authority to remove or alter this general prohibition for certain threatened species on a species-specific basis.[104] Thus, it is within the jurisdiction of the FWS to provide exemptions for conservation efforts, for example, by providing species-specific take protection for landowners who pursue certain habitat conservation measures. However, a 4(d) rule is not easy to obtain, and it is generally very specific. Moreover, a 4(d) rule only applies to threatened species, as noted above.

10. Bird Letters

Landowners are encouraged to engage in open communication with the FWS on how to avoid a Section 9 violation, and the FWS has a history of providing advice and recommendations to landowners.[105] Historically, this advice has been rendered in the form of letters providing guidelines to avoid take of listed wildlife species or simple declarations of the FWS that it "believes" the landowner's property would not provide suitable habitat for particular listed species or that the landowner's activity would not likely result in a take of listed wildlife species. Although these so-called "bird letters" do not as a legal matter preclude future liability, the expectation is that the government will use enforcement discretion regarding landowners who have cooperated with the FWS in avoiding the taking of a listed species.[106]

C. Liability Avoidance and Mitigation under the Migratory Bird Treaty Act

1. Bird Letters and Avian Protection Plans

Like the ESA bird letters, MBTA bird letters are generally enforcement discretion documents that outline the FWS' willingness not to recommend prosecution for MBTA takings if a project proponent agrees to follow certain "best management practices."[107] This enforcement discretion approach can take several forms, including project-specific letters, general guidance, and the proffer of enforcement/prosecutorial discretion in avian protection plans. In particular, it has been used for avian protection plans for power lines prepared by electric utilities and acknowledged by the FWS.[108]

2. Incidental Take Authorizations Pursuant to a Possible New Regulation

The language of the MBTA gives the FWS authority and discretion to adopt regulations to permit reasonable activities that result in the taking of birds. Congress, in Section 704 of the MBTA, expressly authorizes the promulgation of regulations that permit the taking of migratory birds in a broad grant of authority to the FWS.

Pursuant to Section 704, the FWS has promulgated a series of regulations that permits the taking of migratory birds in many circumstances. For example, as discussed under Section I(B) above, current regulations authorize the issuance of permits and season limitations for migratory bird hunting, as well as for a number of other activities that would otherwise be proscribed by the MBTA, such as falconry, raptor propagation, scientific collecting, take of depredating birds, taxidermy, take of overabundant birds, and waterfowl sale and disposal. Special purpose permits, for activities outside the scope of the specific permits, are also available.[109]

From this broad Congressional grant of authority in Section 704(a), the FWS may have the authority to promulgate regulations establishing a new permit that would allow for the taking of birds at wind energy developments under certain conditions. Although the FWS does not have express authorization in the MBTA to issue "incidental take permits" as provided in the ESA, the broad grant of authority in Section 704 seems to allow issuance of such permits should the FWS choose to exercise this authority in the wind energy and other contexts. This would require the promulgation of a new regulation by the FWS.

3. Special Purpose Permits

As an alternative to a new regulation, under current MBTA regulations at 50 C.F.R. Part 21, "special purpose permits" may be granted when an applicant makes a sufficient showing of an activity's benefit to the migratory bird resource or other compelling justification.

FWS regulations provide for migratory bird permits for special purpose activities which are otherwise outside the scope of standard permits available for such activities as falconry, raptor propagation, scientific collecting, taxidermy, control of depredating birds, control of overabundant bird populations, etc.[110] According to 50 C.F.R. § 21.27, "permits may be issued for special purpose activities related to migratory birds, their parts, nests, or eggs, which are otherwise outside the scope of the standard form permits of this part." A special use permit may be issued to an applicant who submits a written application and "makes a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification."[111]

The FWS in very limited circumstances has issued special purpose permits to authorize incidental take. This approach potentially could be used to authorize incidental take caused by wind energy projects. For example, a wind energy project theoretically could apply to the FWS for a special use permit for an incidental take of birds based on a showing that the wind facility was providing an overall positive benefit to the migratory bird resource, perhaps through accompanying mitigation measures, or constitutes a situation of compelling justification due to the benefits of renewable energy generation. To date, however, the FWS has not endorsed such an interpretation of the special-purpose activity regulation.

4. FWS Interagency Memoranda of Understanding

Pursuant to Executive Order 13186,[112] FWS has worked with over twenty Federal agencies over the last few years in developing Memoranda of Understanding ("MOUs") to deal with possible violations of the MBTA by addressing migratory bird conservation in a proactive manner and to minimize take of migratory birds. There are currently two official MOUs between the FWS and Federal agencies, and the FWS hopes to enter into approximately eighteen more in the future. An MOU does not authorize a take, but it can establish a good faith effort of interagency communication, give agencies more certainty in their practices, and aid conservation in the long term. To date, the FWS has not entered into this type of MOU with the private sector.

D. Liability Avoidance and Mitigation under the Bald and Golden Eagle Protection Act

1. Special and Incidental Take Permits

As discussed under Section I(C), the Secretary may authorize otherwise prohibited activities by regulation and the Secretary recently proposed a permit program under the BGEPA.[113]

Endnotes

[1] 16 U.S.C. §§ 703–712.

[2] *Id.* §§ 668–668d.

[3] *Id.* §§ 1531–1544.

[4] 42 U.S.C. § 4371, *et. seq.*

[5] The full Committee's October 22, 2008, approval prospectively authorized the inclusion *nunc pro tunc* of technical revisions. This final version includes those technical revisions.

[6] 16 U.S.C. § 1531(b).

[7] *Id.* § 1536(a)(2).

[8] 50 C.F.R. § 402.02.

[9] *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 278 F.3d 1059, 1069–72 (9th Cir. 2004); *Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001).

[10] 16 U.S.C. § 1532(5).

[11] *Id.* § 1532(3).

[12] Critical habitat has been designated for only thirty-eight percent of listed domestic species.

[13] *Gifford Pinchot*, 278 F.3d at 1071–74; *see Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 623 (W.D. Wash. 1991); 16 U.S.C. § 1533(b)(2).

[14] Memorandum of FWS Director to Regional Directors, December 9, 2004. The memorandum also advised the FWS to apply the statutory standard by "discuss[ing] whether, with implementation of the proposed Federal action, critical habitat would remain functional (or retain the current ability for the primary constituent elements [the regulatory wording for the statutory features 'essential to the conservation' of the species] to be functionally established) to serve the intended conservation role for the species."

[15] 16 U.S.C. § 1538.

[16] *Id.* § 1538(a)(1)(B). The Secretary has extended the "take" prohibition to threatened species of fish and wildlife. *Id.* § 1533(d); 50 C.F.R. § 17.31(a).

[17] 16 U.S.C. § 1532(19).

[18] *See* 50 C.F.R. § 17.31.

[19] *Id.* § 17.3.

[20] *Id.*

[21] *Id.* § 17.3. *See* 46 Fed. Reg. 54,750 (1981) ("To be subject to Section 9, the modification or degradation must be *significant* . . . .) (emphasis in original).

[22] 46 Fed. Reg. 54,750 (1981) ("[H]abitat modification or degradation, standing alone, is not a taking pursuant to Section 9.").

[23] *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 691 n.2 (1995); 40 Fed. Reg. 44,413 (1975) ("[P]otential restrictions on environmental modifications are expressly limited to those actions causing actual death or injury to a protected species of fish or wildlife."). *See also* Memorandum from Associate Solicitor, Conservation and Wildlife, to Director, Fish and Wildlife Service (May 11, 1981) (stating that the *Palila* court decision "erroneously supports the view that habitat modification alone may constitute 'harm'"); "Endangered and Threatened Wildlife and Plants: Final Redefinition of 'Harm,'" 46 Fed. Reg. 54,748 (1981) ("[H]abitat modification or degradation, standing alone, is not a taking pursuant to Section 9.").

[24] *See Sweet Home*, 515 U.S. at 708–709 (O'Connor, J., concurring) ("[T]he challenged regulation is limited to significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals."); *Am. Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993) (stating that, while bald eagles can be harmed by ingesting lead, there is no evidence of actual harm to bald eagles as a result of deer hunting and eagles feeding on deer carrion containing lead slugs). *But see Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 783 (9th Cir. 1995) ("[A] showing of a future injury to an endangered or threatened species is actionable under the ESA."); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1064 (9th Cir. 1996) (holding that an imminent threat of future harm is sufficient for an injunction under the ESA).

[25] 46 Fed. Reg. 54,749 ("[S]ection 9's threshold does focus on individual members of a protected species.").

[26] *See* 50 C.F.R. § 17.3.

[27] 40 Fed. Reg. 44,413 (1975).

[28] The third, and most stringent behavioral standard—species' "conservation"—is less relevant to wind energy projects. It is contained in two ESA sections—Sections 7(a)(1) and 4(f). Section 3(2) of the ESA defines "conservation" to mean actions that permit eventual recovery of the listed species to the point that it no longer requires ESA protection. *See* 16 U.S.C. § 1532(2). Section 7(a)(1) relates solely to federal agencies, and speaks of programs, not agency actions as does Section 7(a)(2). Section 7(a)(1) requires that federal "agencies shall, in consultation with" the Secretary or the Secretary of Commerce, as applicable, "utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of" listed species. 16 U.S.C. § 1536(a)(1). The House Committee with ESA jurisdiction and the FWS and NMFS rejected the notion that this provision requires that all federal agency actions be structured to advance conservation or recovery of listed species. 51 Fed. Reg. 19,954–55 (1986). The FWS and NMFS made their conservation recommendations non-binding in 50 C.F.R. § 402.14(j). Because the Section 7(a)(1) consultation requirement applies at the *program*-wide

level, the Section 7(a)(2) agency *action* consultation requirement still leaves a federal agency with the discretion to approve a specific activity or project (such as a permit or authorization for a wind energy project) that does not foster conservation (and thereby, disregard conservation recommendations that are often included in the biological opinion prepared by the FWS or NMFS during the consultation process). Even as to agency programs (including any "program" that might be established in a federal agency for wind energy development), due to those Congressional and regulatory interpretations, federal agencies often have ignored the Section 7(a)(1) "consultation" command for possible conservation programs. However, the finding of the Fifth Circuit Court of Appeals that such consultations with the FWS or NMFS are legally enforceable in *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998), may prompt more Section 7(a)(1) consultations, as evidenced by the emphasis given to this provision in the Memorandum of Agreement between FWS/NMFS and the Environmental Protection Agency on "Enhanced Coordination Under the Clean Water Act and Endangered Species Act." 66 Fed. Reg. 11,202 (2001).

In recognition that "conservation" is the ultimate objective of the ESA and to enlist the most knowledgeable in the cause, Section 4(f) directs the Secretary and the Secretary of Commerce, as applicable, to prepare "recovery plans" for most listed species and suggests the appointment of "recovery teams" to draft those documents. 16 U.S.C. § 1533(f). A recovery plan is not a legally binding document under *Fund for Animals v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996). However, some courts have conducted judicial review of recovery plans and required compliance with Section 4(f). *See, e.g.*, *Grand Canyon Trust v. Norton*, 2006 WL 167560 (D. Az. 2006).

[29] 16 U.S.C. §§ 1540(a) and (b).

[30] *Id.* § 1540(e)(6).

[31] *Id.* § 1540(g). In any suit filed by a private citizen pursuant to Section 11(g), a court may award costs of litigation, including reasonable attorney and expert witness fees, to any party whenever the court deems such an award appropriate. *Id.* § 1540(g)(4).

[32] *Id.* §§ 1540(a) and (b) ("Any person who knowingly violates . . . .").

[33] *See United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998) (ESA is a general intent statute, meaning the defendant did not have to know he was killing a wolf, only that he was shooting an animal that turned out to be a wolf); *United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990) (defendant did not need to know that possessing the turtle was illegal to violate the ESA, only that he possessed the turtle); *United States v. St. Onge*, 676 F. Supp. 1044 (D. Mont. 1988) (government did not have to show the defendant knew the animal he was killing was a grizzly bear).

[34] 16 U.S.C. § 1540(a) and (b). The statutory fines and periods of imprisonment authorized for violations of the ESA, MBTA, and BGEPA noted herein reflect the inflation-based adjustments required by Federal Fines and Sentencing Laws, 18 U.S.C. §§ 3551, *et. seq.* The Alternative Fines Act, 18 U.S.C. § 3571, in general sets forth maximum monetary fines a defendant who has been found guilty of any federal crime (not just a wildlife crime) may be sentenced to pay. The Alternative Fine Based on Gain or Loss, 18 U.S.C. § 3571(d), requires that if any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than

the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

[35] For a list of the migratory birds protected by the MBTA, *see* 50 C.F.R. § 10.13.

[36] 16 U.S.C. § 703(a).

[37] 50 C.F.R. § 10.12.

[38] 952 F. 2d 297 (9th Cir. 1991).

[39] *Id.* at 302.

[40] *E.g., United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E. D. Cal. 1978), *aff'd*, 578 F.2d (9th Cir. 1978).

[41] *See* Blaydes and Firestone, *Wind Power, Wildlife and the Migratory Bird Treaty Act*: *A Way Forward*, accepted for publication, 38(4) ENVTL. L. ___ (2008) ("The line between habitat modification and direct harm can be quite fine, if not nonexistent."); Baldwin, *The Endangered Species Act, Migratory Bird Treaty Act, and Department of Defense Readiness Activities*: *Background and Current Law*, CRS Report for Congress (2004) at 7 ("There evidently is . . . confusion as to what constitutes direct harm [from habitat modification and destruction]."); Lemly and Ohlendorf, *Regulatory Implications of Using Constructed Wetlands to Treat Selenium-Laden Wastewater*, 52 ECOTOXICOLOGY ENVT'L SAFETY 46–56 (2002) (noting the unforeseen impact of selenium-laden wastewater in artificial wetlands on migratory birds).

[42] 45 F. Supp. 2d 1070 (D. Co. 1999).

[43] *Id.* at 1185. According to the court, the proximate causation requirement distinguished the bird deaths involved in the case from those which may result from "driving an automobile, piloting an airplane, maintaining an office building, or living in a residential dwelling with a picture window . . . ." *Id.* at 1085.

[44] The U. S. Congress first explicitly acknowledged that the MBTA covers "incidental take" in some circumstances when, in 2002, it enacted P.L. 107-314, which provides that during a specified period of time the take proscription in the MBTA does not apply to the incidental take of a protected bird during authorized military readiness activities. This suspension of the MBTA was enacted in response to a case finding that take of protected birds during military readiness activities was unlawful under the MBTA (*Center for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161 (D. D.C. 2002) and remained in effect until a new regulation to exempt incidental take of migratory birds during military readiness activities was finally adopted by the FWS. The final regulation was adopted by the FWS in 2007 and is located at 50 C.F.R. § 21.15. The regulation generally permits incidental take in connection with military preparedness activities, and requires for those ongoing or proposed activities that the armed forces determines may result in a significant adverse effect on a population of a migratory bird species that the armed forces must confer and cooperate with the FWS to develop and implement appropriate conservation measures to minimize or mitigate such significant adverse effects.

In addition to the above-noted Congressional action, while not dispositive for purposes of the MBTA, an executive order signed by President Clinton which imposed additional obligations on federal agencies to protect migratory birds defined the term "take" to include "unintentional

take" (in a manner which did not mean "unintended" but the equivalent of incidental take as defined above). Exec. Order No. 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, 66 Fed. Reg. 3853 (2001).

[45] 16 U.S.C. § 704.

[46] *See* 50 C.F.R. Parts 13, 20, and 21.

[47] Although the MBTA does not authorize a private cause of action, two decisions out of the District of Columbia have found that citizens can sue a federal agency for violations of the MBTA by asserting a claim against a federal agency under the Administrative Procedure Act, which allows courts to review and set aside agency actions which are "not in accordance" with law. *See Humane Society v. Glickman*, 217 F.3d 882 (D.C. Cir. 2002); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209 (D.D.C. 2003).

[48] 16 U.S.C. § 707(a), (b), and (c).

[49] *See* Letter from Jamie Rappaport Clark, Director, U.S. Fish and Wildlife FWS, to Regional Directors (Sept. 14, 2000), *available at* http://www.fws.gov/migratorybirds/issues/towers/comtow.html; Suggested Practices for Avian Protection on Power Lines—The State of the Art in 2006, at 21, available on the website for the Avian Power Line Interaction Committee at http://www.aplic.org. *See also* "Authorizations Under the Bald and Golden Eagle Protection Act for Take of Eagles," 73 Fed. Reg. 29,075 (2008) (noting that incidental take permits issued under Sections 7 and 10 of the ESA for the bald eagle while it was listed under the ESA were issued with regulatory assurances that the FWS would exercise enforcement discretion with respect to violations of the MBTA and the BGEPA).

[50] *Id*.

[51] Blaydes and Firestone, *supra* note 41.

[52] There is an extensive history of discussions between the DOI (and its subdivisions, including the FWS) and the DOJ about the interpretation of the MBTA, and the application of its criminal penalty provisions in circumstances other than unpermitted "take" by hunting. In 1985, Secretary Hodel and Solicitor Richardson sought the DOJ's opinion as to whether DOI officials and employees would be subject to prosecution for MBTA offenses in connection with the operation of Kesterson Reservoir, an agricultural water body at which toxic levels of selenium were bioaccumulating in migratory waterfowl, causing thousands of bird deaths, mutations, and reproductive dysfunction. The DOJ memorandum reviewed the entire body of judicial and administrative interpretations of the statute to that juncture, including the limited case law imposing liability on the basis of avian mortalities resulting from hazardous or inherently dangerous activities such as chemical or pesticide manufacture and disposal. The DOJ concluded in that situation that MBTA charges were not appropriate. The rationale of the DOJ memorandum clearly would not have approved MBTA prosecution of entities or persons involved solely in the construction, or use of houses, office buildings or other structures in the air column, into which birds might speculatively or even predictably collide. Since the DOJ's comprehensive analysis of MBTA prosecution authority in 1985, there has been no significant change in its broad institutional position of non-liability except in matters of hazardous chemical or petroleum activities. In sum, the DOJ's longstanding charging policy does not criminalize

actors solely on the basis of their construction or use of structures with which avian collisions may occur.

[53] 16 U.S.C. § 668a.

[54] *Id*. § 668c.

[55] *See* "Protection of Bald Eagles; Definition of 'Disturb,'" 72 Fed. Reg. 31,132 (2007).

[56] *See* 50 C.F.R. § 22.3.

[57] *See* "Authorizations under the Bald and Golden Eagle Protection Act for Take of Eagles," 72 Fed. Reg. 31,132, 31,141 (2007). At the same time as it adopted the final definition of "disturb," the FWS proposed to amend the regulatory definition of "take" as it applies to eagles to add the word "destroy" and thereby make it consistent with the statutory prohibition on unpermitted eagle nest destruction. *Id*.

[58] *Andrus v. Allard,* 444 U.S. 51, 56–59 (1979).

[59] *See Moon Lake,* 45 F. Supp. 2d at 1086–88.

[60] The only court to have addressed the relationship between the prohibitions of the ESA and the BGEPA suggested that the latter may cover habitat modification through the term "disturb" in the definition of "take" in the BGEPA. The court stated as follows in this regard:

> Both the ESA and the Eagle Protection Act prohibit the take of bald eagles, and the respective definitions of 'take' do not suggest that the ESA provides more protection for bald eagles than the Eagle Protection Act . . . . The plain meaning of the term 'disturb' is at least as broad as the term 'harm,' and both terms are broad enough to include adverse habitat modification.

Contoski v. *Scarlett*, Civ No. 05–2528 (JRT/RLE), slip op. at 5–6 (D. Minn. Aug 10, 2006). In response to a public comment that the FWS' proposed definition of the term "disturb" in the BGEPA inappropriately incorporates habitat protection which is not authorized by the BGEPA, the FWS stated that it "agrees that the Eagle Act is not a habitat management law," but noted that "there is a difference between protecting habitat per se, and protecting eagles in their habitat. The proposed and final definitions protect eagles from certain effects to the eagles themselves that are likely to occur as the result of various activities, including some habitat manipulation." 72 Fed. Reg. at 31,134.

[61] 16 U.S.C. § 668a. Pursuant to this authority the Secretary has promulgated BGEPA permit regulations for scientific and exhibition purposes, Indian religious purposes, to take depredating eagles, to possess golden eagles for falconry, and for the take of golden eagle nests that interfere with resource development or recovery operations. 50 C.F.R. §§ 22.21–22.25.

[62] Under new paragraph (a) to 50 C.F.R. § 22.11, the FWS provides take authorization under the BGEPA to existing and future holders of incidental take permits under Section 10(a)(1)(B) of the ESA where the take of bald and golden eagles is specifically authorized in a habitat conservation plan, as long as the permit holder is in full compliance with the terms and conditions of the ESA permit. Under a new regulation located at 50 C.F.R. § 22.28, the FWS established a new permit category to provide expedited permits to entities authorized to take bald eagles through

incidental take statements issued pursuant to Section 7 of the ESA. It is anticipated that Section 22.28 will be superseded upon adoption of a previously-proposed regulation which would establish a new permit for incidental take of eagles. Under this proposed regulation, to be located at 50 C.F.R. § 22.26, incidental take of bald or golden eagles would be authorized only where it is determined to be compatible with the preservation of bald and golden eagles and cannot practicably be avoided. *See* "Authorizations Under the Bald and Golden Eagle Protection Act for Take of Eagles," 73 Fed. Reg. 29,075 (2008). For a description of proposed Section 22.26, *see* 72 Fed. Reg. 31,141. At the same time that it announced this proposal, the FWS proposed another new regulation, to be located at 50 C.F.R. § 22.27, which would authorize the removal of bald and golden eagle nests where necessary to protect human safety or the welfare of eagles. *Id.*

[63] 16 U.S.C. §§ 668a and 668b.

[64] 42 U.S.C. § 4332(2)(C); 40 C.F.R. pts. 1500–1508.

[65] 40 C.F.R. §§ 1501.3 and 1508.9.

[66] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–53 (1989).

[67] *See* 16 U.S.C. § 1536(a)(2) and (e)–(h).

[68] *Endangered Species Consultation Handbook—Procedures for Conducting Consultation under Section 7 of the Endangered Species Act* (FWS 1998), available at http://www.fws.gov/Endangered/consultations/s7hndbk/s7hndbk.htm.

[69] 50 C.F.R.§ 402.14(a) and (b). Any such finding by a Federal agency must be with the consent of a specified representative of the FWS or NMFS, as applicable. *Id*. § 402.14(b).

[70] *Id.* § 402.13.

[71] 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

[72] *See* 16 U.S.C. § 1536(b)(1); 50 C.F.R. § 402.14(e).

[73] *See* 16 U.S.C. § 1536(b)(4); *supra* note 68 at 4-50 ("*Section 7 requires minimization of the level of take. It is not appropriate to require mitigation for the impacts of incidental take*." (emphasis in original)).

[74] *See* 50 C.F.R. §§ 402.02 and 402.15(i)(2).

[75] *See* 16 U.S.C. § 1536(b)(5)(A).

[76] *Bennett v. Spear*, 520 U.S. 154, 169–70, 177–78 (1997). *See infra* Section II.B.1 (discussing reasonable and prudent measures).

[77] *See* 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(*i*); *Ramsey v. Kantor*, 96 F.3d 434, 440–42 (9th Cir. 1996).

[78] 50 C.F.R. § 402.16.

[79] 16 U.S.C. §§ 1536(b)(4) and 1539(a)(2) (allowing a permit to be issued if the "taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity").

[80] 16 U.S.C. § 1536(b)(4); *see* 50 C.F.R. § 402.14(*i*) (incidental take statement issued only after formal ESA consultation).

[81] 50 C.F.R. § 402.14(i); *Ramsey*, 96 F.3d at 440–42.

[82] 16 U.S.C. § 1539(a)(1)(B).

[83] *Id.* § 1539(a)(2)(B).

[84] The *Handbook for Habitat Conservation Planning and Incidental Take Permitting Process* is available at http://www.fws.gov/Endangered/hcp/hcpbook.html. In the addendum to the *Handbook*, the FWS and NMFS provide guidance on the following five concepts: permit duration, public participation, adaptive management, monitoring and biological goals and objectives. *See generally* "Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process," 65 Fed. Reg. 35,242 (2000).

[85] 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5), and 222.307(g). *See generally*, "Habitat Conservation Plan Assurances ('No Surprises') Rule," 63 Fed. Reg. 8859 (1998).

[86] 16 U.S.C. § 1536.

[87] Hall, Dale, FWS Memo, "Final General Conservation Plan Policy," October 5, 2007.

[88] *See generally* "Announcement of Final Safe Harbor Policy," 64 Fed. Reg. 32,717 (1999); FWS—Safe Harbor Agreements for Private Landowners (2004), available at http://www.fws.gov/endangered/factsheets/harborqua.pdf.

[89] 16 U.S.C. § 1539(a)(1)(A).

[90] 64 Fed. Reg. at 32,717–26 (1999).

[91] 43 C.F.R. §§ 17.22(c)(5) and 17.32(c)(5).

[92] *See generally* "Announcement of Final Policy for Candidate Conservation Agreements with Assurances," 64 Fed. Reg. 32,726 (1999); FWS—Candidate Conservation Agreements with Assurances for Non-federal Landowners (2004), available at http://www.fws.gov/endangered/factsheets/CCAAsNon-Federal.pdf. Candidate conservation agreements are authorized in 50 C.F.R. §§ 17.22(d) and 17.32(d).

[93] For privacy and other reasons a non-federal landowner may not request regulatory assurances.

[94] 16 U.S.C. § 1539(a)(1)(A).

[95] 64 Fed. Reg. at 32,726–36.

[96] *Id*.

[97] Examples of such conservation agreements and MOUs include a 2007 agreement involving the FWS, State of California, Sonoma County, several towns, and stakeholders concerning the California tiger salamander and three listed plants in the Santa Rosa Plain, California; a 1997 agreement among the FWS, Plum Creek Timber Company and the State of Montana concerning the grizzly bear on private land in Swan Valley, Montana; a 1995 MOU between the FWS and White Mountain Apache Tribe concerning endangered species on tribal land in Arizona; and a

1993 MOU between the FWS and Georgia-Pacific Corp. concerning the red-cockaded woodpecker on 4.2 million acres of Southern timberland.

[98] *Friends of the Wild Swan v. Babbitt*, 168 F.3d 498 (table) (9th Cir. 1999), 1999 WL 38606 (unpublished opinion).

[99] 50 C.F.R. §§ 17.22(c)(2)(ii) and 17.32(c)(2)(ii). "Conservation agreements" were specifically identified in an August 2, 2004, memorandum from the FWS's Manager of California-Nevada Operations Office (now Region 8) to all staff, entitled "Updating Guidance for Designating Critical Habitat on Private Lands in California and Nevada."

[100] *See generally*, "Guidance for the Establishment, Use and Operation of Conservation Banks," 60 Fed. Reg. 58605 (1995); FWS—Conservation Banking: Incentives for Stewardship, available at http://www.fws.gov/endangered/factsheets/ banking_7_05.pdf.

[101] *Id.*

[102] *See* 16 U.S.C. § 1535(c)(1) (for fish and wildlife) and 1535(c)(2) (for plants). Requirements for state programs pertaining to plants differ from those for fish and wildlife only in that plant programs need not include land acquisition.

[103] 16 U.S.C. § 1535(c).

[104] 50 C.F.R. § 17.31.

[105] *See, e. g., Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1068 (9th Cir. 1996) (stating that letters between the FWS and the lumber company were "desirable communication" on how to comply with the ESA).

[106] As noted above, the FWS similarly has used enforcement discretion under the MBTA. *See, supra,* notes 49–50 and accompanying text.

[107] *See id.*

[108] *See* MOU between the FWS and Edison Electric Institute regarding the use and development of avian protection plans.

[109] 50 C.F.R. §§ 13 (general permit procedures), 20.1–20.155 (hunting permits, season limits), 21.21–21.60 (specific permits), and 21.27 (special purpose permits).

[110] 50 C.F.R. Part 21.

[111] *Id.*

[112] Exec. Order No. 13186, "Responsibilities of Federal Agencies to Protect Migratory Birds," 66 Fed. Reg. 3853 (2001).

[113] *See, supra,* note 62, and accompanying text.