

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

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

64 **2. Section 9 Requirements**

65 Section 9 sets a standard applicable to all persons, whether they are subject to any Federal
66 agency action.¹⁴ Section 9(a)(1)(B) prohibits the “take” of endangered species of fish and
67 wildlife within the United States or its territorial waters.¹⁵ A “take” is defined with
68 extraordinary breadth to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or
69 collect, or to attempt to engage in any such conduct.”¹⁶ A “take” of individual members of a
70 listed endangered or threatened species constitutes a violation of the ESA.

71 With regard to the impacts of habitat modification on listed species covered by the
72 Section 9 take prohibition, the FWS has by regulation defined “harm” as “an act which actually
73 kills or injures wildlife,” which “may include significant habitat modification or degradation
74 where it actually kills or injures wildlife by significantly impairing essential behavioral patterns,
75 including breeding, feeding or sheltering.”¹⁷ Injury or death to a listed wildlife species can be
76 the direct or indirect result of habitat modification or degradation, such that the act, “impair[s]
77 essential behavioral patterns, including breeding, feeding or sheltering.”¹⁸ To be actionable,
78 habitat modification or degradation must be “significant,”¹⁹ and land use activities that result in
79 habitat modification or degradation are not sufficient in themselves to constitute a “take” of
80 listed wildlife under Section 9 and the “harm” regulation.²⁰ Instead, only a land use activity that
81 “actually kills or injures wildlife” will constitute a “take” of a listed species.²¹ Accordingly,
82 “harm” requires proof of actual injury—the mere potential for injury to listed wildlife is not
83 “harm.”²² Moreover, the regulation determines “harm” by reference to an individual member of
84 a listed species.²³

85 The FWS also by regulation defined “harass,” but has—unlike the regulatory definition
86 of “harm”—excluded consideration of habitat modification in the context of “harass.”²⁴ While
87 “harm” requires “actual” injury to wildlife, the definition of “harass” includes a “negligent act or
88 omission which creates the likelihood of injury to wildlife by annoying it to” a significant extent.
89 Under the regulatory intent, instead of covering physical modifications of habitat, the “harass”
90 rule addresses the annoying effects of persistent noise, light, or motion. In promulgating the
91 definition, the FWS stated:

92 The concept of environmental damage being considered a “taking”
93 has been retained but is now found in a new definition, of the word
94 “harm” By moving the concept of environmental degradation
95 from the proposed definition of “harass” to the definition of
96 “harm,” potential restrictions on environmental modifications are
97 expressly limited to those actions causing actual death or injury to
98 a protected species of fish or wildlife.²⁵

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

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

110 As discussed in Section II, because most methods of compliance—or securing immunity
111 for noncompliance—with the Section 9 take standard require at least some form of permit from,
112 or agreement with, the FWS, and because that FWS permit or agreement itself constitutes a
113 Federal agency action subject to Section 7(a)(2), the standards of Section 9 and Section 7(a)(2)
114 are often applied together when private land uses or projects are involved.²⁶

115 3. Enforcement

116 Three general types of enforcement actions are available under Section 11 for violations
117 of the ESA. First, Section 11(a) authorizes the government to seek civil penalties against
118 violators, and Section 11(b) authorizes the government to seek criminal penalties.²⁷ Second,
119 Section 11(e)(6) authorizes the government to bring suits to enjoin violations.²⁸ And third,
120 Section 11(g) authorizes private citizens to bring actions to enjoin violations of the ESA by any
121 person and to force certain compliance with the ESA by the Secretary.²⁹ The ESA provides
122 significant penalties only for “knowing” acts,³⁰ but it is a general intent statute which requires
123 only that a violator knew that it was taking a particular action and not that the action was
124 illegal.³¹ Anyone who violates the ESA generally may be fined up to \$25,000 for a civil
125 violation and up to \$100,000 (\$200,000 for an organization) and/or imprisoned for not more than
126 one year for a criminal violation.³²

127 **B. Migratory Bird Treaty Act**

128 The MBTA is a criminal environmental law which implements four international treaties
129 that the United States has entered into in order to protect over eight hundred species of birds that
130 migrate across the United States and its territories.³³ The MBTA states as follows:

131 Unless and except as permitted by regulations...it shall be
132 unlawful at any time, by any means, or in any manner to pursue,
133 hunt, take, capture, kill, attempt to take, capture, or kill, possess,
134 offer for sale, sell...offer to purchase, purchase...ship, export,
135 import...transport or cause to be transported...any migratory bird,
136 any part, nest, or eggs of any such bird, or any product...composed
137 in whole or in part, of any such bird or any part, nest, or egg
138 thereof.³⁴

139 FWS regulations broadly define “take” to mean “pursue, hunt, shoot, wound, kill, trap, capture,
140 or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.”³⁵ An
141 unauthorized “take” of any one of the protected bird species constitutes a violation of the MBTA.
142 By delegation of authority from the Secretary, the FWS administers the MBTA.

143 With regard to the impacts of habitat modification on protected birds, unlike the ESA the
144 definition of “take” in the MBTA does not include “harm” or “harass.” And the MBTA itself is
145 silent in regard to habitat modification and destruction. As a result, the MBTA’s applicability to
146 habitat modification and destruction is unclear. In *Seattle Audubon Society v. Evans*,³⁶ which
147 involved a claim that the MBTA prohibited the U.S. Forest Service from logging activities that
148 may provide habitat for a protected bird, the Ninth Circuit Court of Appeals concluded that the
149 MBTA covers only direct, though unintended, bird deaths, and that habitat destruction leading
150 indirectly to bird deaths was not a take for purposes of the MBTA.³⁷ In contrast to this and
151 similar cases involving timber activities, there are several cases which have found MBTA
152 liability in connection with the discharge of extra-hazardous materials or the misapplication of
153 pesticides.³⁸

154 Reconciling these cases or determining what may constitute prohibited direct harm to
155 migratory birds from habitat modification or destruction is not easy.³⁹ A case which attempted
156 to provide some order to the evaluation of claims under the MBTA is *United States v. Moon
157 Lake Elec. Ass’n*,⁴⁰ which is noteworthy for the wind energy industry because the court found the
158 defendant electrical association liable under the MBTA and the BGEPA for the killing of
159 protected birds resulting from its failure to install inexpensive protective equipment on its power
160 poles. In *Moon Lake*, the district court disagreed with the distinction in *Seattle Audubon*
161 between direct and indirect take, finding that the MBTA’s misdemeanor provision may apply to
162 unintended bird deaths which are a probable consequence of a defendant’s actions. The court
163 also ruled that the MBTA is not limited simply to physical conduct associated with hunting or
164 poaching.⁴¹ Although *Moon Lake* did not involve habitat modification, the court’s extensive
165 analysis of incidental take under the MBTA could influence subsequent decisions. Based on the
166 case law and other precedent,⁴² it appears that incidental take of a protected bird can subject one
167 to liability under the MBTA in some contexts, but the precise scope of the MBTA in connection
168 with habitat modification or destruction and wind energy projects remains to be determined.

169 Unlike the ESA, the MBTA has no provision which expressly authorizes the issuance of
170 permits by the FWS authorizing incidental take. The MBTA does authorize the Secretary to
171 determine when, to what extent, if any, and by what means it is compatible with the terms of the
172 related treaties “to allow hunting, taking, capture, killing, possession, sale, purchase, shipment,
173 transportation, carriage, or export of any . . . [protected] bird, or any part, nest, or egg thereof”
174 and to adopt regulations governing the same.⁴³ Pursuant to this authority the FWS has
175 promulgated regulations which set forth requirements for the issuance of permits for a wide
176 variety of specific purposes, including falconry, scientific collecting, conservation education,
177 taxidermy, and waterfowl sale and disposal, as well as for the hunting of migratory waterfowl.⁴⁴
178 To date, however, the FWS has not promulgated regulations expressly providing for a permitting
179 program for incidental take (although the FWS, in very limited circumstances, has issued
180 individual permits). As discussed in Section II(C), the FWS recently began—and has partially
181 completed—a rulemaking under a similar statute, the BGEPA, which authorizes incidental takes
182 of bald and golden eagles in certain circumstances. As discussed in Section II(C)(2), the FWS
183 believes it has the authority to do the same under the MBTA.

184 The MBTA is enforced by the FWS through the U.S. Department of Justice (“DOJ”) and
185 there is no private cause of action enabling others to bring suit to enforce this law.⁴⁵ The MBTA
186 imposes only criminal penalties on those who violate the MBTA. Under the felony provision,
187 anyone who “shall knowingly (1) take by any manner . . . any protected bird with intent to sell,
188 barter or offer to barter such bird, or (2) sell, offer for sale, barter or offer to barter, any protected
189 bird” is subject to a felony violation and may be fined up to \$250,000 (\$500,000 for
190 organizations) and/or imprisoned for up to two years. All other takes under the MBTA, (other
191 than by placing or directing the placement of bait for a protected bird, which also is a felony),
192 regardless of intent, are subject to the misdemeanor provision of the MBTA, under which a
193 violator may be fined up to \$15,000 and/or imprisoned for up to six months.⁴⁶ The misdemeanor
194 provision is likely to be the most applicable provision in a wind energy context.

195 To date no actions under the MBTA or the BGEPA have been brought against the
196 developer of a wind energy project. The FWS has stated that it carries out its mission to protect
197 migratory birds through investigations and enforcement and by fostering relationships with
198 individuals, companies, and industries that have programs to minimize their impacts on
199 migratory birds.⁴⁷ Because, the FWS has not promulgated regulations expressly providing for
200 issuance of permits for unintentional take, the FWS exercises enforcement discretion and focuses
201 on those individuals, companies, or agencies that take migratory birds without regard for their
202 actions and the law, especially when conservation measures have been developed and not
203 implemented.⁴⁸ Although two authors recently questioned whether the exercise of enforcement
204 discretion and lack of enforcement by the FWS and State agencies effectively results in an
205 exemption from the MBTA for wind energy developers,⁴⁹ it is possible that in the appropriate
206 circumstances the FWS would pursue an action against a wind energy developer under the
207 MBTA or the BGEPA.⁵⁰

208 **C. Bald and Golden Eagle Protection Act**

209 The BGEPA provides specific protections to bald and golden eagles. Under the BGEPA,
210 it generally is unlawful for anyone to “take, possess, sell, purchase, barter, offer to sell, purchase
211 or barter, transport, export or import, at any time or in any manner, any bald eagle . . . or any
212 golden eagle, alive or dead, or any part, nest, or egg thereof . . .”⁵¹ As defined in the BGEPA,

213 “take” for this purpose includes “pursue, shoot, shoot at, poison, wound, kill, capture, trap,
214 collect, molest or disturb.”⁵² Recently, the FWS clarified the meaning of the word “disturb” in
215 the BGEPA in anticipation of the ultimate removal of the bald eagle from the list of threatened
216 species and thus loss of protection under the ESA.⁵³ Under the new regulation, “disturb” means

217 to agitate or bother a bald or golden eagle to a degree that causes,
218 or is likely to cause, based on the best scientific information
219 available, (1) injury to an eagle, (2) a decrease in its productivity,
220 by substantially interfering with normal breeding, feeding, or
221 sheltering behavior, or (3) nest abandonment, by substantially
222 interfering with normal breeding, feeding, or sheltering behavior.⁵⁴

223 Although there are differences in the meaning of these terms, as noted by the FWS, the term
224 “disturb” in the BGEPA significantly overlaps with the terms “harm” and “harass” in the ESA.⁵⁵
225 At the same time as it adopted the final definition of “disturb,” the FWS proposed to amend the
226 regulatory definition of “take” as it applies to eagles to add the word “destroy” and thereby make
227 it consistent with the statutory prohibition on unpermitted eagle nest destruction. An
228 unauthorized “take” of any one of the protected eagles constitutes a violation of the BGEPA and
229 MBTA. By delegation of authority from the Secretary, the FWS administers the BGEPA.

230 The United States Supreme Court has described BGEPA as both “exhaustive” and
231 “consistently framed to encompass a full catalog of prohibited acts.”⁵⁶ Relying on this language,
232 one court has held that the BGEPA prohibits electrocutions of eagles.⁵⁷ Such a decision suggests
233 that the “taking” of a bald or golden eagle by a wind turbine could be prosecutable under the
234 BGEPA.

235 Unlike the ESA—but like the MBTA—the definition of “take” in the BGEPA does not
236 expressly include impacts arising from habitat modification.⁵⁸

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

240 taking, possession, and transportation of [bald and golden
241 eagles] . . . for the scientific or exhibition purposes of public
242 museums, scientific societies, and zoological parks, or for the
243 religious purposes of Indian tribes, or . . . for the protection of
244 wildlife or agricultural or other interests in any particular locality
245 [provided such permits are] compatible with the preservation of the
246 bald eagle or the golden eagle.⁵⁹

247 Unlike the ESA but like the MBTA, the BGEPA does not contain an express incidental take
248 permit program. In connection with the removal of the bald eagle as a listed species under the
249 ESA, however, the FWS recently adopted regulations which authorize incidental takes of eagles
250 which are comparable to those authorized under the ESA, and has indicated that it intends to
251 adopt an additional regulation in this regard in the near future.⁶⁰

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

256 sell, purchase, barter . . . transport . . . at any time or in any manner any [eagle] . . . or any part,
257 nest, or egg thereof.” If convicted of a criminal violation under the BGEPA, the first offense is a
258 misdemeanor for which the violator may be fined up to \$100,000 (\$200,000 for an organization)
259 and/or imprisoned for up to one year, and in the case of a second or subsequent conviction for
260 such a violation the offense becomes a felony for which the violator may be fined up to \$250,000
261 (\$500,000 for an organization) and/or imprisoned up to two years. Civil penalties may be
262 imposed regardless of intent up to a maximum of \$5,000 for each violation.

263 **D. National Environmental Policy Act**

264 NEPA and its implementing rules require an environmental impact statement (“EIS”)
265 assessing alternatives, before any discretionary major Federal agency action with significant
266 environmental consequences can be adopted.⁶¹ Additionally, NEPA rules require an
267 environmental assessment (“EA”) before a Federal agency can take many actions that do not rise
268 to the level of environmental significance requiring an EIS.⁶² NEPA is an information-
269 disclosure law that is procedural only, and does not limit the agency’s substantive range of
270 decision.⁶³ But NEPA compliance process, by obtaining and disclosing environmental impact
271 information and allowing public comment, often affects the substance of the agency’s decision.
272 If a wind power project needs any federal permit (such as a Clean Water Act Section 404 permit,
273 a permit for use of federal lands, or an incidental take permit), this can trigger NEPA analysis
274 duties. NEPA can be useful in analyzing the impacts of a proposed wind power project, and
275 potential alternatives, on species and habitat, and in providing mitigation recommendations.
276 That is, NEPA can add to the analytic rigor in considering wind power impacts.

277 **E. Laws Relating to Native Americans**

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

292 **II. METHODS FOR COMPLIANCE OR AVOIDANCE/REDUCTION** 293 **OF LIABILITY FOR NON-COMPLIANCE**

294 The Committee charged the Legal Subcommittee with identifying all existing methods
295 for compliance and avoidance or reduction of liability for noncompliance with these four
296 statutes. For each of the primary wildlife statutes identified in the Committee’s Charter—the
297 ESA, MBTA, and the BGEPA—we have identified all potentially relevant statutory, regulatory,
298 judicial, and informal techniques.

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

300 Except in the extremely rare circumstance where a specially convened committee of
301 cabinet members excuses compliance,⁶⁴ there is no method for avoiding compliance with
302 Section 7(a)(2), although typically only the applicable Federal agencies are liable for
303 noncompliance. As noted above, Section 7(a)(2) addresses Federal agency actions, but private
304 landowners or project proponents frequently encounter Section 7(a)(2)'s requirements in the
305 context of federal permitting or licensing actions, particularly "wetland permits" issued under
306 Section 404 of the Clean Water Act.

307 Regulations establish three different processes for compliance with Section 7(a)(2) based
308 on the degree of impact the Federal agency action may have on listed species or designated
309 critical habitat. If the Federal agency finds that the proposed agency action (in the case of
310 federal permits, both the permit issuance and the private land use or project authorized by the
311 permit) will not affect a listed species or critical habitat, the action may proceed without
312 involvement of the FWS in a consultation process.⁶⁵ Otherwise, the Federal agency typically
313 prepares a biological assessment to determine the effects of the proposed agency action. If the
314 Federal agency finds that the action is "not likely to adversely affect" a listed species or critical
315 habitat, the action may proceed if the FWS concurs in writing (termed "informal
316 consultation").⁶⁶ If the Federal agency determines that the action is likely to adversely affect a
317 listed species or critical habitat (or the FWS does not concur in the agency's not-likely-to-
318 adversely-affect determination), the Federal agency and the FWS engage in what is termed
319 "formal consultation" as prescribed in Section 7(b).⁶⁷ The formal consultation process begins
320 with submission of the biological assessment to the FWS and proceeds under statutory and
321 regulatory deadlines.⁶⁸

322 The initial product of formal consultation is a biological opinion issued by the FWS. If
323 the FWS finds that the proposed action passes the Section 7(a)(2) standards (jeopardy to the
324 species or adverse modification of critical habitat is not likely), it will so advise the Federal
325 agency in the biological opinion and then typically suggest "reasonable and prudent measures" to
326 minimize any impacts of "takes" that might occur. Unlike the voluntary mechanisms for
327 avoidance of take liability discussed below, the FWS is limited under Section 7(a)(2) to
328 proposing measures to "minimize" take impacts and may not propose measures to mitigate for
329 those impacts.⁶⁹ If the FWS finds instead that the action would result in jeopardy or adverse
330 modification, it will suggest to the Federal agency "reasonable and prudent alternatives" to the
331 proposed agency action.⁷⁰ FWS regulations limit the degree to which the reasonable and
332 prudent measures or alternatives may alter the agency action.

333 Federal agencies engaged in formal consultation are not required to follow the biological
334 opinions and reasonable and prudent measures or alternatives;⁷¹ however, the agencies seldom
335 depart significantly from them. If the Federal agencies incorporate reasonable and prudent
336 measures or a reasonable and prudent alternative in permits, licenses, and the like, then the
337 authorized parties and certain other affected parties (e.g., the owner of land leased to a permitted
338 project) are also covered (including, as discussed below, granted immunity from certain possible
339 take of listed species).⁷²

340 Regulations require reinitiation of the Section 7(a)(2) process for a Federal agency action
341 in certain circumstances.⁷³ The principal circumstances calling for reinitiation occur: (1) when

342 the scientific understanding of the action’s impacts on listed species or critical habitat covered by
343 the original Section 7(a)(2) process changes significantly and results in harsher impacts than
344 those analyzed in that process; (2) when a new species is listed or new critical habitat is
345 designated that would be impacted by the agency action; or (3) when (as described in
346 Section II(B)(1) below) the amount of incidental take allowed by an incidental take statement is
347 exceeded. The reinitiation of the Section 7(a)(2) process may lead to the FWS proposing new
348 reasonable and prudent measures or alternatives for the proposed agency action.

349 **B. Avoidance of Liability for Noncompliance with the Section 9 “Take”**
350 **Prohibition in the Endangered Species Act**

351 The ESA has a well-developed array of techniques for avoidance of liability for certain
352 types of “take” otherwise prohibited under Section 9. As the Section 9 standard is violated if an
353 agency action or private land use or project takes even a single member of a listed wildlife
354 species, it is quite stringent. Because the standard applies to all persons, it is also quite pervasive.
355 In 1982 Congress enacted amendments to the ESA that established the basis for these take-
356 liability-avoidance techniques. In so doing, Congress recognized that few agency actions or
357 private land uses or projects that occur in the vicinity of a listed wildlife species could be
358 designed to avoid entirely the possibility of take of even a single member of that species. The
359 FWS has developed several additional techniques by regulation or practice. These statutory
360 provisions, regulations, and practices apply to takes that are “incidental” to an otherwise lawful
361 activity—commonly referred to as “incidental take.”⁷⁴ In the following ten subsections, the
362 subcommittee has described one technique under Section 7(b)(4) for avoiding take liability in
363 connection with Federal agency actions and multiple techniques under Sections 10(a)(1)(A) and
364 (B) for avoiding take liability for private land uses or projects.

365 **1. Incidental Take Statements**

366 The single technique for take liability avoidance for Federal agency actions under
367 Section 7 is limited to those actions that undergo formal consultation (*i.e.*, actions for which a no
368 effect or “not likely to adversely affect” listed species or critical habitat finding cannot be made).
369 Section 7(b)(4) provides that, if the biological opinion issued by the FWS concludes that the
370 proposed Federal agency action complies with the Section 7(a)(2) jeopardy and critical habitat
371 standards, the FWS will issue an incidental take statement (“ITS”) to the agency.⁷⁵ The ITS will
372 allow a specified amount of incidental take (stated either in number of species members or in
373 acreage or other measurement of occupied or suitable habitat) over a specified term, if the
374 Federal agency complies with the reasonable and prudent measures recommended by the FWS.
375 Should the biological opinion find that the Federal agency action would violate either the
376 jeopardy standard or the critical habitat standard, the FWS may still issue an ITS if the agency
377 adopts a reasonable and prudent alternative offered by the FWS. In the case of federal permits,
378 licenses, or other authorizations, the ITS will grant immunity for the specified incidental takes
379 not only to the applicable Federal agencies, but also to the permittees, licensees, and certain other
380 associated parties (*e.g.*, the owner of land leased to the permitted or licensed project).⁷⁶

381 The principal differences between the ITS for Federal agency actions under
382 Section 7(b)(4) and the permits and agreements with private landowners or project proponents
383 under Section 10(a)(1)(A) and (B) of the ESA described in the next sections below, are that:
384 (i) the latter techniques provide critical “No-Surprises” assurances (also described below) and the

385 ITS does not; (ii) the ITS has statutory and regulatory deadlines and the latter techniques do not;
386 and (iii) the Federal agencies assume more of the costs in the formal consultation process that
387 produces the ITS (even when private land or projects are involved) than in the latter techniques.

388 **2. Habitat Conservation Plans and Incidental Take Permits**

389 Section 10(a)(1)(B) of the ESA⁷⁷ authorizes the Secretary to issue an Incidental Take
390 Permit (“ITP”) that will allow a non-federal landowner to engage in otherwise lawful activity
391 covered by a Habitat Conservation Plan (“HCP”), even if it results in the incidental taking of a
392 listed species. The ITP will allow a specified amount of incidental take (stated either in number
393 of species members or in acreage or other measurement of occupied or suitable habitat) over a
394 specified term, if the permittee continues to comply with the ITP. The incidental taking of a
395 listed species must be covered by the HCP and identified in the ITP. An HCP must be included
396 in every application for an ITP.

397 In approving an ITP and HCP, the FWS or NMFS, as applicable, must find that the
398 taking will be incidental, that the applicant will minimize and mitigate the impacts of the taking,
399 that the applicant will ensure proper funding for the plan and that the taking will not appreciably
400 reduce the likelihood of the survival and recovery of the species in the wild.⁷⁸ The FWS and the
401 NMFS have published comprehensive guidance on HCPs and the incidental take permitting
402 process in the form of a detailed handbook, including an addendum which sets forth a five-point
403 policy that provides clarifying guidance of these agencies for those applying for an incidental
404 take permit under Section 10 of the ESA⁷⁹ The so-called “No-Surprises” rule allows a permit
405 holder to negotiate assurances that additional mitigation in the form of land, property interests, or
406 financial compensation will not be required beyond the level of mitigation provided for under the
407 HCP, regardless of a change in circumstance during the period covered by the permit.⁸⁰
408 However, the trade off for these regulatory assurances is that the ITP/HCP application process is
409 lengthy. Because granting a permit is a final Federal agency action subject to the Section 7
410 consultation requirement, the FWS must consult with itself.⁸¹ This may add significant time to
411 the period it takes for a landowner to submit a HCP and obtain an ITP.

412 **3. General Conservation Plans**

413 A general conservation plan (“GCP”) allows the FWS to develop a Section 10(a)(1)(B)
414 conservation plan suitable for the needs of a local area, complete all NEPA requirements for a
415 Section 10(a)(1)(B) ITP issuance, and then issue individual permits to landowners who wish to
416 apply for an ITP and demonstrate compliance with the terms and conditions of the GCP. The
417 development of a GCP is undertaken by the FWS, rather than an individual applicant, and is
418 ideally based upon a conservation strategy for the species and addresses the needs of the local
419 community. Basically, the GCP has everything that is contained in a traditional HCP, including
420 No-Surprises assurances, except the names of the applicant and future permittees. The GCP is
421 not a substitute for a regional multiple action HCP which a county or other jurisdiction may use.
422 Such a large-scale effort would be better developed using the traditional HCP approach because
423 of the complexity of fully analyzing all activities under a regional multiple action HCP.⁸²

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425

426 **4. Safe Harbor Agreements**

427 A safe harbor agreement is a voluntary agreement in which a non-federal landowner
428 works with the FWS to develop management actions that will contribute to the recovery of a
429 listed species for an agreed-upon time period.⁸³ Management actions can include habitat
430 maintenance and reintroduction of listed species onto the land. In exchange for implementing
431 these management actions, the FWS provides regulatory assurance to the landowner by issuing
432 an enhancement of survival permit pursuant to Section 10(a)(1)(A) of the ESA.⁸⁴ This permit
433 provides that property that is part of a safe harbor agreement can be altered and returned to
434 agreed-upon baseline conditions at the end of the agreement time period, even if it involves the
435 taking of listed species.⁸⁵ This permit also may include No-Surprises assurances similar to those
436 discussed under II.B.2.⁸⁶

437 **5. Candidate Conservation Agreements**

438 A candidate conservation agreement is a formal agreement between a non-federal
439 landowner and the FWS that addresses the conservation needs of candidate or at-risk species.⁸⁷
440 The goal of candidate conservation agreements is to prevent the listing of these species. A non-
441 federal landowner that enters into a candidate conservation agreement with the FWS typically
442 receives certain regulatory assurances.⁸⁸ In the case of a candidate conservation agreement with
443 assurances, the agreement provides incentives for the non-federal landowner to voluntarily
444 implement conservation measures for candidate or at-risk species. In exchange for implementing
445 conservation measures that will remove or reduce the threat to candidate or at-risk species, the
446 FWS provides regulatory assurances (similar to the No-Surprises assurances) to the landowner
447 by issuing an enhancement of survival permit pursuant to Section 10(a)(1)(A) of the ESA.⁸⁹
448 This permit provides that no additional conservation measures will be required of the landowner
449 if the species becomes listed in the future, even if it involves the taking of listed species.⁹⁰ In
450 addition, this permit allows permit holders to take species and modify habitat conditions to those
451 baseline conditions agreed upon and specified in the agreement.⁹¹

452 **6. Conservation Agreements and Memoranda of Understanding**

453 A few FWS Regions have experimented with a basic contract between the FWS and a
454 landowner—called a “conservation agreement” or memorandum of understanding (“MOU”)—
455 which describes land use activities the landowner intends to take and methods the landowner will
456 use to provide protection for potentially affected listed species. The FWS’s signing of a
457 conservation agreement or MOU constitutes an agency action which permits the FWS to issue a
458 biological opinion and ITS which provides incidental take immunity to the landowner as well as
459 the FWS.⁹² This technique to secure incidental take immunity was found valid by the Ninth
460 Circuit Court of Appeals in a citizen suit challenge to the Plum Creek conservation agreement.⁹³
461 Recently, as a matter of practice, Region 8 of the FWS has settled on the “net conservation
462 benefit” standard for conservation agreements identical to the standard applied by rule to Safe
463 Harbor Agreements.⁹⁴ This technique benefits the landowner by requiring significantly less time
464 and fewer procedural steps to secure the incidental take immunity than does an ITP, but it lacks
465 the No-Surprises assurances landowners obtain with an ITP.

466 **7. Conservation Banking**

467 Conservation banks are lands that are permanently protected and managed for listed or at-
468 risk species, with the concept having been developed from the concept of wetland mitigation
469 banking.⁹⁵ The FWS approves these banks to sell mitigation credits to developers who need to
470 offset adverse environmental impacts elsewhere. Thus, conservation banking utilizes traditional
471 concepts of supply and demand to facilitate the buying and selling of mitigation credits. By
472 selling mitigation credits, landowners can generate income, preserve their property and
473 participate in conservation management plans. Developers who purchase these habitat or species
474 mitigation credits are able to offset their negative environmental impacts in one simple
475 transaction.

476 One instance in which conservation banking can be utilized is to assist in the obtainment
477 of incidental take permits pursuant to Section 10 of the ESA. In applying for an incidental take
478 permit, a landowner must submit an HCP that reports actions that will be taken to minimize and
479 mitigate any adverse impacts on listed species. This mitigation may involve the purchase of
480 mitigation credits from a conservation bank.⁹⁶

481 **8. Section 6 State Cooperative Agreements**

482 Section 6 of the ESA provides for substantial federal funding of State conservation
483 programs benefiting endangered fish, wildlife and plants. Section 6(c) of the ESA authorizes the
484 Secretary to enter into a cooperative agreement with any State or territory which establishes and
485 maintains an adequate and active program for the conservation of endangered species and
486 threatened species.⁹⁷ States with eligible cooperative agreements are eligible to receive funds
487 from the Cooperative Endangered Species Conservation Fund (“CESCF”) established pursuant
488 to Section 6 of the ESA up to specified limits.

489 The “adequate and active programs” established by the States to secure funding under the
490 CESCF are usually skeletal in substance and do not contain provisions for the protection of any
491 specific listed species. These State programs provide no basis for securing take liability
492 immunity. However, Section 6(c) does provide for cooperative agreements with States when
493 “plans are included under which immediate attention will be given to those resident species of
494 fish and wildlife [and, in a similar provision, for “resident species of plants] which are
495 determined by the Secretary [of the Interior] or the State agency to be endangered or threatened
496 and which the Secretary and the State agency agree are most urgently in need of conservation
497 programs.”⁹⁸ If such a species-specific cooperative agreement is developed, the State, and
498 private landowners or project proponents who enroll in the program, can secure incidental take
499 immunity through an incidental take statement issued by the FWS. The FWS’s decision to
500 approve the species-specific cooperative agreement is a Federal agency action that is subject to
501 the Section 7(a)(2) process; if that process includes formal consultation, the FWS issues an ITS.
502 For example, the State of Idaho and the Federal government (the FWS and the NMFS) are
503 working on a cooperative agreement specific to listed salmonids in the Snake River basin in
504 which irrigators and private timberland owners could voluntarily enroll and obtain certificates of
505 inclusion that would secure for them the immunity of the ITS if they abide by the agreement’s
506 salmon protection provisions.

507 **9. Section 4(d) Rules**

508 Section 4(d) of the ESA gives the Secretary authority to issue regulations to conserve
509 threatened species or prohibit the taking of threatened species. As previously mentioned, this
510 authority has been delegated to the FWS and NMFS. While the FWS has adopted a general
511 blanket rule that extends the Section 9(a)(1) take prohibition to all threatened wildlife species, it
512 has also retained the authority to remove this general prohibition for certain threatened species
513 on a species-specific basis.⁹⁹ Thus, it is within the jurisdiction of the FWS to provide
514 exemptions for conservation efforts, for example, by providing species-specific take protection
515 for landowners who pursue certain habitat conservation measures. However, a 4(d) rule is not
516 easy to obtain, and it is generally very specific. Moreover, a 4(d) rule only applies to threatened
517 species, as noted above.

518 **10. Bird Letters**

519 Landowners are encouraged to engage in open communication with the FWS on how to
520 avoid a Section 9 violation, and the FWS has a history of providing advice and recommendations
521 to landowners.¹⁰⁰ Historically, this advice has been rendered in the form of letters providing
522 guidelines to avoid take of listed wildlife species or simple declarations of the FWS that it
523 “believes” the landowner’s property would not provide suitable habitat for particular listed
524 species or that the landowner’s activity would not likely result in a take of listed wildlife species.
525 Although these so-called “bird letters” do not as a legal matter preclude future liability, the
526 expectation is that the government will use prosecutorial discretion regarding landowners who
527 have cooperated with the FWS in avoiding the taking of a listed species.¹⁰¹

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

530 **1. Bird Letters and Avian Protection Plans**

531 Like the ESA bird letters, MBTA bird letters are generally enforcement discretion
532 documents that outline the FWS’s willingness not to recommend prosecution for MBTA takings
533 if a project proponent agrees to follow certain “best management practices.”¹⁰² This
534 enforcement discretion approach can take several forms, including project-specific letters,
535 general guidance, and the proffer of enforcement/prosecutorial discretion in avian protection
536 plans. In particular, it has been used for avian protection plans for power lines prepared by
537 electric utilities and acknowledged by the FWS.¹⁰³

538 **2. Incidental Take Authorizations Pursuant to a Possible New Regulation**

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

543 Pursuant to Section 704, the FWS has promulgated a series of regulations that permits the
544 taking of migratory birds in many circumstances. For example, as discussed under Section I(B)
545 above, current regulations authorize the issuance of permits and season limitations for migratory
546 bird hunting, as well as for a number of other activities that would otherwise be proscribed by the

547 MBTA, such as falconry, raptor propagation, scientific collecting, take of depredating birds,
548 taxidermy, take of overabundant birds, and waterfowl sale and disposal. Special purpose
549 permits, for activities outside the scope of the specific permits, are also available.¹⁰⁴

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

557 **3. Special Purpose Permits**

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

561 FWS regulations provide for migratory bird permits for special purpose activities which
562 are otherwise outside the scope of standard permits available for such activities as falconry,
563 raptor propagation, scientific collecting, taxidermy, control of depredating birds, control of
564 overabundant bird populations, etc.¹⁰⁵ According to 50 C.F.R. § 21.27, “permits may be issued
565 for special purpose activities related to migratory birds, their parts, nests, or eggs, which are
566 otherwise outside the scope of the standard form permits of this part.” A special use permit may
567 be issued to an applicant who submits a written application and “makes a sufficient showing of
568 benefit to the migratory bird resource, important research reasons, reasons of human concern for
569 individual birds, or other compelling justification.”¹⁰⁶

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

578 **4. FWS Interagency MOUs**

579 Pursuant to Executive Order 13186,¹⁰⁷ FWS has worked with over twenty Federal
580 agencies over the last few years in developing Memoranda of Understanding (“MOUs”) (add
581 footnote to executive order) to deal with possible violations of the MBTA by addressing
582 migratory bird conservation in a proactive manner and to minimize take of migratory birds.
583 There are currently two official MOUs between the FWS and Federal agencies, and the FWS
584 hopes to enter into approximately eighteen more in the future. An MOU does not authorize a
585 take, but it can establish a good faith effort of interagency communication, give agencies more
586 certainty in their practices, and aid conservation in the long term. To date, the FWS has not
587 entered into this type of MOU with the private sector.
588

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

591 **1. Special and Incidental Take Permits**

592 As discussed under Section I(C) above, the Secretary may authorize otherwise prohibited
593 activities by regulation and the Secretary recently proposed a permit program under the
594 BGEPA.¹⁰⁸

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 16 U.S.C. § 1531(b).

⁶ *Id.* § 1536(a)(2).

⁷ 50 C.F.R. § 402.02.

⁸ *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 278 F.3d 1059, 1069–72 (9th Cir. 2004); *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001).

⁹ 16 U.S.C. § 1532(5).

¹⁰ *Id.* § 1532(3).

¹¹ Critical habitat has been designated for only thirty-eight percent of listed domestic species.

¹² *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).

¹³ 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.”

¹⁴ 16 U.S.C. § 1538.

¹⁵ *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).

¹⁶ 16 U.S.C. § 1532(19).

¹⁷ 50 C.F.R. § 17.3.

¹⁸ *Id.*

¹⁹ *Id.* § 17.3 (2002). See 46 Fed. Reg. 54,750 (1981) (“To be subject to Section 9, the modification or degradation must be *significant*”) (emphasis in original).

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

²¹ See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 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.”).

²² See *Babbitt*, 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).

²³ 46 Fed. Reg. 54,749 (“[S]ection 9’s threshold does focus on individual members of a protected species.”).

²⁴ See 50 C.F.R. § 17.3.

²⁵ 40 Fed. Reg. 44,413 (1975).

²⁶ 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 of the Interior 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 Services 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).

²⁷ 16 U.S.C. §§ 1540(a) and (b).

²⁸ *Id.* § 1540(e)(6).

²⁹ *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. *See id.* § 1540(g)(4).

³⁰ *Id.* §§ 1540(a) and (b) (“Any person who knowingly violates . . .”).

³¹ *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).

³² 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.

³³ For a list of the migratory birds protected by the MBTA, *see* 50 C.F.R. § 10.13

³⁴ 16 U.S.C. § 703(a).

³⁵ 50 C.F.R. § 10.12.

³⁶ 952 F. 2d 297 (9th Cir. 1991).

³⁷ *Id.* at 302.

³⁸ *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).

³⁹ *See* Blaydes and Firestone, *Wind Power, Wildlife and the Migratory Bird Treaty Act: A Way Forward*, accepted for publication, 38(4) *Environmental Law* ____ (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 p. 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 ENV'T L SAFETY* 46–56 (2002) (noting the unforeseen impact of selenium-laden wastewater in artificial wetlands on migratory birds).

⁴⁰ 45 F. Supp. 2d 1070 (D. Co. 1999).

⁴¹ *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 the “driving an automobile, piloting an airplane, maintaining an office building, or living in a residential dwelling with a picture window” *Id.* at 1085.

⁴² 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).

⁴³ 16 U.S.C. § 704.

⁴⁴ *See* 50 C.F.R. Parts 13, 20 and 21.

⁴⁵ 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).

⁴⁶ 16 U.S.C. §§ 707(a) and (b).

⁴⁷ *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 page 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).

⁴⁸ *Id.*

⁴⁹ Blaydes and Firestone, *supra* note 39.

⁵⁰ 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 waterbody 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 caselaw 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 nonliability 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.

⁵¹ 16 U.S.C. § 668(a).

⁵² *Id.* § 668c.

⁵³ *See* Protection of Bald Eagles; Definition of “Disturb,” 72 Fed. Reg. 31,132 (2007).

⁵⁴ See 50 C.F.R. § 22.3.

⁵⁵ See “Authorizations under the Bald and Golden Eagle Protection Act for Take of Eagles,” 72 Fed. Reg. 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.

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

⁵⁷ See *Moon Lake*, 45 F. Supp. 2d at 1086–88.

⁵⁸ 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’s 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.” Protection of Bald Eagles; Definition of “Disturb,” 72 Fed. Reg. 31,132, 31,134 (2007).

⁵⁹ 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.

⁶⁰ Under new paragraph (a) to 50 C.F.R. § 22.11, the FWS provides take authorization under the BGEPA to existing holders of incidental take permits under Section 10 of the ESA where the bald eagle is covered in a habitat conservation plan or the golden eagle is covered as a non-listed species, 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 later this year 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. 29075 (2008). For a description of proposed Section 22.26, see *Authorizations Under the Bald and Golden Eagle Protection Act for Take of Eagles*, 72 Fed. Reg. 31,141 (2007). 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. 72 Fed. Reg. 31,141 (2007).

⁶¹ 40 U.S.C. § 4332(2)(C); 40 C.F.R. pts. 1500–1508.

⁶² 40 C.F.R. §§ 1501.3, 1508.9.

⁶³ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–53 (1989).

⁶⁴ *See* 16 U.S.C. § 1536(a)(2) and (e)–(h).

⁶⁵ 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.

⁶⁶ *Id.* § 402.13.

⁶⁷ 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

⁶⁸ *See* 16 U.S.C. § 1536(b)(1); 50 C.F.R. 402.14(e).

⁶⁹ *See* 16 U.S.C. § 1536(b)(4); *Endangered Species Consultation Handbook – Procedures for Conducting Consultation Under Section 7 of the Endangered Species Act* at 4-50 (FWS 1998) (“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)).

⁷⁰ *See* 50 C.F.R. § 402.02 (definitions of “reasonable and prudent alternatives” and “reasonable and prudent measures”).

⁷¹ *Bennett v. Spear*, 520 U.S. 154, 169–70, 177–78 (1997).

⁷² *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).

⁷³ 50 C.F.R. § 402.16.

⁷⁴ 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”).

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

⁷⁶ 50 C.F.R. § 402.14(i); *Ramsey v. Kantor*, 96 F.3d 434, 440–42 (9th Cir. 1996).

⁷⁷ 16 U.S.C. § 1539(a)(1)(B).

⁷⁸ *Id.* § 1539(a)(2)(B).

⁷⁹ 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).

⁸⁰ 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).

⁸¹ 16 U.S.C. § 1536.

⁸² Hall, Dale, FWS Memo, “Final General Conservation Plan Policy,” October 5, 2007.

⁸³ *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>.

⁸⁴ 16 U.S.C. § 1539(a)(1)(A).

⁸⁵ 64 Fed. Reg. at 32,717–26 (1999).

⁸⁶ 43 C.F.R. §§ 17.22(c)(5) and 17.32(c)(5).

⁸⁷ *See generally* Announcement of Final Policy for Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,726 (999); 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).

⁸⁸ For privacy and other reasons a non-federal landowner may not request regulatory assurances.

⁸⁹ 16 U.S.C. § 1539(a)(1)(A).

⁹⁰ 64 Fed. Reg. at 32,726–36 (1999).

⁹¹ *Id.*

⁹² 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.

⁹³ *Friends of the Wild Swan v. Babbitt*, 168 F.3d 498 (table) (9th Cir. 1999), 1999 WL 38606 (unpublished opinion).

⁹⁴ 50 C.F.R. §§ 17.22(c)(2)(ii) and 17.32(c)(2)(ii). “[C]onservation 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.”

⁹⁵ *See generally*, Guidance for the Establishment, Use and Operation of Conservation Banks, 60 Fed. Reg. 58605 (November 28, 1995); FWS—Conservation Banking: Incentives for Stewardship, available at http://www.fws.gov/endangered/factsheets/banking_7_05.pdf.

⁹⁶ *Id.*

⁹⁷ *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.

⁹⁸ 16 U.S.C. § 1535(c).

⁹⁹ 50 C.F.R. § 17.31.

¹⁰⁰ *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).

¹⁰¹ As noted above, the FWS similarly has used prosecutorial discretion in its enforcement of the MBTA. *See, supra*, note 47 and accompanying text.

¹⁰² *See id.*

¹⁰³ *See* MOU between the FWS and Edison Electric Institute regarding the use and development of avian protection plans.

¹⁰⁴ 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).

¹⁰⁵ 50 C.F.R. Part 21

¹⁰⁶ *Id.*

¹⁰⁷ Exec. Order No. 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, 66 Fed. Reg. 3853 (2001).

¹⁰⁸ *See, supra*, note 68, and accompanying text.