WIND ENERGY DEVELOPMENT AND THE PROTECTION OF MIGRATORY BIRDS

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Wind power is the world's most rapidly growing source of electricity, and although growth tends to be slower in the United States, wind generating capacity has been steadily increasing. Despite the fact that wind energy projects have for decades been touted as environmentally preferable alternatives to traditional energy sources such as coal, the wind energy industry is currently grappling with its own environmental issues, particularly those related to impacts on migratory birds, of which there are over a thousand species. *See* 50 C.F.R. § 10.13.

Unlike generating power from coal, operating a wind facility does not involve the wholesale demolition of mountaintop habitats or emitting pollutants into the atmosphere that can kill large numbers of migratory birds. It does, however, involve very direct and sometimes spectacular impacts to avian species as birds fly headlong into the spinning turbines. Some land-based wind farms have been responsible for ongoing fatalities of protected avian species, most conspicuously the wind farm at Altamont Pass in California, which has been dubbed by critics as the "condor cuisinart."

The simple fact is that all wind energy projects will very likely kill or "take" a migratory bird at some point. Even in the offshore environment, where the concentration of avian species decreases dramatically, it is virtually certain that any wind project will result in at least some direct, albeit unintentional deaths of migratory birds. *See*, *e.g.*, Cape Wind Energy Project Environmental Assessment, OCS EIS/EA BOEMRE 2011-024, at 18–20 (Apr. 18, 2011), *available at* http://www.boem.gov/uploadedFiles/BOEM/Renewable_Energy_Program/Studies/EA_FONNSI_4_2011.pdf.

In the United States, this inevitably brings wind energy developers and, in some cases, government agencies issuing licenses to wind developers into direct conflict with the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703–12, which makes it a crime to "take" migratory birds without authorization from the secretary of the interior. Unfortunately, the nature and language of this unusual statute, coupled with the piecemeal approach the government has taken to its enforcement, have conspired to create an unsettled area of law that has frustrated consistent application for almost a century. Unlike those practicing in neighboring Canada, with whom the United States shares the obligation to protect migratory birds, U.S. practitioners face a daunting task in advising their wind energy clients on the nature and degree of legal risk they face under the wide-ranging interpretations of the MBTA.

The Migratory Bird Treaty Act and Associated Treaties

One of the oldest natural conservation laws, the MBTA was originally enacted in 1918 for the purpose of implementing a 1916 bilateral treaty between the United States and Great Britain, which was acting for Canada, in the attempt to protect migratory birds from unregulated hunting. *Missouri v. Holland*, 252 U.S. 416 (1920). (The U.S. Supreme Court recently granted a writ of certiorari in the case of *U.S. v. Bond*, 681 F.3d 149 (3d Cir. 2012), which challenges the basis of the Court's 1920 decision to uphold the constitutionality of the MBTA in *Holland*. *Bond v. U.S.*, 2013 U.S. LEXIS 914 (U.S. Jan. 18, 2013); *Bond v. U.S.*, 2012 U.S. Briefs 80504, 2012 U.S. S. Ct. Briefs LEXIS 3855 (U.S. Aug. 31, 2012) (challenging the notion that a treaty can expand the legislative power of Congress).

To that end, the signatories, "being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless, have resolved to adopt some uniform system of protection which shall effectively accomplish such objects." Convention between the United States and Great Britain (for Canada) for the Protection of Migratory Birds; 39 Stat. 1702; TS 628 (1916) (Canada Convention). Canada's companion statute is the Migratory Birds Convention Act, S.C. 1994, c.22 (1917) (MBCA), which focuses primarily on the protection of bird nests and eggs, as well as unregulated hunting and unintentional take of birds with chemicals.

The MBTA was subsequently amended to implement three additional bilateral conventions between the United States and neighboring countries; the Convention Between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals, 50 Stat. 311, TS 912 (1936); Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, 25 UST 3329, TIAS 7990 (1972); and the Convention Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, 92 Stat. 3110, TIAS 9073 (1976).

Both the MBTA and the MBCA are criminal statutes, subjecting violators to prosecution for misdemeanors or even felonies. The fundamental prohibition in the MBTA makes it a crime "to pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill . . . [a]t any time by any means or in any manner" any migratory bird protected by the treaties except as permitted by regulations promulgated by the secretary of the interior. 16 U.S.C. §§ 703(a), 704(a). The MBCA is much less prescriptive, making a crime the taking of the eggs or nests of migratory birds, as well as hunting or incidentally killing migratory birds with chemicals without a permit.

Under the MBTA, the secretary of the interior is authorized to promulgate rules that allow for exceptions to the MBTA's expansive prohibitions. Specifically, the Secretary is directed to determine

> when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow for the hunting, taking, capturing, [and] killing . . . [of migratory birds] . . . and to adopt suitable regulations permitting and governing the same. . . .

16 U.S.C. § 704(a); *see also* 16 U.S.C. § 712(2) (authorizing the secretary to promulgate regulations "necessary to implement the provisions of the convention[s]" with the UK, Mexico, Japan, and the U.S.S.R.).

The secretary delegated this responsibility to the U.S. Fish and Wildlife Service (FWS) which promulgated regulations at 50 C.F.R. parts 10, 20, and 21. FWS regulations establish a program that prohibits the taking, possessing, importation, exportation, transportation, selling, or purchasing of any migratory birds unless as authorized by a valid FWS permit. 50 C.F.R. § 21.11. The term, "take" is defined to include "pursue, hunt, shoot, wound, kill, capture, or collect." 50 C.F.R. § 10.12.

FWS has also promulgated regulations making permits available for a limited number of activities including falconry, scientific collection, raptor propagation, rehabilitation and education, take of depredating birds, taxidermy, and waterfowl sale and disposal. *See* 50 C.F.R. pts. 20 and 21. Permits for "special" uses are also provided for under the regulations, although an applicant must make "a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification" in order to obtain one. 50 C.F.R. § 21.27.

None of the MBTA regulations expressly address the issuance of permits for unintentional, incidental take of migratory birds, such as that which would be associated with the operation of a wind energy facility. *E.g.*, 69 Fed. Reg. 31,074 (June 2, 2004). The FWS has not generally made permits available for otherwise lawful activities that incidentally take migratory birds. *Newton County Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997). Although the conventional wisdom has been that none of the regulations contemplate issuing such a permit (*e.g.*, U.S. Department of the Interior, Office of the Inspector General, Investigative Report, *Cape Wind Associates, LLC*, at 20 (Jan. 8, 2010)), this view may be changing.

Strict Criminal Liability for Incidental Take of Migratory Birds

Since it appears that there are no regulations allowing for the incidental take of migratory birds, the MBTA, as currently implemented, makes the unintentional, incidental take of migratory birds, such as that associated with a wind facility, a crime, subjecting the

one responsible for *any* "take" of migratory birds to potential federal prosecution.

Environment Canada has made clear that its current regulations simply do not allow for an incidental take permit for violations of its MBCA. However, the MBCA only makes the unintentional incidental take of migratory bird eggs and nests a criminal offense. It does not appear that the MBCA prohibits the type of incidental "take" of migratory birds that would be associated the operation of a wind energy facility.

Both the MBTA and MBCA are strict liability criminal statutes. *Cf.*, *United States v. Corrow*, 119 F.3d 796 (10th Cir. 1997), *cert. denied*, 522 U.S. 1133 (1998). Strict liability crimes are uncommon because criminal intent, or "mens rea," is an essential element of most criminal offenses. In typical criminal prosecutions, two essential elements must be established in order to show that a crime was committed: (1) *actus reus*—the defendant actually engaged in the prohibited act; and (2) mens rea—the defendant had necessary intent to commit the criminal act. In the case of the MBTA and the MBCA, this mens rea— or "guilty mind"—element is dispensed with; a person or entity could be held criminally liable under these statutes even if there was no intent to harm a bird or act in a reckless fashion. *E.g.*, *United States v. Stephens*, 142 Fed. Appx. 821, 822 (5th Cir. 2005) ("Violations of [the MBTA] are strict liability offenses, requiring no proof of specific intent to commit the crime.").

In the United States, the fact that all unintentional take of migratory birds constitutes a strict liability crime has raised the specter of criminal prosecution for anyone engaged in mundane and otherwise lawful activities such as driving cars, piloting airplanes, constructing buildings—even children playing in the street—if they inadvertently "take" a migratory bird without a permit. *See United States v. Moon Lake Electric Ass'n*, 45 F. Supp. 2d 1070, 1081–82, 1085 (D. Colo. 1999), for an entertaining discussion of the subject. In order to avoid such "absurd results" and in the attempt to avoid simply leaving the issue of which activities trigger criminal liability to the sole discretion of prosecutors on a case-by-case basis, the courts have each been adopting their own standards for determining whether an activity subjects one to criminal liability under the MBTA. *See Mahler v. United States Forest Service*, 927 F. Supp. 1559, 1582–83 (S.D. Ind. 1996); *United States v. CITGO*, 2012 U.S. Dist. LEXIS 125996, 14–21 (S.D. Tex. Sept. 5, 2012).

Some courts maintain that, because the MBTA was originally intended as a hunting and poaching statute, its provisions could only be enforced against those engaged in hunting, poaching, or trapping activities. *E.g.*, *Newton Cty. Wildlife Ass'n*, 113 F.3d at 115; *Seattle Audubon Soc'y v. Evans*, 952 F. 2d 297, 303 (9th Cir. 1991); *Mahler*, 927 F. Supp. at 1579 ("Properly interpreted, the MBTA applies to activities that are intended to harm birds or to exploit harm to birds such as hunting or trapping, and trafficking in birds and bird parts. The MBTA does not apply to other activities that result in unintended deaths of migratory birds."). In such jurisdictions, courts will not hold those who are engaged in other activities, such as oil and gas development or forestry or engineering projects, criminally liable for the unintentional, incidental take of migratory birds. *E.g.*, *United States v. Brigham Oil & Gas L.P.*, 840 F. Supp. 2d 1202, 1212 (D.N.D. 2012) ("Like timber harvesting, oil development and production activities are not the sort of physical conduct engaged in by hunters and poachers, and such activities do not fall under the prohibitions of the [MBTA]."); *see also United States v. Chevron*, 2009 U.S. Dist. LEXIS 102682, *8 (W.D. La. Oct 30, 2009) ("These [MBTA] regulations were clearly not intended to apply to commercial ventures where, occasionally, protected species might be incidentally killed as a result of totally legal and permissible activities . . ."). Also in such jurisdictions, a wind operator would likely be insulated from prosecution under the MBTA.

However, many courts hold that criminal liability under the MBTA applies to the unintentional take of migratory birds associated with activities unrelated to hunting. These courts focus on the language of the statute rather than interpretations of the original intent of the MBTA; because section 703 expressly states that it is illegal to kill migratory birds "by *any* means or in *any* manner," these courts find that prosecution is not limited to hunting or poaching activities. 16 U.S.C. § 703(a) (emphasis added). *E.g.*, *United States v. Corbin Farm Service*, 444 F. Supp. 510, 532 (E.D.

Cal. 1978) (farmer criminally liable for accidental poisoning of migratory birds when applying pesticides to alfalfa crop); *Moon Lake*, 45 F. Supp. 2d 1070 (defendant criminally liable for incidental take of birds associated with operation of transmission line); *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010) (oil and gas company criminally liable for death of migratory birds lodged in drilling equipment); *CITGO*, 2012 U.S. Dist. LEXIS 125996 (MBTA conviction upheld for incidental death of birds exposed to waste oil in open tanks). In the attempt to reconcile this broad application of the MBTA with the obvious pitfalls of transforming even the most mundane activity into a crime if it happens to harm a bird, the courts have developed various and inconsistent standards for determining whether an individual violated the act.

In some jurisdictions, if the defendant unintentionally takes a migratory bird while engaged in otherwise lawful activity, he has not violated the MBTA. *Brigham Oil*, 840 F. Supp. 2d at 1213–14 (defendant not criminally liable for bird deaths associated with oil reserve pits because "the criminalization of lawful, commercial activity which may indirectly injure or kill migratory birds is not warranted under the MBTA"); *United States v. Rollins*, 706 F. Supp. 742 (D. Idaho 1989) (because farmer applied pesticide as directed, he was not criminally liable for take of migratory birds under the MBTA). In other jurisdictions, whether the action that takes the birds is lawful or not makes no difference. Instead, the principles of due process and criminal "proximate cause" control the outcome. In these jurisdictions, a defendant who unintentionally takes migratory birds will be held criminally liable only if it was *reasonably foreseeable* that the activity would result in the take of migratory birds. *Corbin Farm*, 444 F. Supp. at 532 (defendant found criminally liable for poisoning protected birds because it was foreseeable that spreading pesticide on alfalfa crop may kill birds).

CITGO appears to establish a hybrid standard, requiring that the defendant be engaged in unlawful conduct that would foreseeably lead to bird deaths in order to be found guilty of an MBTA violation for unintentional take. *CITGO*, 2012 U.S. Dist. LEXIS 125996, *20–21 (oil company violated MBTA by keeping open oil tanks in violation of Texas law and it was reasonably foreseeable that these tanks would take birds). Another hybrid standard worthy of note was established in *Moon Lake*, 45 F. Supp. 2d at 1084–85, where the district court held that the incidental take of migratory birds associated with construction of a electric transmission line constituted a violation of the MBTA because (1) the take of birds was reasonably foreseeable; and (2) the defendant utility failed to take reasonable measures to mitigate the likelihood of take. The Tenth Circuit appears to have adopted this standard in *Apollo Energies, Inc*., where the court upheld MBTA convictions where FWS alerted two oil and gas exploration companies that their equipment may result in migratory bird deaths, the companies took no prophylactic measures to prevent or mitigate, and birds were subsequently killed. 611 F.3d 679. This judicial standard is analogous to the Canadian "due diligence" defense, where there is no violation of the MBCA regulations so long as reasonable steps are taken to ensure that birds would not be harmed. *R. v. Syncrude Canada Ltd.*, 2010 ABPC 229.

Still, other U.S. jurisdictions have held that those engaged in "extrahazardous" activities will always be subject to criminal liability for incidental take under the MBTA even if the utmost care has been taken to prevent such harm. *United States v. FMC Corp*., 572 F.2d 902, 907 (2d Cir. 1978) (although dumping wastewater from pesticide manufacture into pond was otherwise lawful, criminal conviction proper because take of migratory birds was incidental to inherently "hazardous" activity).

Given that FWS has not brought an MBTA enforcement action against a wind energy operator, it is unclear how the take of migratory birds related to the operation of a wind energy facility would be treated under any of these judicial standards. It is unquestionable that such take is reasonably foreseeable—indeed almost unavoidable—as a result of operating a wind facility. Whether, and under what circumstance, a wind operator would be found criminally liable if prosecuted would depend greatly on the jurisdiction in which the case is tried, and how the court applies its standards in the context of wind energy. On the one hand, the operation of a wind energy facility is an otherwise lawful activity. Under

Brigham Oil, prosecution would fail. One can assume that wind operators would at least attempt to take some measure to mitigate the take of migratory birds. What would constitute sufficient mitigation to avoid conviction under the *Moon Lake* and *Apollo Energies* standard remains to be seen. Whether a court using the *FMC* standard would consider the operation of a wind energy facility an "extrahazardous" activity for the purpose of evaluating impacts to birds, and therefore constituting a *de jure* violation of the MBTA, also remains to be seen. *See* M. Blaydes Lilley & J. Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, 38 ENVTL. L. 1167, at 1186–93 (Fall 2008) (where authors debate the standards by which a wind energy operator could be prosecuted in light of disparate case law).

Perhaps in recognition of this fact, it has been the policy of FWS to work cooperatively with wind developers to promote the minimization of the impacts of their projects rather than to seek criminal prosecution under the MBTA. *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO 09-05-906, WIND POWER: IMPACTS ON WILDLIFE AND GOVERNMENT RESPONSIBILITIES FOR REGULATING DEVELOPMENT AND PROTECTING WILDLIFE 36 (2005). Indeed, FWS has published comprehensive guidelines for developers designed to minimize the impacts of their projects. U.S. Fish and Wildlife Service, *Land-Based Wind Energy Guidelines*, OMB No. 1018-0148, *available at* http://www.fws.gov/windenergy/docs/WEG_final.pdf.

Although FWS guidelines and recommendations clearly indicate that acting in accordance with the recommendations of the service does not insulate a developer from criminal liability, it may be reasonable to assume that a developer who follows the direction of FWS with respect to migratory bird protection will not likely find itself prosecuted for a crime under the MBTA. *See* U.S. FISH AND WILDLIFE SERVICE, INTERIM GUIDANCE ON AVOIDING AND MINIMIZING WILDLIFE IMPACTS FROM WIND TURBINES 2 (May 2003), *available at* http://www.fws.gov/habitatconservation/wind.pdf (explaining that FWS and the Department of Justice will likely exercise prosecutorial discretion in such cases, as "it must be recognized that some birds may be killed at structures such as wind turbines even if all reasonable measures to avoid it are implemented"). Environment Canada has adopted a similar policy, indicating that those in substantive compliance with the MBCA may avoid prosecution. *See* Environment Canada's "Approach to Incidental Take of Migratory Birds Under the *Migratory Birds Convention Act, 1994*" Web site, *available at* http://www.ec.gc.ca/paom-itmb/default.asp?lang=En&n=1AC34678-1. However, if the facts behind cases such as *Moon Lake* or *Apollo Energy* serve as any guide, a wind energy operator may find itself subject to prosecution for violating the MBTA if the operator disregards the recommendations of FWS. And in such a circumstance, the defense options would likely be limited.

Agency Vulnerability Under the MBTA

Another significant and often overlooked issue facing the wind energy industry in the United States is the fact that many wind facilities require some form of approval or authorization of the federal government. It is these federal approvals that may be vulnerable to challenge by third parties if they authorize a project that results in the incidental, unintentional take of migratory birds. The MBTA, in conjunction with the Administrative Procedure Act (APA), 5 U.S.C. § 1551 et seq., could potentially be used by anyone with standing to challenge government decisions authorizing third-party projects if the operation of the project would result in a violation of the MBTA's strict prohibition on incidental take. *See, e.g.*, *Sierra Club v. Martin*, 933 F. Supp. 1559 (N.D. Ga. 1996) (granting preliminary injunction of U.S. Forest Service issuance of logging permits under APA and the MBTA where permittees' logging activities would likely take migratory birds), *rev'd*, 110 F.3d 1551 (11th Cir. 1997); *see also* Pls.' Opp. to Fed. Defs.' Mot. for Summ. J. and Reply in Supp. of Their Mot. for Summ. J. at 19–21 (Doc. No. 222), *Public Employees for Environmental Responsibility v. Beaudreau*, Civ. No. 1:10-cv-01067-RBW-DAR (D.D.C. filed Aug. 2010). This is because APA allows private parties to challenge government agencies to prevent them from taking any "final action" that is "arbitrary, capricious and an abuse of discretion, or otherwise not in accordance with law." *Sierra Club*, 933 F. Supp. at 1564; 5 U.S.C. § 706(2)(A); 72 Fed. Reg. 8932 (Feb. 28, 2007).

Until very recently, MBTA permits for incidental, unintentional take were no more available to the federal government than they were to private parties. This exposed federal agency actions that incidentally took protected birds as well as agency approvals of third-party activities that would result in the incidental take of protected birds subject to challenge under the MBTA and APA. *See Center for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161 (D.D.C. 2002) (holding that that the Department of the Navy violated the MBTA and APA by using an island in the Pacific as a bombing range without an incidental take authorization); *Humane Soc'y v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000) (holding that Department of Agriculture's Goose Management plan killed migratory birds without an authorization and therefore violated the MBTA); *see also Sierra Club*, 933 F. Supp. 1559; *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008) (finding that the MBTA would apply through APA when FCC approves communication towers that could take migratory birds).

However, some circuits have held that the MBTA does not apply to actions or approvals issued by federal agencies at all, making their decisions immune to the APA/MBTA challenge. *Sierra Club*, 110 F.3d at 555 (reversing district court and finding only persons, associations, partnerships, or corporations subject to the MBTA; neither agency action nor agency approval of third-party action can be challenged for violation of the MBTA under APA); *Newton Cty.*, 113 F.3d at 115 (MBTA does not apply to actions by agencies because the term "person" does not include "sovereign").

Under Executive Order 13186, all federal agencies are directed to take actions to protect and conserve migratory birds consistent with the migratory bird conventions, and to ensure that their own actions do not violate the MBTA. The order is silent on the issue of the authority of the secretary of the interior to promulgate regulations authorizing incidental take of migratory birds. *See* 66 Fed. Reg. at 3853, 3856. Under the order, every federal agency taking actions that are likely to have a measurable negative effect on migratory bird populations is required to enter into a memorandum of understanding (MOU) with FWS outlining how the agency will promote conservation of migratory birds. 66 Fed. Reg. 3853 at 3854–56 (Jan. 17, 2001). E.O. 13186 and the associated MOUs acknowledge the inevitability that agency actions will result in the unintentional take of migratory birds.

Therefore, in many jurisdictions, authorizations and approvals by federal agencies of wind energy projects, and the projects dependent on their authorizations, may be vulnerable to challenge under the MBTA. One of the more recent high-profile MBTA cases involves the Cape Wind project intended to be developed on the Outer Continental Shelf offshore Massachusetts. In *Public Employees for Environmental Responsibility v. Beaudreau*, Civ. No. 1:10-cv-01067-RBW-DAR (D.D.C. filed Aug. 2010) (PEER), various groups and a municipality challenged the Minerals Management Service's (now the Bureau of Ocean Energy Management (BOEM)) issuance of a lease for and subsequent approval of the construction and operation of a large-scale wind turbine array to be located in Nantucket Sound approximately 12 miles offshore Massachusetts. BOEM and FWS have been in close consultation for years regarding how best to minimize potential take of migratory species, and have been working under an MOU executed pursuant to E.O. 13186. Nevertheless, plaintiffs are challenging the approval of the project on the grounds that, inter alia, BOEM violated the MBTA's strict prohibition on unauthorized take by failing to obtain an incidental take permit. Neither BOEM nor the lessee currently has an MBTA permit from FWS. The government argues, inter alia, that the MBTA does not require it to obtain a permit before authorizing a third party to construct an offshore wind energy project. *Id.*, Fed. Defs.' Mot. for Summ. J. and Opp. to PEER Pl.'s Mot. for Summ. J. at 30–31(Doc. No. 205).

Permits for Incidental Take

To date, FWS has issued very few incidental take permits. The first was issued in response to *Pirie*, where the district court held that the Department of the Navy violated the MBTA and APA by using an island in the Pacific as a bombing range without MBTA authorization. 191 F. Supp. 2d at 161. The court

enjoined the Navy from conducting further bombing exercises, and ordered it to obtain an incidental take permit from FWS. However, in the 2003 Defense Authorization Act, the Congress gave the military an interim period during which it was exempt from FWS's regulatory prohibition on incidental take. Further, Congress ordered FWS to promulgate regulations exempting the Armed Forces from the prohibition against incidental take during authorized military readiness exercises. *See* 72 Fed. Reg. 8931 (Feb. 28, 2007). In its final rulemaking, FWS pointed out that Congress made the necessary determination under 16 U.S.C. § 704(a) that permitting incidental take for such purposes was "consistent with the MBTA and the Treaties." 72 Fed. Reg. 8932, 8934; *see also* H.R. Rep. No. 107-722, at 624 (2002) ("The conferees believe this provision to be entirely consistent with the underlying terms of all treaty obligations of the United States."). Only the Department of Defense can take advantage of these incidental take permits.

On August 24, 2012, FWS issued a "special purpose permit" to the National Marine Fisheries Service (NMFS) pursuant to 50 C.F.R. § 21.27 authorizing the incidental take of Layasan albatrosses in connection with longline fishing offshore Hawaii. *See* U.S. Fish and Wildlife Service, Environmental Assessment: *Issuance of an MBTA Permit to the National Marine Fisheries Service Authorizing Take of Seabirds in the Hawaii-based Shallow-set Longline Fishery* (July 27, 2012), *available at* http://www.fws.gov/pacific/migratorybirds/nepa.html. It is now clear that FWS believes it currently has the authority to issue incidental take permits to other agencies under its existing regulations, although it is uncertain whether such permits are necessary.
In this instance, NMFS is the agency responsible for issuing authorizations to fishermen for the use of a fishery, and it is the fishermen's activities that will result in incidental take of migratory birds. The intent is that this "take" will be "covered" by the permit FWS issued to NMFS. The validity of this special purpose permit is currently being challenged in the District Court for the District of Hawaii on a number of grounds, including allegations that FWS failed to make the necessary showing under 50 C.F.R. § 21.27 that there is a "compelling justification" for the permit. *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, ___ Civ. No. ___, D. Haw. (filed Nov. 2, 2012). Plaintiffs are also challenging FWS's finding that the issuance of the permit is "consistent" with the conservation purposes of the Migratory Bird Conventions under 16 U.S.C. § 704(a).

It is unclear whether this piecemeal approach of issuing customized special purpose permits under 50 C.F.R. § 21.27 for the purpose of authorizing incidental take of migratory birds represents an approach FWS intends to pursue in the future or whether it is a temporary means of authorizing important government projects. Reliance on 50 C.F.R. § 21.27, which by regulation and statute requires case-by-case determinations regarding importance of the project and compatibility with the conventions, does not appear to be susceptible of use as a regularized permitting process, and may not provide much certainty for the industry, permitting agencies, or bird advocates. Perhaps the resolution of the *PEER* and *Turtle Island* cases will help clarify the legal standards by which the actions of federal agencies are to be judged under the MBTA, determine whether a defense of substantial compliance exists or whether the MBTA applies to government authorizations of third-party activities, and help clarify the extent of FWS's ability to authorize incidental take under its existing regulations. That said, it does not appear that anything in the four Migratory Bird Conventions, the MBTA, its regulations, or E.O. 13186 precludes the service from promulgating regulations establishing a regularized system for authorizing the incidental take of migratory birds that may resolve some of the uncertainty and conflicting jurisprudence associated with the history and status quo of MBTA enforcement.

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