

# Environmental Impact Review in Real Estate Transactions

A Practical Guidance® Practice Note by  
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This practice note deals with environmental impact reviews, which real estate practitioners confront in a wide variety of real estate development projects. Such reviews may be required for new developments, redevelopments, improvements on existing properties, or renovation projects. They may also be required in large-scale projects like shopping centers or residential developments, or relatively small-scale projects like warehouses. These reviews examine the potential impact of a project on habitats, wildlife, air and water quality, and a broad array of other environmental concerns. They are most often seen in the context of review under the National Environmental Policy Act (NEPA), but are also required in the context of permitting under the Clean Water Act (CWA) and Endangered Species Act (ESA).

For detailed coverage of environmental impact review, see 1 Environmental Law Practice Guide § 1.01 et seq.

## Introduction

While environmental impact reviews can be time-consuming and costly, these reviews must be done carefully and thoroughly. This is particularly true for large projects and projects in sensitive areas, as a project's size and location may correspond to its impact. Permit decisions, particularly those involving projects in environmentally sensitive areas, are often subject to challenges by environmental and community groups. The stronger the record supporting the

permitting decision, including the environmental impact review, the more likely such challenges will be unsuccessful.

This practice note is designed to give real estate practitioners an overview of environmental impact reviews in the context of several federal environmental statutes, specifically:

- NEPA
- The Clean Water Act's Section 404 permitting process
- The Endangered Species Act's incidental take permitting process
- The Migratory Bird Treaty Act (MBTA)

A number of these laws have state-level counterparts whose requirements typically parallel, but may also diverge from, their federal counterparts. Moreover, specific requirements under these laws may vary depending on the location and specific facts of the project, and may shift with regulatory and case law developments. It is therefore important to work with local counsel in the jurisdiction where the property is located and regulatory specialists when preparing environmental impact reviews.

Under most circumstances, the real estate practitioner should work with environmental counsel in preparing, and preparing for, the environmental impact reviews discussed below. Whether you will need environmental counsel depends largely on the size and scope of the potential impacts, as well as the experience and expertise of the individual practitioner. This practice note assumes limited environmental experience and expertise, and will point out where seeking environmental counsel is recommended and how the real estate practitioner can aid the environmental counsel.

# Environmental Review Process for NEPA and Little NEPAs

NEPA, 42 U.S.C. § 4331, and state law equivalents known as “little NEPAs,” are perhaps the most commonly encountered environmental statutes among real estate practitioners. If your project requires federal permits, involves federal funding, or is part of a federal project, it may be subject to a federal NEPA analysis. Real estate projects that require changes to zoning or state-level permitting may also trigger the state’s little NEPA. Because of this, any time a project involves federal or state funding or permitting, practitioners should consult NEPA specialists to ensure a smooth process.

As a general matter, NEPA and its state-level counterparts require agencies to consider the environmental impacts of their decision making. However, they do not require agencies to prioritize environmental concerns, nor do they require agencies to limit chosen actions to the least-environmentally damaging options. Instead, these laws require agencies to consider environmental impacts, evaluate alternatives, specify the process for doing so, and mandate public disclosure of its decision making. In other words, NEPA and its counterparts require agencies to “take a ‘hard look’ at the environmental consequences before taking a major action.” *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). (What constitutes a major action is discussed below.) Decisions may only be set aside where the process or disclosure was inadequate, or where the ultimate decision was arbitrary or capricious.

So-called little NEPAs generally follow the federal NEPA framework, and similarly are procedural rather than substantive in nature. Currently, 21 states and municipalities have some form of NEPA statutes, including New York state and city, California, Massachusetts, and New Jersey. The Council on Environmental Quality (CEQ) keeps a full list of little NEPAs on its website, which is available at <https://ceq.doe.gov/laws-regulations/states.html>. Each state and local law imposes slightly different requirements. Consultation with local counsel is important for projects that do or may trigger one of these laws.

The CEQ is responsible for implementing NEPA, and has issued regulations and guidance establishing the procedures agencies must follow when evaluating the environmental impacts of their actions. In addition, each federal agency has its own NEPA implementation regulations that supplement CEQ regulations. A list of these regulations can

be found at <https://energy.gov/sites/prod/files/2013/10/f3/Agency%20Implementing%20Procedures%2021Oct2013.pdf>.

NEPA is implicated when a real estate project could significantly affect the environment and involves major federal actions. Little NEPAs have analogous state-level triggers. Agency decisions regarding permitting and funding that are prerequisites to project completion are often the type of major actions that trigger NEPA review, as are projects involving federal land. However, each agency’s NEPA regulations may differ somewhat regarding what constitutes a major action for purposes of NEPA. Moreover, the question of whether a type of decision is either “federal” or “major” enough to trigger NEPA is frequently litigated. This is particularly so when federal involvement is minor or attenuated or where the agency action is nondiscretionary. Whether your project will trigger a NEPA analysis therefore depends on what agencies your project involves, and where the project is located. As a general matter, however, if a project requires approvals or other engagement with a federal or state agency, the practitioner should work with environmental counsel to investigate the regulations of the agency or agencies in question to determine whether it may require a NEPA analysis.

If a government agency determines that a project constitutes a major action that could significantly affect the environment, it will initiate the NEPA process. This process generally involves three levels of analysis:

- 1. Categorical exclusion determination.** Agency NEPA regulations may exclude certain actions that do not individually or cumulatively have a significant effect on the environment from NEPA analysis. This phase determines whether the action in question is excluded from NEPA review. Each agency has its own list of categorical exclusions and processes for adding new ones. They vary by state and region, but generally include activities such as minor repairs and upkeep, or small installation projects.
- 2. Environmental assessment (EA).** If the environmental impacts are unclear, the agency will conduct an environmental assessment to determine whether impacts are “significant.” If the EA finds no significant impact, the agency issues a Finding of No Significant Impact (FONSI), and the agency may proceed with the action. If the EA finds that the decision will significantly impact the environment, the agency must proceed to the next level of analysis. If it is clear at the outset that a proposed project will have significant environmental impacts, the agency may proceed directly to the next step without preparing an EA.

**3. Environmental impact statement (EIS).** The EIS is considered the most time-consuming and complicated step of NEPA review. During this stage, the agency reviews the environmental impact of the proposed action, including the purpose and need for the project and possible mitigation measures, and evaluates reasonable alternatives to the proposed action. The EIS requires public input at several stages and culminates in the publication of a Record of Decision (ROD) that explains the agency's decision, describes the alternatives and factors the agency considered in selecting its chosen action, and responds to public comments. There is no time requirement for completion of the EIS, and completion can take months to years depending on the scope and nature of the project.

Procedural requirements under state NEPAs are generally similar to the federal process. Practitioners should consult with local counsel if they or their environmental counsel determine that a project may trigger state or local NEPA laws.

For a chart setting out when mandatory environmental impact reviews are required in the 50 states, DC, Guam, PR, & VI, and indicating if third-parties may prepare environmental assessments and/or environmental impact statements, see LexisNexis® 50-State Surveys, Statutes & Regulations, Environmental Law, Assessment & Information Access.

### **The Real Estate Practitioner's Role in the NEPA Process**

While the majority of the work performed under NEPA falls to the agency or agencies making the decision, the project developer (often referred to as the "project proponent" in environmental statutes and regulations), through its real estate or environmental counsel, plays a role at every stage of the process. The real estate practitioner can work with environmental counsel to help the NEPA process proceed efficiently and work to strengthen the administrative record supporting the agency's decision so that it can best withstand any challenges. The real estate practitioner should coordinate with environmental counsel to engage the agency or agencies early in the process. While the agency itself must develop the EA and EIS, early engagement will help the project proponent define and shape the scope of the proposed action, the purpose and need of the project, and the reasonableness of proposed alternatives.

Because both the EA and EIS can be costly and time-consuming, the practitioner should consult with environmental counsel to determine whether the agency

action sought is sufficiently federal or major enough to trigger NEPA and, if it is, to determine whether a categorical exclusion may apply. The practitioner should also work with environmental counsel to fully review statutes related to the agency action in question, as well as the relevant agency's regulations and guidance to identify potentially applicable categorical exclusions. Proceeding directly to an EIS can reduce the time it takes to complete the NEPA process for large projects or those that appear likely to have significant impacts. The practitioner should confer with environmental counsel to determine whether to recommend that the agency proceed directly to an EIS for such projects.

The role of project developers in the EA and EIS, and by extension, the role of real estate practitioners and their environmental counsel, varies depending on agency, region within the agency, and project type. In general, though, the practitioner may be involved with both formulating the scope and substance of the EA or EIS and ensuring that the administrative record is robust and accurate. In particular, and as discussed below in more detail, the project proponent can help the agency define the proposed action, identify and describe reasonable alternatives to the proposed action, and describe the potentially affected environment and the environmental impacts of the proposed action and the alternatives. Given their understanding of the project, real estate practitioners can aid environmental counsel in drafting various key portions of the EA and EIS documents:

- **The project proposal.** This is a critical component of both the EA and EIS that guides evaluation of the project and any possible alternatives. Project proponents can initiate the NEPA process by submitting, typically through counsel, a proposal for a major federal action to the necessary agency. This proposal in turn may be used by the agency to define the proposed action in the EA and EIS. The practitioner, and for more complicated projects environmental counsel, should therefore be careful to work with the client to identify the goals and objectives of the project, and include detailed descriptions of the likely direct and indirect environmental impacts and possible mitigation or other measures to reduce them.
- **Purpose and needs section.** The purpose and needs statement identifies the agency's goals and objectives for pursuing the action that is subject to NEPA review. However, in most jurisdictions the agency may take into account the project proponent's goals as well. It behooves the project developer, through counsel, to include a purpose and needs statement in the project proposal that identifies goals that align with the agency's. The real estate practitioner can work with environmental

counsel to draft these statements. Note that the purpose and needs cannot be so narrowly defined that it may only be accomplished by the proposed action.

- **Reasonable alternatives.** The agency is responsible for identifying reasonable alternatives, including a “no action” alternative. Whether an alternative is reasonable, and whether it is ultimately selected by the agency, is based on the purpose and needs of the project. The project proponent, through counsel, can and should prepare materials discussing why alternatives may be infeasible, unreasonable, inconsistent with the purpose and needs, etc. Because the real estate practitioner may be more familiar with the project and its goals, he or she should work with environmental counsel to develop these materials.
- **Preparing NEPA documents.** The EA and EIS documents must identify alternatives to the proposed action and explain why either the proposed action has no significant impact, or why the proposed action is preferable to reasonable alternatives. These documents must review a wide variety of environmental impacts, including the impact of the proposed action, the possibility of mitigating or avoiding these environmental impacts, and the impacts from proposed alternatives. The project proponent may fund a third-party contractor or consultant to prepare EA or EIS documents. Doing so typically streamlines the NEPA process. The project proponent may select the contractor or consultant for an EA, though the agency must independently evaluate the environmental issues and is responsible for determining the scope and content of the EA. See <https://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf> (Forty Most Asked Questions Concerning CEQ’s NEPA Regulations). For the EIS, the agency is required to select the third-party contractor even if the project proponent pays for costs of the EIS. Nevertheless, the project proponent may suggest third-party contractors. The real estate practitioner may have experience in identifying consultants or contractors who can prepare these documents. Otherwise, environmental counsel will typically be able to assist in identifying contractors or consultants.

Under CEQ regulations, the contractor that prepares the EIS may not have conflicts of interest, which are broadly defined to cover “any known benefits other than general enhancement of professional reputation.” See <https://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf> (Forty Most Asked Questions Concerning CEQ’s NEPA Regulations). Perceived and actual conflicts of interest often give rise to challenges of the NEPA process, making this an important consideration for identifying or selecting possible contractors. CEQ regulations require

EIS contractors to execute a disclosure statement specifying that they have no financial or other interest in the outcome of the project. EA contractors should similarly execute such a disclosure for inclusion in the administrative record.

- **Supplementing the administrative record.** The administrative record is critical for evaluating the sufficiency of the NEPA process, including the environmental impact assessment, if the agency’s decision is challenged through litigation. The agency may request supplemental information from the project proponent, or the project proponent may request inclusion of materials in the administrative record. As such, the project proponent, typically through environmental counsel, should ensure the inclusion of materials that can be used to defend the reasonableness of the agency’s decision to select the proposed project over either no action or an alternative. These can include studies, technical information, factual materials, correspondence, and other records.
- **Commenting.** The agency must solicit and review public comments regarding both the scope of the EIS and the contents of the draft EIS. CEQ regulations mandate that the agency solicit comments from project proponents, if any. The project proponent, typically through environmental or experienced real estate counsel, can and should comment at both stages. The real estate practitioner should work with environmental counsel to review third-party comments and respond where warranted. Likewise, if the agency solicits public comments on the EA, the project proponent, through environmental or experienced real estate counsel, should comment and respond to third parties if necessary.

## Judicial Review of NEPA Reviews

An agency’s NEPA determinations can be challenged in court, typically by an environmental or community group, particularly where projects are larger or located in environmentally sensitive areas. The challenge to the agency action is brought under the Administrative Procedure Act (APA), 5 U.S.C. § 500 et seq., against the agency. This can take the form of a challenge to a decision not to prepare an EA, a decision not to prepare an EIS, or a challenge to the adequacy of an EA or EIS.

An agency’s decision not to prepare an EA typically rests on its determination that a categorical exclusion applies, while a determination not to prepare an EIS often rests on a Finding of No Significant Impact (FONSI) that results from an EA. These challenges often allege insufficient or incorrect information was utilized by the agency, or claim an inappropriate or flawed analysis.

The standard of review for agency decisions regarding whether to prepare an EA or EIS depends on both the court and the agency's rationale. A majority of courts review agency decisions not to prepare an EA or EIS under an arbitrary or capricious standard. If the agency finds that a categorical exclusion applies, the courts are split between a reasonableness standard and an arbitrary and capricious standard. Decisions not to prepare an EIS based on a FONSI are typically based on an arbitrary and capricious standard that examines whether the agency took a "hard look" at the proposed action's potential environmental effects, properly identified environmental concerns, and convincingly presented and documented its findings.

Challenges to a completed EIS can include claims that important information was not considered by the agency, that the agency's consideration of alternatives was inadequate, or that the agency failed to adequately consult with other agencies (e.g., consultation with the U.S. Fish and Wildlife Service regarding Endangered Species Act issues).

Review of agency NEPA decisions is generally limited to the administrative record. The plaintiff holds the burden of proof in challenging the determination, and courts generally give substantial deference to the agency. The real estate practitioner should work with environmental counsel to ensure the administrative record is complete and supports the agency's determination. Although these challenges to agency actions are lawsuits against the agency itself, the interests of the developer may support intervention into the case in some circumstances. Consideration of whether the project proponent should consider intervention should be discussed with environmental counsel.

For complete coverage of the NEPA judicial review process, see 1-1 Environmental Law Practice Guide § 1.11.

### **Special Considerations**

Large projects often require approvals from several different agencies at the federal, state, and local levels. Moreover, agencies must consult with and solicit comments from any agency that is identified by statute or regulation, or that has expertise over the type of environmental impact involved (e.g., the U.S. Fish and Wildlife Service for endangered species). If multiple agencies are involved, CEQ regulations provide guidance regarding coordination between lead and cooperating agencies.

Where a project involves multiple agencies at multiple levels, the practitioner should confer with local environmental counsel as to how to engage and coordinate with the various agencies.

For complete coverage of the NEPA review process, see 1-1 Environmental Law Practice Guide § 1.04. For more on little NEPAs, see 1-1 Environmental Law Practice Guide § 1.05.

For more on the Council on Environmental Quality regulations, see 1-1 Environmental Law Practice Guide § 1.02.

For discussions of determining an action's significance and the substantive criteria for determining an environmental effect's significance, see 1-1 Environmental Law Practice Guide § 1.07 and § 1.08, respectively.

For more details on environmental impact statements—including timing, preparation, scope, format and contents, and procedures—see 1-1 Environmental Law Practice Guide § 1.09. See also 1-1 Environmental Law Practice Guide § 1.10 (special types of environmental impact statements).

## **Other Common Statutes Requiring Environmental Impact Review**

### **Clean Water Act**

Projects located on or adjacent to waterways and wetlands may require a dredge-and-fill permit under the Clean Water Act. The Clean Water Act prohibits the "discharge of dredged or fill material into waters of the United States" without a permit, unless the activity is expressly exempted. These permits, known as Section 404 or 404(b) permits, fall into two broad categories: (1) general (which cover most discharges that have minimal adverse environmental effects) or (2) individual (for activities that have potentially significant environmental impacts). General permits require little or no individual review and may be issued with little or no delay. Individual permits, however, must be reviewed by the U.S. Army Corps of Engineers (the USACE) for compliance with statutory and regulatory requirements, as well as a public interest review. The Environmental Protection Agency (EPA), on the other hand, is responsible for developing policies, guidance, and environmental criteria used in evaluating Section 404 permit applications. The EPA may prohibit or restrict the use of a specific area for disposal, and may also review and comment on individual permit applications. The EPA and the USACE share responsibility for enforcing Section 404 provisions.

Individual permitting can cause substantial delay and increased costs, but failing to obtain Section 404 permits can lead to claims by the government for fines and penalties in addition to restoration and mitigation.

Therefore, it is critical for the practitioner at the outset of a project to consult environmental counsel to determine whether a project may require a Section 404 permit, and, if so, whether it will be eligible for a general permit or must undergo an individual permitting process. Note, however, that the following activities are exempt from Section 404's permit requirements:

- Established (ongoing) farming, ranching, and silviculture activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices
- Maintenance (but not construction) of drainage ditches
- Construction and maintenance of irrigation ditches
- Construction and maintenance of farm or stock ponds
- Construction and maintenance of farm and forest roads, in accordance with best management practices
- Maintenance of structures such as dams, dikes, and levees

Three factors must be met to trigger the Section 404 permitting requirement: (1) the "discharge" of (2) "dredged or fill materials" into (3) "waters of the United States." The meaning of these terms, and whether a Section 404 permit is required, is subject to extensive and ever-changing case law and regulatory guidance. That means the precise contours of these terms may differ depending on which EPA region, USACE office, and federal circuit your project is located in. Further, the last several years have involved multiple attempts to revise the definition of the term "waters of the United States" (often referred to as WOTUS), resulting in extensive regulatory action and litigation that is currently ongoing. First, an attempt by the Obama administration to revise the WOTUS rule was blocked by the courts in 2015 before it ever took effect (proposed Clean Water Rule of 2015). Then, in July 2017, the EPA and USACE reversed course under the Trump administration by formally rescinding the 2015 WOTUS rule and began a new process to re-evaluate the definition of WOTUS. The EPA published a final revised WOTUS rule in April 2020 ("2020 WOTUS rule"), which is being challenged in multiple courts around the country. As of this writing, one federal court in California has denied a request to enjoin the implementation of the 2020 WOTUS rule, and another federal court in Colorado has granted an injunction as to its implementation in Colorado. Both cases are on appeal, and other similar cases are still pending in federal district courts. This creates significant uncertainty for the indefinite future as to whether the 2020 WOTUS rule, or the pre-2015 rules, regulations, and guidance documents, will be utilized in any particular jurisdiction and practitioners

will need to confirm the applicable standards in the jurisdiction of their projects on an ongoing basis. Updates regarding the regulations are available on the EPA's website. See <https://www.epa.gov/wotus-rule>.

A key question in determining whether a project requires a Section 404 permit is whether activities are located on or in "waters of the United States." Navigable and interstate waters, their tributaries, and wetlands adjacent to navigable and interstate waters are typically considered "waters of the United States." Wetlands adjacent to tributaries may also be considered "waters of the United States."

A source of significant confusion is whether waters with a "significant nexus" to traditional navigable waters are also covered by the CWA. This significant nexus test arises from Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), in which he argued that waters that affect the physical, biological, or chemical integrity of traditionally navigable waters are covered by the CWA. The EPA developed guidance to implement this test in the wake of the *Rapanos* decision, and that guidance remains in effect until and unless the 2020 WOTUS rule is in effect in the jurisdiction where a project is located. To determine whether a significant nexus exists requires a factual analysis that can involve geographic, hydrologic, and potentially biologic considerations, and may require consultation with both experts and agency officials. Under the 2020 WOTUS rule, the definition is significantly narrower than under the "significant nexus" test, particularly as to wetland areas that are not adjacent to jurisdictional waters, and tributaries that do not contribute perennial or intermittent flow into traditional navigable waters in a typical year. The 2020 WOTUS rule can be found [here](#).

The USACE determines whether an area constitutes "waters of the United States." This decision, known as a jurisdictional decision or JD is reviewable in court and is valid for five years. The USACE has developed numerous guidance documents to aid in making JD under the CWA, and are available online. See <http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Related-Resources/CWA-Guidance/>. In addition, applicants (i.e., project developers through counsel) can seek a permit using a preliminary jurisdictional decision, which assumes jurisdiction and allows the permit process to move forward more quickly. See [http://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/AJD/JD\\_PJD%20form.pdf](http://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/AJD/JD_PJD%20form.pdf). Note that doing so may involve additional compensatory mitigation, as all waters affected by the permitted activities will be considered jurisdictional waters.

In sum, if your client's project involves adding materials to or otherwise impacting one of the wetlands or waterways

discussed above, you should consult environmental counsel to carefully evaluate whether you will need a Section 404 permit. A few examples of activities that require a permit include:

- The addition of dredged material to a specified discharge site located in waters of the United States
- The runoff or overflow from a contained land or water disposal area
- Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States that is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation (Note that this does not include simply mowing or cutting down plants where the process does not disturb the roots or surrounding soil)

The real estate practitioner should also consult with environmental counsel to determine whether the activity in question may be covered by a general permit. These general permits are issued on a nationwide, regional, and state basis. Nationwide permits (NWP) are available online. See [http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/2017\\_NWP\\_FinalDD/](http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/2017_NWP_FinalDD/). Of particular relevance are NWP 29 for Residential Development activities and NWP 39 for Commercial and Institutional Developments. Other examples include minor road-building activities and utility line backfill. In addition, certain activities may be permitted under a Letter of Permission (LOP) process, which is a streamlined individual permitting process based on region-specific criteria for activities that the USACE has determined to have only minor environmental impacts. Local environmental counsel or local agency officials may be helpful in determining whether a regional or state general permit, or whether the local region's LOP, might apply.

If no general permit applies to the activity in question, an individual permit is necessary. The applicant, typically through environmental counsel, must prepare an analysis of the project for USACE consideration under Section 404(b)(1) of the CWA. The USACE, and in some instances EPA, will then evaluate whether the permit can be issued and under what conditions. A Section 404 permit is not available if either a practical alternative exists that is less damaging to the aquatic environment or if the permit would result in significant degradation to the waters. The permit application must show steps taken to minimize and avoid impacts to the waters and aquatic resources, and to compensate for unavoidable losses. The USACE must also evaluate the public interest of the permit, including the impact on such factors as navigation, economics, fish and

wildlife values, land use, and the needs and the welfare of the people. In addition, the application must list any threatened or endangered species that might be impacted and measures taken to minimize and mitigate that impact.

An important aspect of any Section 404 application is compensatory mitigation for unavoidable impacts to aquatic resources. There are a number of methods of compensatory mitigation, including, for example, restoration of degraded habitat, creation of new wetlands, and preservation of wetlands through easements or through the purchase of credits from a mitigation bank. Significant guidance is available for developing a project's compensatory mitigation mechanisms, and it is important for the real estate practitioner to consult with environmental counsel and work with the USACE to develop an application's mitigation plan. See <https://www.epa.gov/cwa-404/compensatory-mitigation>.

For complete coverage of Section 404 permitting requirements and what constitutes "waters of the United States," see 4-19 Environmental Law Practice Guide § 19.01 et seq.

## Endangered Species Act

If your client's project is located on or around endangered or threatened species habitat or is located on previously undeveloped lands (i.e., greenfield development), it is possible that the project will require an incidental take permit under the Endangered Species Act (ESA). Under the ESA, it is illegal to "take" any endangered or threatened species without a permit. The term "take" is broad, and includes both intentional and incidental killing, harassing, or harming of endangered or threatened species. It also includes habitat modification that may result in killing or injuring an endangered or threatened species by impairing behaviors like nesting or reproduction.

The first step for the practitioner, often with assistance of environmental counsel, is to determine the location of endangered or threatened species that could potentially be affected by the project. The U.S. Fish and Wildlife Service (USFWS) has developed a mapping tool called Information for Planning and Consultation (IPaC), see <https://ecos.fws.gov/ipac/>, which will show you any threatened or endangered species that may live on or around the proposed project. Note that this tool lists any and all plants and animals that may occur on the project property. Consultation with the USFWS, or, for projects involving marine resources, the National Marine Fisheries Service, and third-party consultants as necessary, is important to determine whether your project is likely to "take" endangered or threatened species that might be listed on IPaC.

If your project will result in habitat modification or harm to endangered or threatened plants or animals, the project proponent, typically through environmental counsel, will need an incidental take permit. See <https://www.fws.gov/Endangered/esa-library/pdf/permits.pdf>. The process is extensive, including the development of a habitat conservation plan (HCP) and, under certain circumstances, a full NEPA process. To apply for an incidental take permit, the project proponent, usually through counsel, must develop and submit an HCP, see <https://www.fws.gov/endangered/esa-library/pdf/hcp.pdf>, which describes the likely impacts of the taking and the measures the applicant has taken to minimize and mitigate those impacts. The HCP must also describe alternatives considered and reasons those alternatives were rejected. These minimization and mitigation measures are included as conditions of the permit, along with monitoring and reporting requirements, all of which will vary substantially based on the project, region, and species at issue.

As with the initial determination about whether “takes” are likely, it is important to coordinate with the USFWS or National Marine Fisheries Service (NMFS) and outside consultants when preparing the HCP. The project planner must also be included to determine whether design or scheduling changes will be required to minimize or mitigate takes. Minimization efforts may include designing the project to avoid sensitive areas or scheduling construction to avoid disturbing mating and rearing seasons. Mitigation includes many forms, from paying into established conservation funds to preserving existing habitat through acquisition or easements, to restoring degraded habitat or establishing buffer areas around existing habitat. The USFWS may have additional requirements. Further, the USFWS will determine whether an HCP is a “Low Effect” or “High Effect” HCP. Low effect HCPs involve only minor or negligible effects on the species or their habitat, and only minor or negligible effects on other environmental resources. Low Effect HCPs do not undergo NEPA analysis. All other HCPs must undergo either an EA or EIS. Given the complexity of these plans, consultation with environmental counsel and third-party environmental consultants is recommended, and often critical.

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In 2019 and 2020, the USFWS and the National Oceanic and Atmospheric Administration implemented changes to the ESA regulations. The 2020 changes have not been finalized or implemented as of this writing. Information about the 2019 and 2020 revisions can be found [here](#).

For more on the Endangered Species Act, see 4-24 Environmental Law Practice Guide § 24.03[3]; see also 4-24 Environmental Law Practice Guide § 24.03[3][f][iv] (permit for incidental taking of listed species).

### **Migratory Bird Treaty Act**

Like the ESA, the Migratory Bird Treaty Act (MBTA) prohibits the “take” of migratory birds, including their nests and eggs. Unlike the ESA, the MBTA does not prohibit habitat destruction. Also unlike the ESA, there does not yet exist an incidental take permit, nor is it clear that incidental takes of migratory birds are even prohibited, and a new proposed rule by the USFWS would limit takes to intentional injuring or killing of birds. The new rule is expected to be finalized by the end of 2020. Nevertheless, if your client’s project may result in the injury or death of migratory birds, which include several hundred different species, or their nests and eggs, your client may face some risk of exposure for fines or other actions under the act. The USFWS has guidance describing ways to avoid or mitigate the risk of bird takes, which should be considered by the real estate practitioner if it appears there could be effects on migratory birds. See <https://www.fws.gov/birds/management/project-assessment-tools-and-guidance/conservation-measures.php>. Reviewing and limiting the impact of the projects on migratory bird species may reduce the risk that the USFWS would pursue claims relating to any incidental or accidental takes. Consultation with environmental counsel to review possible liability under the MBTA is recommended.

For more on the Migratory Bird Treaty Act, see 4-24 Environmental Law Practice Guide § 24.03[2][a]. For the MBTA’s criminal enforcement provisions, see 2A-12C Environmental Law Practice Guide § 12C.03. Information about the new proposed rule can be found [here](#).