



## U.S. Court of Appeals Upholds Emergency Take Provision in Airport's U.S. Fish and Wildlife Permit

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Following the U.S. Court of Appeals for the Second Circuit's January 26, 2016, decision in *Friends of Animals v. Clay*, No. 14-4071 (Jan. 26, 2016), airports that have secured depredation permits from the U.S. Fish and Wildlife Service ("FWS") that contain "emergency take" provisions may "take" migratory birds on an emergency basis irrespective of species. This makes depredation permits a much more useful tool for on-airport wildlife hazard management, because it avoids the need to specify species in advance of the hazardous wildlife control.

Pursuant to FWS regulations, no person may "take" or attempt to "take" a migratory bird – defined as hunting, shooting, wounding, killing, capturing, or collecting – without specific authorization from the FWS in the form of a depredation permit. See 50 C.F.R. §§ 10.12, 21.41(a). Usually for depredation permits, applicants specify the particular species of migratory bird causing injury to human interests. In turn, the permits grant authority for "takes" only within species-specific quotas. Because of the "grave risks that arise when birds congregate near aircraft," *Friends of Animals*, slip op. at 7, however, the FWS often includes an "emergency-take" provision in an airport proprietor's depredation permit. Under such a provision, the FWS authorized the Port Authority of New York and New Jersey to take any species that poses a threat of serious bodily injury or risk to human life, irrespective of species.

In upholding the provision, the Second Circuit rejected *Friends of Animals'* claim that a prohibition on "kill[ing] migratory birds unless specifically authorized," combined with an applicant's responsibility to identify the species causing injury, implied a limitation on FWS's authority to authorize the emergency take of unenumerated species. Rather than restrain the agency, the Court held that an applicant's responsibility to identify the species causing injury merely ensures that the FWS has adequate information to make its permitting determination.