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Krisztina Nadasdy

Boston College Law School, krisztina.nadasdy@bc.edu

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KILLING TWO BIRDS WITH ONE STONE: HOW AN INCIDENTAL TAKE PERMIT PROGRAM UNDER THE MBTA CAN HELP COMPANIES AND MIGRATORY BIRDS

KRISZTINA NADASDY*

Abstract: Under the Migratory Bird Treaty Act (MBTA), it is unlawful to kill a migratory bird “by any means, or in any manner” without a permit. The United States has interpreted the language “by any means, or in any manner” to include the incidental killing of birds. In conflict with this interpretation, however, is the fact that permits for the incidental killing of migratory birds are not issued under the MBTA. This current system hurts both migratory birds and the entities whose commercial activities might result in migratory bird deaths. Birds continue to die in large numbers while entities cannot acquire permits to assure compliance with the MBTA. This Note explores the current state of the law regarding the incidental killing of migratory birds and concludes that a meaningful incidental take permit program would reduce migratory bird deaths and provide commercial entities with a means to assure their compliance with the MBTA.

INTRODUCTION

In 1916, the United States negotiated a treaty with Canada for the protection of migratory birds.¹ As both countries agreed, migratory birds “are of great value as a source of food or in destroying insects . . . but are nevertheless in danger of extermination through lack of adequate protection.”² In 1918, the United States executed the treaty by enacting the Migratory Bird Treaty Act (MBTA), which imposes criminal penalties on persons, associations, partnerships, or corporations that kill migratory birds without permission from the government.³ In-

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¹ Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702 [hereinafter U.S.-Gr. Brit. Treaty]. Great Britain negotiated the treaty on behalf of Canada. *See id.*

² *Id.*

³ Migratory Bird Treaty Act, ch. 128, 40 Stat. 755, 755–56 (1918) (codified as amended at 16 U.S.C. §§ 703–712 (2006)).

terested parties may obtain permission to kill a certain amount of birds by requesting permits from the Fish and Wildlife Service (FWS).⁴

The predominant threat to migratory bird populations in the nineteenth and early twentieth centuries was large-scale, unmitigated hunting, poaching, and capture of birds for market.⁵ Early prosecutions under the MBTA reflected these direct threats to birds, such as hunting and capture without a permit.⁶ Currently, however, migratory birds are threatened by a vast array of activities not directed at birds, such as operations involving power lines, wind energy, airplanes, and oil drilling.⁷ These activities contribute greatly to the total amount of birds killed; for example, four million to five million birds are killed annually because of collisions with communications towers.⁸

Bird deaths that result from activities not directed at birds are known as incidental takes.⁹ The government prosecutes entities whose activities kill birds incidentally, but the FWS has not promulgated regulations that would allow those entities to obtain permits and comply with the law.¹⁰ Without permits, entities whose activities might result in incidental takes must commence operations with uncertainty as to the legal-

⁴ 16 U.S.C. § 704(a) (2006); 50 C.F.R. § 10.1 (2012).

⁵ See George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 168 (1979); Meredith Blaydes Lilley & Jeremy Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, 38 ENVTL. L. 1167, 1177–78 (2008).

⁶ See Coggins & Patti, *supra* note 5, at 182; Lilley & Firestone, *supra* note 5, at 1181.

⁷ Lilley & Firestone, *supra* note 5, at 1172–73.

⁸ Albert M. Manville, II, *Towers, Turbines, Power Lines, and Buildings—Steps Being Taken by the U.S. Fish and Wildlife Service to Avoid or Minimize Take of Migratory Birds at These Structures*, in PROCEEDINGS OF THE FOURTH INTERNATIONAL PARTNERS IN FLIGHT CONFERENCE: TUNDRA TO TROPICS 262, 263–64 (2009), available at http://www.partnersinflight.org/pubs/mcallenproc/articles/pif09_anthropogenic%20impacts/manville_pif09.pdf and <http://www.perma.cc/0tp4TwrVsjx>; see U.S. FISH & WILDLIFE SERV., MIGRATORY BIRD MORTALITY: MANY HUMAN-CAUSED THREATS AFFLICT OUR BIRD POPULATIONS 1–2 (2002), available at www.fws.gov/birds/mortality-fact-sheet.pdf and <http://www.perma.cc/0S5J6qUIPj4> [hereinafter BIRD MORTALITY FACT SHEET].

⁹ See *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202, 1208 (D.N.D. 2012); Julie Lurman, *Agencies in Limbo: Migratory Birds and Incidental Take By Federal Agencies*, 23 J. LAND USE & ENVTL. L. 39, 40 (2007).

¹⁰ See *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 682 (10th Cir. 2010) (prosecution of oil and gas operator); *United States v. Moon Lake Electric Ass'n*, 45 F. Supp. 2d 1070, 1071 (D. Colo. 1999) (prosecution of rural electric cooperative); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 514–15 (E.D. Cal. 1978), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978) (prosecution of pesticide distributor); 50 C.F.R. §§ 21.1–.61 (2012) (describing types of migratory bird permits and notably not including civilian incidental take permits); Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931, 8932 (Feb. 28, 2007) (codified at 50 C.F.R. pt. 21 (2012)) (“Current regulations. . . do not expressly address the issuance of permits for incidental take.”).

ity of their actions.¹¹ Courts have added to the confusion by taking divergent stances on the issue with some even concluding that the MBTA's prohibition on killing birds does not apply to incidental killing.¹²

The current system to address incidental takes is insufficient and wrought with uncertainty, and it does not further the protection of migratory birds.¹³ A large portion of the bird species that the MBTA protects are endangered or might soon be listed as endangered if additional protective measures are not taken.¹⁴ The meaningful regulation of incidental takes, however, might reduce the amount of birds killed.¹⁵

This Note argues that the FWS should use its regulatory authority under the MBTA to promulgate regulations for incidental takes in the form of incidental take permits.¹⁶ Part I gives a brief history of migratory bird protection in the United States followed by a detailed look at the migratory bird treaties and the MBTA itself.¹⁷ Part II explores judicial interpretation of incidental takes under the MBTA and existing mechanisms to address incidental takes.¹⁸ Part III argues that the FWS has the authority to regulate incidental takes and that the current system is inadequate.¹⁹ This Note concludes that the FWS should promulgate regulations for incidental take permits and that incidental take permits would further the protection of migratory birds.²⁰

¹¹ HOLLAND & HART LLC, DEVELOPMENT OF A PERMIT PROGRAM FOR INCIDENTAL TAKE OF MIGRATORY BIRDS 1–2 (2010), available at <http://www.ingaa.org/File.aspx?id=11062> and <http://www.perma.cc/0xgz7phjzEi>; Lilley & Firestone, *supra* note 5, at 1199.

¹² *Brigham*, 840 F. Supp. 2d at 1211 (listing a number of cases that have applied the MBTA to unintentional takings and holding instead that unintentional takings are outside the scope of the MBTA); *infra* notes 75–112 and accompanying text.

¹³ *Infra* notes 194–243 and accompanying text; see Lilley & Firestone, *supra* note 5, at 1208–09.

¹⁴ Manville, *supra* note 8, at 262; AM. BIRD CONSERVANCY, RULEMAKING PETITION TO THE U.S. FISH & WILDLIFE SERVICE FOR REGULATING THE IMPACTS OF WIND ENERGY PROJECTS ON MIGRATORY BIRDS 10 (Dec. 14, 2011), available at http://www.abcbirds.org/abc_programs/policy/collisions/pdf/wind_rulemaking_petition.pdf and <http://www.perma.cc/072xt7VE4ar> [hereinafter ABC RULEMAKING PETITION]; N. AM. BIRD CONSERVATION INITIATIVE, U.S. COMM., ET AL., THE STATE OF THE BIRDS UNITED STATES OF AMERICA 2009, at 4 (2009), available at http://www.stateofthebirds.org/2009/pdf_files/State_of_the_Birds_2009.pdf and <http://www.perma.cc/02gi9FGJ5C2> [hereinafter STATE OF THE BIRDS].

¹⁵ Conrad A. Fjetland, *Possibilities for Expansion of the Migratory Bird Treaty Act for the Protection of Migratory Birds*, 40 NAT. RESOURCES J. 47, 67 (2000).

¹⁶ *Infra* notes 162–269 and accompanying text.

¹⁷ *Infra* notes 21–70 and accompanying text.

¹⁸ *Infra* notes 71–161 and accompanying text.

¹⁹ *Infra* notes 162–243 and accompanying text.

²⁰ *Infra* notes 244–269 and accompanying text.

I. THE MIGRATORY BIRD TREATY ACT

A. *Background on Migratory Bird Protection in the United States*

In the late 1800s, a combination of the population's aversion to regulation and belief that wildlife was an infinite resource created a bleak situation for many bird species.²¹ Many citizens had a general disdain for wilderness and wildlife and "believed that wild animals best served them in the market—as a choice dinner course or tailored into a coat or hat—rather than roaming the frontier."²² Birds were an important source of food and income for many people, and in the absence of government regulation, people slaughtered them at an alarming pace and brought some species to the brink of extinction.²³ Attempts to regulate what citizens believed was their right to use and exploit wildlife for profit, sustenance, and sport were weak or non-existent.²⁴

Perhaps the most striking example is the plight of the passenger pigeon, which was the most abundant bird species in North America in the early 1800s.²⁵ The birds became popular in meat markets and were caught and killed in large numbers.²⁶ For example, the small town of Hartford, Michigan sent almost twelve million pigeons to various meat markets in a forty-day period in 1869.²⁷ A lack of government regulation also contributed to the population decline.²⁸ By the mid-1800s, the population of passenger pigeons was decreasing, and in 1914 the last one died in the Cincinnati Zoo.²⁹

Beginning in 1900, Congress attempted to implement various comprehensive bird protections.³⁰ First, Congress enacted the Lacey Act, which prohibited transportation of illegally killed birds across state lines.³¹ The Lacey Act, however, was poorly enforced.³² In 1913, Congress enacted the Weeks-McLean Act, which prohibited the killing of

²¹ See Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 685, 690 (2005); Coggins & Patti, *supra* note 5, at 167–68; Lilley & Firestone, *supra* note 5, at 1177.

²² Blumm & Ritchie, *supra* note 21, at 686–87.

²³ *Id.* at 685, 687, 690, 692; Coggins & Patti, *supra* note 5, at 168.

²⁴ Blumm & Ritchie, *supra* note 21, at 690; Coggins & Patti, *supra* note 5, at 168.

²⁵ Blumm & Ritchie, *supra* note 21, at 691; STATE OF THE BIRDS, *supra* note 14, at 3.

²⁶ Blumm & Ritchie, *supra* note 21, at 691.

²⁷ *Id.*

²⁸ *Id.* at 690 & n.110, 691.

²⁹ *Id.* at 692.

³⁰ Lilley & Firestone, *supra* note 5, at 1178–79.

³¹ The Lacey Act, ch. 553, § 3, 31 Stat. 187, 188 (1900) (codified as amended at 16 U.S.C. §§ 3371–3378 (2006)); Lilley & Firestone, *supra* note 5, at 1178.

³² Lilley & Firestone, *supra* note 5, at 1178.

certain birds without permission from the federal government.³³ Various courts, however, quickly declared that the Weeks-McLean Act was unconstitutional.³⁴

In 1916, after these unsuccessful attempts at regulation, the Secretary of State negotiated a protectionist bird treaty with Canada.³⁵ This treaty led to the enactment of the Migratory Bird Treaty Act (MBTA) in 1918, which imposed criminal penalties on persons, associations, partnerships, or corporations that killed birds without permission from the government.³⁶

B. *The Migratory Bird Treaties*

The United States has negotiated four migratory bird treaties.³⁷ President Woodrow Wilson signed the first migratory bird treaty in 1916 with Canada.³⁸ The United States later negotiated migratory bird

³³ Weeks-McLean Law of 1913, ch. 145, 37 Stat. 828, 847–48; Lilley & Firestone, *supra* note 5, at 1178–79.

³⁴ United States v. McCullagh, 221 F. 288, 294–96 (D. Kan. 1915); United States v. Shauer, 214 F. 154, 160 (E.D. Ark. 1914); Lilley & Firestone, *supra* note 5, at 1179.

³⁵ U.S.-Gr. Brit. Treaty, *supra* note 1, at 1702; Coggins & Patti, *supra* note 5, at 169. The birds protected under the treaty were those migrating between the United States and Canada. Coggins & Patti, *supra* note 5, at 169.

³⁶ Migratory Bird Treaty Act, ch. 128, 40 Stat. 755, 755–56 (1918) (codified as amended at 16 U.S.C. §§ 703–712 (2006)).

³⁷ Convention Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647 [hereinafter U.S.-U.S.S.R. Treaty]; 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, U.S.-Japan, Mar. 4, 1972, 25 U.S.T. 3329 [hereinafter U.S.-Japan Treaty]; Convention Between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311 [hereinafter U.S.-Mex. Treaty]; U.S.-Gr. Brit. Treaty, *supra* note 1, at 1705.

³⁸ U.S.-Gr. Brit. Treaty, *supra* note 1, at 1705. In 1995, the parties negotiated a protocol that replaced the original treaty. Protocol Between the Government of the United States of America and the Government of Canada Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States, U.S.-Can., Dec. 14, 1995, S. TREATY DOC. No. 104–28 [hereinafter U.S.-Can. 1995 Protocol]. The 1995 protocol sets forth broad conservation goals and commits the parties to “long-term conservation” using a “comprehensive international framework” that includes the regulation of takes. *Id.* The protocol sets conservation principles such as providing for sustainable uses of birds, habitat conservation, and population restoration, and it suggests monitoring, regulation, and enforcement to achieve these goals. *Id.*

treaties with the governments of Mexico, Japan, and the Union of Soviet Socialist Republics (U.S.S.R.).³⁹

President Franklin D. Roosevelt signed a treaty for the protection of migratory birds between the United States and Mexico in 1937.⁴⁰ The convention with Mexico declares it “right and proper to protect birds denominated as migratory . . . by means of adequate methods which will permit . . . the utilization of said birds rationally for purposes of sport, food, commerce and industry.”⁴¹ The convention binds the parties to “establish laws, regulations and provisions” to carry out the conservation purposes of the Act.⁴²

President Gerald R. Ford signed a treaty in 1974 between the United States and Japan for the protection of migratory birds.⁴³ The United States and Japan found birds to be of “great value for recreational, aesthetic, scientific, and economic purposes, and that this value can be increased with proper management.”⁴⁴ The Japan treaty prohibits the illegal killing of migratory birds, but allows contracting parties to permit killings “[f]or scientific, educational, propagative or other specific purposes not inconsistent with the objectives of this Convention.”⁴⁵

President Jimmy Carter signed the last of the migratory bird treaties with the U.S.S.R. in 1978.⁴⁶ The contracting parties agreed that migratory birds are of “great scientific, economic, aesthetic, cultural, educational, recreational and ecological value and that this value can be increased under proper management.”⁴⁷ The convention prohibits the killing of migratory birds except in limited circumstances, including for “specific purposes not inconsistent with the principles of th[e] Convention.”⁴⁸

The MBTA implements the terms of these four bilateral migratory bird conventions.⁴⁹ The terms of the conventions guide the purpose of the MBTA and set forth conservation goals to which the contracting

³⁹ U.S.-U.S.S.R. Treaty, *supra* note 37, at 4647; U.S.-Japan Treaty, *supra* note 37, at 3329; U.S.-Mex. Treaty, *supra* note 37, at 1311.

⁴⁰ U.S.-Mex. Treaty, *supra* note 37, at 1316.

⁴¹ *Id.* at 1312.

⁴² *Id.*

⁴³ U.S.-Japan Treaty, *supra* note 37, at 3330.

⁴⁴ *Id.* at 3331.

⁴⁵ *Id.* at 3333.

⁴⁶ U.S.-U.S.S.R. Treaty, *supra* note 37, at 4647–48.

⁴⁷ *Id.* at 4649.

⁴⁸ *Id.* at 4651–52.

⁴⁹ 16 U.S.C. §§ 703(a), 704(a), 712(2) (2006).

parties must adhere in developing their domestic statutes and regulations.⁵⁰

C. *The MBTA: Statutory Provisions and Regulations*

The MBTA is a criminal statute with a broad prohibition against the killing of migratory birds.⁵¹ The Act protects more than one thousand species of birds.⁵² The Secretary of the Interior, acting through the Fish and Wildlife Service (FWS), has the authority to enforce the provisions of the Act.⁵³ The MBTA does not provide a private right of action.⁵⁴

1. Section 703(a): The Prohibition on Taking and Killing

The MBTA prohibits the taking and killing of migratory birds.⁵⁵ Section 703(a) of the MBTA states in pertinent part: “Unless and except as permitted by regulations . . . it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, [or] sell . . . any migratory bird.”⁵⁶ The statute does not define the term “take,” but it is preceded by the phrase “at any time, by any means or in any manner.”⁵⁷ The regulations made pursuant to the MBTA define the term “take” as “to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.”⁵⁸

2. Section 707: The Penalty Provision

A violation of the MBTA may result in either felony or misdemeanor penalties.⁵⁹ The felony provision is narrow and can only be

⁵⁰ See *id.*; U.S.-U.S.S.R. Treaty, *supra* note 37, at 4649; U.S.-Japan Treaty, *supra* note 37, at 3331; U.S.-Mex. Treaty, *supra* note 37, at 1312; U.S.-Gr. Brit. Treaty, *supra* note 1, at 1702.

⁵¹ See 16 U.S.C. §§ 703(a), 707.

⁵² 50 C.F.R. § 10.13 (2012); *Official Number of Protected Migratory Bird Species Climbs to More Than 1,000*, U.S. FISH & WILDLIFE SERV. (Mar. 1, 2010), <http://www.fws.gov/midwest/news/184.html>, available at <http://www.perma.cc/0GjV8aFhF6r>.

⁵³ 16 U.S.C. §§ 704(a), 706; 50 C.F.R. § 10.1.

⁵⁴ See 16 U.S.C. §§ 703–712 (notably lacking provisions allowing private citizen suits).

⁵⁵ See *id.* § 703(a).

⁵⁶ *Id.*

⁵⁷ See *id.* §§ 703–712 (notably not including a definitions section). The specific wording of the section at issue can be found in § 703(a). *Id.* § 703(a).

⁵⁸ 50 C.F.R. § 10.12.

⁵⁹ 16 U.S.C. § 707(a)–(b). For misdemeanor violations, the punishment is a fine of no more than \$15,000 and/or a maximum jail sentence of six months. *Id.* § 707(a). For felony

used on entities that *knowingly* take migratory birds and sell or barter them, or have an intent to do so.⁶⁰ The misdemeanor provision is broad and leaves vulnerable to punishment any person, association, corporation, or partnership that violates any part of the Act or fails to comply with any regulations promulgated under the Act.⁶¹

The misdemeanor provision, unlike the felony provision, contains no mental state requirement.⁶² A violation of the MBTA that results in misdemeanor penalties is a strict liability crime, which means that no intent on the part of the defendant is required.⁶³ In *United States v. Reese*, the U.S. District Court for the Western District of Tennessee in 1939 addressed the issue on first impression, and the court reasoned that Congress intended to create substantive protections for migratory birds, and thus intentionally omitted a scienter requirement.⁶⁴ Since *Reese*, courts have consistently found that intent is not required for misdemeanor convictions under the MBTA.⁶⁵ Congress has also acknowledged the strict liability standard.⁶⁶

3. Section 704(a): Authority to Regulate

Section 704(a) allows the Secretary of the Interior to permit the taking of migratory birds under certain circumstances.⁶⁷ The section states in pertinent part:

violations, the punishment is a fine of no more than \$2,000 and/or a maximum jail sentence of two years. *Id.* § 707(b).

⁶⁰ *Id.* § 707(b).

⁶¹ *Id.* § 707(a).

⁶² See *id.* § 707(a)–(b) (illustrating that the felony provision requires intent or knowledge, but the misdemeanor provision requires neither).

⁶³ *United States v. Manning*, 787 F.2d 431, 435 n.4 (8th Cir. 1986); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 536 (E.D. Cal. 1978), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978); *United States v. Reese*, 27 F. Supp. 833, 835 (W.D. Tenn. 1939); S. REP. NO. 99–445, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128.

⁶⁴ 27 F. Supp. at 835.

⁶⁵ *Manning*, 787 F.2d at 435 n.4; *United States v. Catlett*, 747 F.2d 1102, 1105 (6th Cir. 1984); Larry Martin Corcoran, *Migratory Bird Treaty Act: Strict Criminal Liability for Non-Hunting, Human Caused Bird Deaths*, 77 DENV. U. L. REV. 315, 318 & n.17 (1999).

⁶⁶ S. REP. NO. 99–445, at 16. In 1986, Congress amended the MBTA to add “knowingly” as a mental state requirement to the felony provision. Emergency Wetlands Resources Act of 1986, Pub. L. No. 99–645, § 501, 100 Stat. 3582, 3590. The accompanying Senate report stated: “Nothing in this amendment is intended to alter the ‘strict liability’ standard for misdemeanor prosecutions under 16 U.S.C. 707(a), a standard which has been upheld in many Federal court decisions.” S. REP. NO. 99–445, at 16.

⁶⁷ 16 U.S.C. § 704(a). Section 712(2) restates the Secretary’s authority to promulgate regulations to carry out the terms of the treaties. See *id.* § 712(2).

[T]he Secretary of the Interior is authorized and directed, from time to time, . . . to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same.⁶⁸

The Secretary has used § 704(a) to promulgate regulations allowing for migratory bird hunting and permits.⁶⁹ FWS has created permit schemes for: import, export, banding or marking, scientific collecting, taxidermy, waterfowl sale and disposal, special purposes, falconry, propagation, rehabilitation, depredation, military readiness activities, and population control.⁷⁰

II. INCIDENTAL TAKES AND THE MBTA

Before the 1970s, prosecutions under the MBTA were predominantly against those who engaged in illegal conduct *directed at* birds, such as hunting and poaching without a permit.⁷¹ In the 1970s, the government began prosecuting entities under the Act whose conduct was *not directed at* birds but resulted in incidental bird deaths.⁷² Neither the language of the MBTA nor its legislative history addresses the scope of the term take and whether it includes incidental takes.⁷³ Conse-

⁶⁸ *Id.* § 704(a).

⁶⁹ 50 C.F.R. pt. 20 (2012) (hunting regulations); 50 C.F.R. pt. 21 (2012) (migratory bird permits).

⁷⁰ 50 C.F.R. §§ 21.21 (import and export), 21.22 (banding or marking), 21.23 (scientific collecting), 21.24 (taxidermy), 21.25 (waterfowl sale and disposal), 21.27 (special purpose), 21.29 (falconry), 21.30 (propagation), 21.31 (rehabilitation), 21.41–.51 (depredation), 21.15 (military readiness), 21.60–.61 (population control) (2012).

⁷¹ Coggins & Patti, *supra* note 5, at 182; Lilley & Firestone, *supra* note 5, at 1181.

⁷² Coggins & Patti, *supra* note 5, at 183; Lilley & Firestone, *supra* note 5, at 1181; *see* United States v. Union Tex. Petroleum, No. 73-CR-127, 1973 U.S. Dist. LEXIS 15616, at *1–3 (D. Colo. July 11, 1973) (illustrating the prosecution of an oil company for the deaths of migratory birds in open oil sludge pits); United States v. FMC Corp., 572 F.2d 902, 903–04 (2nd Cir. 1978) (illustrating the prosecution of a pesticide manufacturer for the deaths of migratory birds in a wastewater pit).

⁷³ *See* Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2006) (lacking a definitions section); United States v. Moon Lake Electric Ass’n, 45 F. Supp. 2d 1070, 1082 (D. Colo. 1999) (“[T]here is no clearly expressed legislative intent that the MBTA regulates only physical conduct associated with hunting or poaching.”).

quently, courts have reached divergent conclusions as to the scope of the MBTA regarding incidental takes.⁷⁴

A. *Judicial Interpretation of Incidental Takes Under the MBTA*

United States v. Union Texas Petroleum in 1973 is among the first cases that the federal government prosecuted that involved incidental takes.⁷⁵ The government charged a company with violating the MBTA after dead birds were found in its uncovered oil sludge pits.⁷⁶ The company was engaged in petroleum extraction, which is not an action directed at birds or intended to cause bird deaths.⁷⁷ The company filed a motion to dismiss the charges on the grounds that the MBTA did not apply because the company's conduct was not directed at birds.⁷⁸ The U.S. District Court for the District of Colorado denied the motion and stated that "given the broad purposes of the Act and [its] language . . . we doubt that the statute was intended to be limited to hunting or other purposeful killing alone."⁷⁹ The court deferred further inquiry into the defendant's liability and the MBTA's scope until trial, but the defendant pled guilty, and these questions were left unanswered.⁸⁰

In 1978, the Ninth Circuit and the Second Circuit addressed the issue of incidental takes directly.⁸¹ The U.S. Court of Appeals for the Second Circuit addressed the issue in *United States v. FMC Corp.*⁸² In that case, a pesticide manufacturer appealed a jury verdict against it for violation of the MBTA.⁸³ The defendant's manufacturing process produced a large amount of wastewater, which should have been treated before release.⁸⁴ Unbeknownst to the defendant, the treatment system was broken, and many birds died after drinking the wastewater.⁸⁵ The

⁷⁴ *Infra* notes 75–112 and accompanying text.

⁷⁵ *Union Tex. Petroleum*, 1973 U.S. Dist. LEXIS 15616, at *3; Lilley & Firestone, *supra* note 5, at 1181.

⁷⁶ *Union Tex. Petroleum*, 1973 U.S. Dist. LEXIS 15616, at *3.

⁷⁷ *See id.*

⁷⁸ *Id.* at *1–3.

⁷⁹ *Id.* at *3, 9.

⁸⁰ *Id.* at *9; Coggins & Patti, *supra* note 5, at 184.

⁸¹ *See FMC Corp.*, 572 F.2d at 905–08 (discussing the application of the MBTA to the inadvertent poisoning of migratory birds); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 531–36 (E.D. Cal.), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978) (discussing whether the MBTA applies to poisoning migratory birds without any intent).

⁸² *See* 572 F.2d at 905–08 (discussing the application of the MBTA to the inadvertent poisoning of migratory birds).

⁸³ *Id.* at 903–04.

⁸⁴ *Id.* at 904.

⁸⁵ *Id.* at 905.

defendant attempted to scare birds away from the pond with floating devices, loud noises, and guards, but these solutions were ineffective.⁸⁶ The defendant was convicted for killing ninety-two birds between April 11 and June 25, 1975.⁸⁷ On appeal, the court found that although the defendant did not intend to harm the birds, the important public policy behind the MBTA and the dangerousness of defendant's product was sufficient to convict the defendant.⁸⁸

The U.S. Court of Appeals for the Ninth Circuit addressed incidental takes in *United States v. Corbin Farm Service*.⁸⁹ In that case, a pesticide distributor dispersed pesticides over a field, which resulted in the death of a large number of protected migratory birds.⁹⁰ The company argued that its actions were outside the scope of the MBTA because it was not engaged in bird hunting or capture, and the bird deaths were inadvertent.⁹¹ The court disagreed and reasoned that the expansiveness of the statutory language, "by any means or in any manner," may include poisoning.⁹² The court also noted that the MBTA's legislative history revealed no intention to exclude bird poisoning as a punishable offense.⁹³ The court, in finding the defendant's intent argument unpersuasive, also stated that it could impose criminal liability for "those who did not intend to kill migratory birds."⁹⁴ In denying the defendant's motion to dismiss, the court did not reach a holding on defendant's liability but suggested that a lack of reasonable care in spraying pesticides could be a factor in liability.⁹⁵

In 1998, in *United States v. Moon Lake Electric Association*, the issue of incidental takes found its way back to the District of Colorado.⁹⁶ In *Moon Lake*, the government prosecuted a rural electrical distribution cooperative that supplied electricity to an oil field in Colorado via power poles and lines.⁹⁷ Various species of birds used the power poles to

⁸⁶ *Id.*

⁸⁷ *Id.* at 903, 905.

⁸⁸ *FMC Corp.*, 572 F.2d at 908.

⁸⁹ *See Corbin Farm Serv.*, 444 F. Supp. at 531.

⁹⁰ *Id.* at 514–15.

⁹¹ *Id.* at 531–32.

⁹² *Id.* at 532 (quoting 16 U.S.C. § 703(a)).

⁹³ *Id.*

⁹⁴ *Id.* at 536.

⁹⁵ *See Corbin Farm Serv.*, 444 F. Supp. at 536 (foregoing the question of defendant's guilt but discussing the requirement of reasonable care nonetheless). The court reasoned that a person spraying pesticides can be in a position to foresee possible danger and act to prevent it. *Id.* at 535.

⁹⁶ *Moon Lake*, 45 F. Supp. 2d at 1071.

⁹⁷ *Id.*

perch and roost, and thirty-eight birds were electrocuted because the cooperative failed to install protective equipment on many of the poles.⁹⁸ The cooperative filed a motion to dismiss and claimed that it did not violate the MBTA because it was not engaged in hunting or poaching and the bird deaths were unintentional.⁹⁹

The court affirmed its existing precedent that a misdemeanor violation of the MBTA is a strict liability crime and that intent is not required.¹⁰⁰ The court found that the statutory language is not ambiguous and prohibits the taking or killing of birds “by any means or in any manner” without reference to whether that killing is intentional or unintentional, direct or indirect.¹⁰¹ Furthermore, the legislative history indicated no intent to narrow the Act to hunting and poaching.¹⁰² The court further indicated that the reach of the MBTA is limited by proximate causation, because bird deaths must be “reasonably anticipated or foreseen as a natural consequence of the wrongful act.”¹⁰³

In 2010, the U.S. Court of Appeals for the Tenth Circuit decided *United States v. Apollo Energies, Inc.*, where the court addressed proximate causation directly.¹⁰⁴ In that case, two Kansas oil operators, Apollo and Walker, were convicted for violating the misdemeanor provision of the MBTA after dead birds were found lodged in both operators’ equipment.¹⁰⁵ The court, applying the reasoning in *Moon Lake*, found that to uphold the convictions Apollo and Walker must have proximately caused the bird deaths.¹⁰⁶ The court found that Apollo proximately caused the bird deaths because Apollo knew its equipment had killed birds in the past and had received information as part of an FWS awareness campaign regarding bird deaths in oil operating equipment.¹⁰⁷ The court dismissed some charges against Walker, however, because at the time he had not been informed about the effects of his equipment on birds and had no prior experience with birds dying in his equipment.¹⁰⁸

⁹⁸ *Id.* at 1071–72.

⁹⁹ *Id.* at 1072.

¹⁰⁰ *Id.* at 1073–74.

¹⁰¹ *Id.* at 1078, 1079 (quoting 16 U.S.C. § 703(a)).

¹⁰² *Moon Lake*, 45 F. Supp. 2d at 1080.

¹⁰³ *Id.* at 1085 (emphasis omitted) (quoting BLACK’S LAW DICTIONARY 1225 (6th Ed. 1990)).

¹⁰⁴ 611 F.3d 679, 679, 682, 689–91 (10th Cir. 2010).

¹⁰⁵ *Id.* at 682.

¹⁰⁶ *Id.* at 690.

¹⁰⁷ *See id.* at 682–83, 691 (finding that Apollo must have reasonably anticipated and foreseen the bird deaths as a natural consequence of its use of oil drilling equipment).

¹⁰⁸ *Id.* at 691. Walker was charged with violations in 2007 and 2008. *Id.* The court dismissed the 2007 charge for lack of foreseeability but upheld the 2008 charge. *Id.*

In *United States v. Brigham Oil & Gas, L.P.*, the U.S. District Court for the District of North Dakota in 2012 diverged from the developing precedent of foreseeability as a limit on strict liability.¹⁰⁹ In that case, the government charged multiple oil and gas companies with MBTA violations after migratory birds were found dead and oiled in reserve pits.¹¹⁰ Each company had violated the MBTA on prior occasions, and the FWS had informed the companies about dangers that reserve pits pose to migratory birds.¹¹¹ Despite this background, the court dismissed the case and held that the MBTA does not apply to incidental takes and only applies to conduct directed at birds, such as hunting and poaching.¹¹²

B. Existing Incidental Take Regulations and Guidance Under the MBTA

The existing mechanisms to deal with incidental takes under the MBTA are minimal.¹¹³ FWS regulations allow for special purpose permits and incidental takes for military readiness exercises.¹¹⁴ The FWS has also published a series of voluntary guidelines to help certain industries mitigate their impacts on migratory birds.¹¹⁵

¹⁰⁹ 840 F. Supp. 2d 1202, 1202, 1211 (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 Migratory Bird Treaty Act.”).

¹¹⁰ *Id.* at 1203.

¹¹¹ *E.g.*, Statement of Probable Cause at 4, *Brigham*, 840 F. Supp. 2d 1202 (No. 4:11-po-00005-DLH).

¹¹² *Brigham*, 840 F. Supp. 2d at 1203, 1211. The *Brigham* court relied on narrow statements about the applicability of the MBTA from citizen suit cases brought under the APA that were premised on possible future bird deaths from timber harvesting operations. *Id.* at 1209 (discussing *Newton Cnty. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 114–15 (8th Cir. 1997)). Other courts have declined to follow these cases. *Apollo Energies*, 611 F.3d at 685 (acknowledging *Newton County* but declining to follow); *Moon Lake*, 45 F. Supp. 2d at 1085 (explicitly rejecting *Newton County* and similar cases).

¹¹³ *Infra* notes 116–161 and accompanying text.

¹¹⁴ 50 C.F.R. §§ 21.15, 21.27 (2012).

¹¹⁵ Memorandum from Jamie Rappaport Clark, Dir., U.S. Fish & Wildlife Serv., to Reg’l Dirs., Regions 1–7, 2 (Sept. 14, 2000), http://www.fws.gov/habitatconservation/com_tow_guidelines.pdf, available at <http://www.perma.cc/0mB4tR239xk> [hereinafter Communication Tower Guidelines]; THE EDISON ELECTRIC INST.’S AVIAN POWER LINE INTERACTION COMM. & U.S. FISH & WILDLIFE SERV., AVIAN PROTECTION PLAN (APP) GUIDELINES I (2005), available at <http://www.fws.gov/migratorybirds/CurrentBirdIssues/Hazards/APP/AVIAN%20PROTECTION%20PLAN%20FINAL%204%2019%2005.pdf> and <http://www.perma.cc/0V625TbJFga>; U.S. FISH & WILDLIFE SERV., U.S. FISH AND WILDLIFE SERVICE LAND-BASED WIND ENERGY GUIDELINES I (2012), available at http://www.fws.gov/windenergy/docs/WEG_final.pdf and <http://www.perma.cc/0LfoQUWSSiF> [hereinafter LAND-BASED WIND ENERGY GUIDELINES].

1. FWS Regulations

a. *Special Purpose Permits*

The FWS has promulgated a regulation allowing for the issuance of special purpose permits for activities related to migratory birds but not typically allowed by other permits.¹¹⁶ The FWS may grant a special purpose permit if an applicant requests a permit for an activity “related to migratory birds, their parts, nests, or eggs . . . and makes a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.”¹¹⁷

The FWS issues special purpose permits in conjunction with Endangered Species Act (ESA) incidental take permits.¹¹⁸ Under the ESA, entities whose actions might result in the incidental take of endangered species may apply for an incidental take permit (ITP).¹¹⁹ Several migratory birds protected under the MBTA, however, are concurrently listed under the ESA.¹²⁰ Without a special purpose permit under the MBTA, an entity with an ESA ITP for a concurrently listed species would be in violation of the MBTA when a take occurs.¹²¹

The FWS decision to issue special purpose permits in conjunction with the ESA ITPs was based on a memorandum by the Assistant Solicitor of the Fish and Wildlife branch within the Department of the Interior.¹²² In the memorandum, the Assistant Solicitor highlighted some legal obstacles to using the special purpose permit provision of the MBTA to cover incidental takes.¹²³ As the Assistant Solicitor discussed, ESA ITPs may be issued for activities unrelated to migratory birds, whereas for an MBTA special purpose permit the activity must be related.¹²⁴ The Assistant Solicitor further noted that for most ESA ITP hold-

¹¹⁶ 50 C.F.R. § 21.27.

¹¹⁷ *Id.*

¹¹⁸ Memorandum from Dir., Fish & Wildlife Serv., to Reg'l Dirs., Regions 1, 2, 3, 4, 5, 6, and 7 (Feb. 9, 1996), <http://www.fws.gov/endangered/esa-library/pdf/HCPAPP5.PDF>, available at <http://www.perma.cc/0v2PeBzs7GQ> [hereinafter FWS ESA Incidental Take Memorandum].

¹¹⁹ 16 U.S.C. § 1539(a) (2006).

¹²⁰ FWS ESA Incidental Take Memorandum, *supra* note 118.

¹²¹ Memorandum from Pete Raynor, Assistant Solicitor, Fish & Wildlife Branch, to John Rogers, Deputy Dir., U.S. Fish & Wildlife Serv., 2 (Feb. 5, 1996), <http://www.fws.gov/endangered/esa-library/pdf/HCPAPP5.PDF>, available at <http://www.perma.cc/0v2PeBzs7GQ> [hereinafter Incidental Take Memorandum from Solicitor].

¹²² *Id.* at 4; FWS ESA Incidental Take Memorandum, *supra* note 118.

¹²³ Incidental Take Memorandum from Solicitor, *supra* note 121, at 2–3.

¹²⁴ *See id.* at 2.

ers to receive an MBTA special purpose permit as well, they would have to show a “compelling justification” for the take because their activities might not otherwise meet the necessary MBTA permit requirements.¹²⁵ The Assistant Solicitor stated that special purpose permits are “not narrowly focused on incidental take” and suggested that the FWS should implement a permitting program that would specifically target the problems stemming from such takes.¹²⁶

The FWS has issued special purpose permits not in conjunction with ESA ITPs in limited circumstances.¹²⁷ For example, the FWS has issued permits for raptor abatement programs and to allow the take of birds in the course of rat eradication.¹²⁸ In 2012, the FWS issued the first commercial, non-conservation incidental take permit under the special purpose permit provision.¹²⁹ The Pacific Islands Regional office of the National Marine Fisheries Service (NMFS) had applied for an incidental take permit to operate a shallow-set longline fishery in Hawaii.¹³⁰ The deployment and retrieval of fishing lines can injure or kill birds.¹³¹ In the NMFS’s application, the agency proposed to continue operations but examine current practices that might result in bird takes

¹²⁵ *Id.* at 2–3. The regulation requires that special purpose permits only be issued if there is “a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.” 50 C.F.R. § 21.27 (2012). There is, however, no definition of “other compelling justification” in the MBTA or regulations made pursuant to the statute, so the FWS determines this on a case-by-case basis. U.S. FISH & WILDLIFE SERV., PAC. REGION, FINAL 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 5 (2012), available at <http://www.fws.gov/pacific/migratorybirds/pdf/NMFS%20Permit%20Final%20EA.pdf> and <http://www.perma.cc/0GgqkMtW4Ts> [hereinafter NMFS PERMIT FINAL EA].

¹²⁶ Incidental Take Memorandum from Solicitor, *supra* note 121, at 3.

¹²⁷ See Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931, 8947 (Feb. 28, 2007) (codified at 50 C.F.R. pt. 21 (2012)).

¹²⁸ Final Permit Conditions for Abatement Activities Using Raptors, 72 Fed. Reg. 69705, 69705 (Dec. 10, 2007); U.S. DEP’T OF THE INTERIOR, FISH & WILDLIFE SERV., RECORD OF DECISION: PALMYRA ATOLL NATIONAL WILDLIFE REFUGE RAT ERADICATION PROJECT 7 (2011), available at http://www.fws.gov/palmyraatoll/ROD_Palmyra%20Rat%20Eradication_Signed.pdf and <http://www.perma.cc/0zKpFs6Dr4C> [hereinafter PALMYRA ATOLL ROD].

¹²⁹ See Special Purpose Permit Application; Draft Environmental Assessment; Hawaii-Based Shallow-Set Longline Fishery, 77 Fed. Reg. 1501, 1502 (Jan. 10, 2012); *Permit Issued for Hawaiian Fishery*, U.S. FISH & WILDLIFE SERV. (Aug. 20, 2012), <http://www.fws.gov/pacific/news/news.cfm?id=2144375094>, available at <http://www.perma.cc/0YbNrjwZb8x>.

¹³⁰ Special Purpose Permit Application; Draft Environmental Assessment; Hawaii-Based Shallow-Set Longline Fishery, 77 Fed. Reg. at 1501.

¹³¹ *Id.* at 1502.

and report its findings to the FWS.¹³² After the FWS completed an Environmental Assessment (EA) that found that no significant environmental impact would result from the proposed activities, the FWS issued a final permit on August 20, 2012.¹³³ The FWS found “compelling justification” for the permit considering the conservation purposes underlying the MBTA and related regulations.¹³⁴ The final permit allows the fishery to continue business as usual and requires no changes or increased mitigation measures.¹³⁵

b. *Take Authorization for Military Readiness Activities*

The FWS has promulgated regulations that allow the incidental take of migratory birds during military readiness activities.¹³⁶ Under the regulations, the military is allowed to incidentally take migratory birds, but it must consult with the FWS and develop conservation plans if the military determines that an “ongoing or proposed activit[y] . . . may result in a significant adverse effect on a population of a migratory bird species.”¹³⁷ The Secretary may suspend authorization of the take if it determines that the authorization is not compatible with one of the migratory bird treaties.¹³⁸ The Secretary may withdraw authorization if the activity “is likely to result in a significant adverse effect” on migratory birds and the military has failed to provide requested information, or failed to implement conservation measures or proper species monitoring.¹³⁹

Center for Biological Diversity v. Pirie is central to the regulation of incidental takes in military readiness activities.¹⁴⁰ In that case, the Center for Biological Diversity (CBD) sued the Navy, under the Administrative Procedure Act (APA), for violating the MBTA.¹⁴¹ The CBD alleged that

¹³² *Id.*

¹³³ Special Purpose Permit Application; Hawaii-Based Shallow-Set Longline Fishery; Final Environmental Assessment and Finding of No Significant Impact, 77 Fed. Reg. 50153, 50153 (Aug. 20, 2012); *Permit Issued for Hawaiian Fishery*, *supra* note 129.

¹³⁴ See NMFS PERMIT FINAL EA, *supra* note 125, at 4, 5.

¹³⁵ Special Purpose Permit Application; Hawaii-Based Shallow-Set Longline Fishery; Final Environmental Assessment and Finding of No Significant Impact, 77 Fed. Reg. at 50154; NMFS PERMIT FINAL EA, *supra* note 125, at 23, 43.

¹³⁶ 50 C.F.R. § 21.15 (2012).

¹³⁷ *Id.* at § 21.15(a)(1).

¹³⁸ *Id.* at § 21.15(b)(1).

¹³⁹ *Id.* at § 21.15(b)(2).

¹⁴⁰ 191 F. Supp. 2d 161, 163–64 (D.D.C. 2002); *Migratory Bird Permits; Take of Migratory Birds by the Armed Forces*, 72 Fed. Reg. at 8931–33 (codified at 50 C.F.R. pt. 21 (2012)).

¹⁴¹ *Ctr. for Biological Diversity*, 191 F. Supp. 2d at 163.

the Navy was killing migratory birds without a permit through various activities, such as dropping bombs and firing machine guns from aircraft.¹⁴² The U.S. District Court for the District of Columbia found that the Navy's lack of a permit violated the MBTA because its military readiness activities killed protected birds in the past and would kill birds in the future.¹⁴³ The Navy had previously attempted to apply for a permit but was denied by the FWS.¹⁴⁴ Although the FWS denied the permit, it stated that it would not use its enforcement discretion against the Navy.¹⁴⁵ The FWS's choice to not enforce, however, did not preclude the CBD from using the APA to enforce the law against a federal agency.¹⁴⁶

The court issued an injunction prohibiting further military readiness activities in the area under dispute.¹⁴⁷ This decision prompted Congress to issue an order requiring the Secretary to allow for incidental takes in military readiness activities.¹⁴⁸

2. FWS Voluntary Guidance for Various Industries

The FWS has issued guidance for various industries and activities regarding mitigating or eliminating bird mortality.¹⁴⁹ Adherence to guidance is voluntary, meaning that the guidelines offer no direct cause of action against non-compliant entities or the FWS.¹⁵⁰ Furthermore, adherence to the guidelines does not absolve entities from liability under the MBTA.¹⁵¹

¹⁴² *Id.* at 163, 165.

¹⁴³ *Id.* at 174.

¹⁴⁴ *Id.* at 166–67, 170. The Navy was denied a permit because it applied for a depredation permit, which is inapplicable to military readiness activities, and because at the time there were no regulations authorizing the FWS to issue permits for incidental takes. *Id.* at 167.

¹⁴⁵ *Id.* at 168.

¹⁴⁶ *Ctr. for Biological Diversity*, 191 F. Supp. 2d at 177.

¹⁴⁷ Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931, 8933 (Feb. 28, 2007) (codified at 50 C.F.R. pt. 21 (2012)).

¹⁴⁸ Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107–314, § 315, 116 Stat. 2458, 2509 (2002).

¹⁴⁹ Communication Tower Guidelines, *supra* note 115, at 2 (communication towers); AVIAN PROTECTION PLAN (APP) GUIDELINES (electric utilities), *supra* note 115, at 1; LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 1 (wind energy).

¹⁵⁰ See Communication Tower Guidelines, *supra* note 115, at 2; AVIAN PROTECTION PLAN (APP) GUIDELINES, *supra* note 115, at 1; LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 4.

¹⁵¹ Communication Tower Guidelines, *supra* note 115, at 2; AVIAN PROTECTION PLAN (APP) GUIDELINES, *supra* note 115, at 15; LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 6.

The voluntary guidelines for land-based wind energy create a tiered approach to the management of migratory bird risks.¹⁵² The guidelines contain five tiers, which correspond to different stages of the wind energy development process.¹⁵³ At each tier, developers are encouraged to collect or provide certain information, such as assessing potential species of concern and identifying mitigation strategies.¹⁵⁴ The FWS must provide certain data, identify potential concerns, advise developers, and communicate with other agencies.¹⁵⁵ The tiered approach allows for constant communication and evaluation at every step of the process.¹⁵⁶ The FWS provides information and recommendations that developers are free to reject if the developers provide a reasoned explanation.¹⁵⁷ Furthermore, the FWS has committed itself to answering requests for information and consultation within sixty days, and if the agency responds late, the developer must only adhere to the recommendations “if feasible.”¹⁵⁸

Although compliance with the guidelines will not absolve a party from liability under the MBTA, the FWS will consider adherence to the guidelines and a party’s willingness to communicate when deciding to use its enforcement discretion.¹⁵⁹ Whether a company’s reasoned rejection of FWS recommendations would constitute adherence to the guidance remains unclear.¹⁶⁰ The United States has yet to prosecute any wind companies under the MBTA.¹⁶¹

III. INCIDENTAL TAKE PERMITS FOR THE MBTA

The FWS should use the authority it possesses under § 704(a) of the MBTA to promulgate regulations requiring certain entities to ac-

¹⁵² LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 5, 7.

¹⁵³ *Id.* The five tiers are: preliminary site evaluation, site characterization, field studies and impact prediction, post construction studies to estimate impacts, and other post construction studies and research. *Id.* at 7.

¹⁵⁴ *Id.* at 5.

¹⁵⁵ *Id.*

¹⁵⁶ *See id.*

¹⁵⁷ LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 4.

¹⁵⁸ *Id.* at 7.

¹⁵⁹ *Id.* at 6.

¹⁶⁰ *See* ABC RULEMAKING PETITION, *supra* note 14, at 56 (arguing that a developer’s documentation of disagreement constitutes adherence to guidelines); LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 4 (noting that the failure to incorporate guidance may contribute to the FWS’s decision to enforce).

¹⁶¹ Lilley & Firestone, *supra* note 5, at 1198; ABC RULEMAKING PETITION, *supra* note 14, at 76.

quire incidental take permits before commencing operations.¹⁶² First, statutory authority exists in the MBTA for the Secretary to promulgate regulations permitting incidental takes.¹⁶³ Second, the existing mechanisms to deal with incidental takes are insufficient.¹⁶⁴ Third, an incidental take permit program would resolve many of the issues surrounding incidental takes under the MBTA and reduce the amount of incidental bird deaths.¹⁶⁵

A. *Statutory Authority for Incidental Take Permit Regulations Exists in the MBTA*

Section 704(a) gives the FWS broad authority “to determine when, to what extent, if at all, and by what means, it is *compatible with the terms of the conventions* to allow hunting, *taking*, capture, killing, possession, . . . of any [migratory] bird . . . and to adopt suitable regulations permitting and governing the same.”¹⁶⁶ Thus, the FWS may regulate incidental takes via permits if (1) the statutory definition of “take” includes incidental takes, and (2) allowing permits for incidental takes comports with the four migratory bird treaties.¹⁶⁷

1. The Prohibitions in the MBTA Include Incidental Take

The prohibitions in the MBTA against the taking and killing of migratory birds include incidental takes, and a court would be likely to uphold such an interpretation by FWS.¹⁶⁸ When reviewing challenges to an agency’s interpretation of its enabling statute, courts must give

¹⁶² See HOLLAND & HART, LLC, *supra* note 11, at 3 (calling for an incidental take permit program for natural gas pipeline companies); ABC RULEMAKING PETITION, *supra* note 14, at 89 (calling for regulations allowing for incidental take permits for wind energy projects). Others have suggested congressional action as opposed to the administrative regulatory process. See Lilley & Firestone, *supra* note 5, at 1210 (arguing that Congress should amend the MBTA to allow for incidental take permits). This Note proposes use of the regulatory process rather than Congress because the FWS already possesses regulatory authority to create a program; Congress does not need to authorize what is already authorized. *Infra* notes 168–187 and accompanying text.

¹⁶³ *Infra* notes 166–193 and accompanying text.

¹⁶⁴ *Infra* notes 194–243 and accompanying text.

¹⁶⁵ *Infra* notes 244–269 and accompanying text.

¹⁶⁶ 16 U.S.C. § 704(a) (2006) (emphasis added); Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931, 8946 (Feb. 28, 2007) (codified at 50 C.F.R. pt. 21 (2012)) (acknowledging the FWS’s broad authority to promulgate regulations in accordance with the treaties).

¹⁶⁷ See 16 U.S.C. § 704(a); HOLLAND & HART, LLC, *supra* note 11, at 6; ABC RULEMAKING PETITION, *supra* note 14, at 66.

¹⁶⁸ *Infra* notes 174–187 and accompanying text.

agencies broad deference, as delineated in the seminal case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁶⁹ *Chevron* sets forth a two-part test for judicial deference to agency interpretation of statutes.¹⁷⁰ First, if Congress has unambiguously spoken on the issue, then the agency must follow the intent of Congress.¹⁷¹ The intent of Congress is discerned through the statutory language itself, and the legislative history.¹⁷² If Congress's intentions are unclear, courts must defer to the agency's interpretation if the agency has construed the statute in a reasonable manner.¹⁷³

The prohibitions in § 703 include: hunting, taking, capturing, killing, possessing, selling, bartering, attempting to kill, attempting to take, and attempting to sell.¹⁷⁴ The MBTA does not define these terms, and none of the terms are qualified by adjectives such as direct, indirect, purposeful, intentional, or unintentional.¹⁷⁵ In the absence of a statutory definition, the words in a statute should receive their ordinary meaning, which can be found in dictionaries.¹⁷⁶ Around the time of the MBTA's enactment, the word take was defined as: "to grasp; seize . . . [t]o gain control or possession of . . . [t]o catch . . . to bear away; to remove . . . [t]o remove from life; to cause to die . . . [t]o get and take away wrongfully."¹⁷⁷ The term kill was defined as: "To deprive of life; put to death . . . to destroy or ruin; to suppress; to put an end to . . . [t]o slaughter."¹⁷⁸ Neither of these dictionary definitions unambiguously indicates that the words "take" and "kill" describe only purposeful or direct actions.¹⁷⁹

The MBTA's legislative history does not show clear congressional intent on the issue of incidental takes.¹⁸⁰ The congressional debate fo-

¹⁶⁹ 467 U.S. 837, 844–45 (1984).

¹⁷⁰ *Id.* at 842–43.

¹⁷¹ *Id.*

¹⁷² *See id.* at 861–62.

¹⁷³ *See id.* at 843, 865.

¹⁷⁴ 16 U.S.C. § 703(a).

¹⁷⁵ *See id.* §§ 703–712 (lacking a definitions section).

¹⁷⁶ *Babbit v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697 (1995); *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994).

¹⁷⁷ WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2107 (1st ed. 1920).

¹⁷⁸ *Id.* at 1185.

¹⁷⁹ *United States v. Moon Lake Electric Ass'n*, 45 F. Supp. 2d 1070, 1078–79 (D. Colo. 1999); *see* WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 177, at 1185, 2107.

¹⁸⁰ *Moon Lake*, 45 F. Supp. 2d at 1080–82; *see* H.R. REP. NO. 65–243, at 2 (1918) (attributing bird deaths to "the extension of agriculture, and particularly the draining on a large scale of swamps and meadows, together with improved firearms and a vast increase in the

cused on purposeful and direct conduct such as hunting and poaching because at the time, those activities were major threats to bird populations.¹⁸¹ As cases and congressional documents illustrate, however, Congress was concerned with the expansiveness of the MBTA beyond hunting and poaching.¹⁸²

In 1986, after the FWS had won multiple incidental take cases, Congress amended the MBTA to add a mental state requirement for felony offenses.¹⁸³ If Congress found the FWS's court victories as problematic, it could have amended the MBTA to exclude incidental takes by either clarifying the language in § 703 or narrowing the misdemeanor provision.¹⁸⁴ Congress left the misdemeanor provision and § 703 untouched, and in an accompanying Senate Report Congress acknowledged that a misdemeanor conviction does not require a showing of intent.¹⁸⁵

Congress has not clearly spoken on the issue of incidental takes in the MBTA.¹⁸⁶ If the FWS were to implement an incidental take permit program, and if the program was challenged, under *Chevron* a reviewing court would have to defer to the agency's interpretation of the stat-

number of sportsmen") (quoting the Department of Agriculture); 55 CONG. REC. 4816 (1917) (statement of Sen. Smith) ("Nobody is trying to do anything here except to keep pothunters from killing game out of season, ruining the eggs of nesting birds, and ruining the country by it.").

¹⁸¹ *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal. 1978), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978); Coggins & Patti, *supra* note 5, at 168; *see* 56 CONG. REC. 7357 (1918) (statement of Rep. Fees) ("The needs of the farmer call loudly for [the birds] protection . . . [t]he food requirements . . . also demand their protection from the market hunter.").

¹⁸² *See Corbin Farm Serv.*, 444 F. Supp. at 532; 56 CONG. REC. 7455 (1918) (statement of Rep. Mondell) ("What are you going to do in a case like this: a barefoot boy . . . largely through inadvertence and without meaning anything wrong, happens to throw a stone at and strikes and injures a robin's nest . . . whereupon he is hauled before a court for violation of [the migratory bird treaty].").

¹⁸³ Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, § 501, 100 Stat. 3582, 3590; *United States v. FMC Corp.*, 572 F.2d 902, 908 (2nd Cir. 1978); *Corbin Farm Serv.*, 444 F. Supp. at 540.

¹⁸⁴ *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (noting "that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion'") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Moon Lake*, 45 F. Supp. 2d at 1077 (noting "that Congress reviewed and substantively amended the MBTA in 1986 without attempting to vitiate the holdings of *FMC* . . . and *Corbin Farm Service*").

¹⁸⁵ S. REP. NO. 99-445, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128; *see* 100 Stat. at 3590 (amending only the felony provision).

¹⁸⁶ *Supra* notes 174-185 and accompanying text.

ute if the interpretation is reasonable.¹⁸⁷ Because including incidental takes under the language of the MBTA is reasonable, a reviewing court would have to defer to the FWS's interpretation, and thus an incidental take permit program would likely survive judicial review.¹⁸⁸

2. Permitting Incidental Takes Furthers the Goals of the Migratory Bird Treaties

Section 704(a) of the MBTA only allows for regulations that are compatible with the treaties between the United States and Canada, Mexico, Japan, and the Union of Soviet Socialist Republics (U.S.S.R.).¹⁸⁹ Incidental take permits would further the conservation goals of the various migratory bird treaties.¹⁹⁰ All the treaties contemplate regulations for the take of migratory birds.¹⁹¹ Furthermore, the treaties contemplate conservation goals broader than only those related to hunting and poaching.¹⁹² Incidental takes contribute to bird deaths, which the conventions aim to reduce.¹⁹³ A mandatory permit process would force applicants to consider the consequences of projects in relation to migratory birds and take action to reduce such consequences before commencement of a project.¹⁹⁴

¹⁸⁷ See *Chevron*, 467 U.S. at 843 (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

¹⁸⁸ See *id.*; *infra* notes 174–185 and accompanying text.

¹⁸⁹ 16 U.S.C. §§ 703(a), 704(a).

¹⁹⁰ See U.S.-Can. 1995 Protocol, *supra* note 38 (promoting the long-term conservation of migratory birds); U.S.-U.S.S.R. Treaty, *supra* note 37, at 4649; U.S.-Japan Treaty, *supra* note 37, at 3331 (promoting the proper management of migratory birds); U.S.-Mex. Treaty, *supra* note 37, at 1312 (calling for the protection of migratory birds); Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931, 8946 (Feb. 28, 2007) (codified at 50 C.F.R. pt. 21 (2012)) (finding regulations authorizing takes incidental to military readiness activities consistent with the four migratory bird treaties).

¹⁹¹ U.S.-Can. 1995 Protocol, *supra* note 38; U.S.-U.S.S.R. Treaty, *supra* note 37, at 4651; U.S.-Japan Treaty, *supra* note 37, at 3333; U.S.-Mex. Treaty, *supra* note 37, at 1312.

¹⁹² U.S.-Can. 1995 Protocol, *supra* note 38; U.S.-U.S.S.R. Treaty, *supra* note 37, at 4649; U.S.-Japan Treaty, *supra* note 37, at 3331; U.S.-Mex. Treaty, *supra* note 37, at 1312. The Mexico treaty explicitly discusses provisions on hunting, however, it broadly allows for each of the contracting parties to develop their own laws and regulations promoting “the utilization of said birds rationally for purposes of sport, food, commerce, and industry.” U.S.-Mex. Treaty, *supra* note 37, at 1312–13.

¹⁹³ See U.S.-Can. 1995 Protocol, *supra* note 38; U.S.-U.S.S.R. Treaty, *supra* note 37, at 4649–50; U.S.-Japan Treaty, *supra* note 37, at 3331; U.S.-Mex. Treaty, *supra* note 37, at 1312; BIRD MORTALITY FACT SHEET, *supra* note 8 (noting that incidental takes contribute to bird deaths).

¹⁹⁴ See *infra* notes 244–269 and accompanying text.

B. *The Existing Mechanisms to Deal with Incidental Take Are Insufficient*

The FWS currently has three mechanisms to address the issue of incidental takes: general enforcement discretion, existing permits, and voluntary guidelines.¹⁹⁵ None of these options provides companies with certainty as to the legality of their actions under the MBTA, nor do they effectively deal with the problem of declining bird populations.¹⁹⁶

1. General Enforcement Discretion

The FWS enforces the MBTA and has discretion in choosing which violations to refer for prosecution.¹⁹⁷ Thus, the FWS may choose not to enforce the MBTA against certain entities that violate the statute through incidental takes.¹⁹⁸ An assurance against enforcement by the FWS might provide slight comfort to a potential violator, but such an assurance cannot provide total security against prosecution.¹⁹⁹ In *Center for Biological Diversity v. Pirie*, the FWS assured the Navy that it would not enforce the MBTA against the Navy for the incidental take of migratory birds on an island.²⁰⁰ Because the Navy is a federal agency, though, a citizens group was able to sue under the Administrative Procedure Act.²⁰¹ The court held that the Navy violated the MBTA because the taking and killing of migratory birds without an MBTA permit is illegal.²⁰²

More generally, reliance on the FWS's enforcement discretion is problematic because agency policies and goals can change from presidential administration to presidential administration.²⁰³ Thus, an assur-

¹⁹⁵ *Supra* notes 116–161 and accompanying text; *infra* notes 196–197 and accompanying text.

¹⁹⁶ See *infra* notes 196–243 and accompanying text (discussing the drawbacks to current FWS MBTA enforcement).

¹⁹⁷ 16 U.S.C. § 706 (2006); *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 168 (D.D.C. 2002); 50 C.F.R. § 10.1 (2012).

¹⁹⁸ See *Ctr. for Biological Diversity*, 191 F. Supp. 2d at 168 (restating the FWS's "enforcement discretion" for certain activities that might violate the MBTA); Lilley & Firestone, *supra* note 5, at 1198 (noting that the FWS has yet to use its enforcement discretion against wind energy projects).

¹⁹⁹ See *Ctr. for Biological Diversity*, 191 F. Supp. 2d at 177 (noting the FWS's choice not to enforce the MBTA does not preclude enforcement by citizen groups under the APA).

²⁰⁰ *Id.* at 166, 168.

²⁰¹ *Id.* at 175.

²⁰² *Id.* at 174.

²⁰³ See Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 *ECOLOGY L.Q.* 657, 658, 674 (2008) (discussing the ability of agencies to change policies from one administration to the next).

ance against enforcement that conformed with the policy of one administration might not conform with the policy of another.²⁰⁴

Furthermore, a lack of guidance on the implementation of MBTA regulations prevents consistency in judicial interpretations of the Act's scope for those cases that do reach the courts.²⁰⁵ For example, in *United States v. Moon Lake Electric Association* and *United States v. Apollo Energies, Inc.* the courts hinged MBTA liability on the companies' ability to reasonably foresee the bird deaths.²⁰⁶ In contrast, in *United States v. Brigham Oil & Gas, L.P.* the court dismissed FWS's case against three oil and gas companies even though the companies could have reasonably foreseen the bird deaths.²⁰⁷ If the court in *Brigham* would have used the proximate causation analysis from *Moon Lake* and *Apollo Energies*, however, the FWS would have survived a motion to dismiss.²⁰⁸ The MBTA is a federal statute and should apply uniformly across the nation so that the FWS may successfully enforce it.²⁰⁹

Allowing the FWS to use its discretion to refrain from enforcing the MBTA does not further the conservation goals of the treaties or the Act—inaction regarding bird deaths does not contribute to bird conservation.²¹⁰ If the FWS routinely does not refer a certain industry or

²⁰⁴ See *id.*

²⁰⁵ See *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 682 (10th Cir. 2010) (finding a lawfully operating oil driller liable under the MBTA); *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202, 1214 (D.N.D. 2012) (dismissing MBTA violations against lawfully operating oil and gas companies).

²⁰⁶ See *Apollo Energies*, 611 F.3d at 690–91 (discussing the application of the proximate cause standard); *Moon Lake*, 45 F. Supp. 2d at 1085 (discussing the need to prove proximate causation to “obtain a guilty verdict”).

²⁰⁷ *Brigham*, 840 F. Supp. 2d at 1214; see, e.g., Statement of Probable Cause, *supra* note 111, at 4–5.

²⁰⁸ See *Apollo Energies*, 611 F.3d at 682–83, 690–91 (reasoning that defendant's previous violations, coupled with participation in the information campaign, was sufficient to prove that defendant Apollo could reasonably foresee the harm); *Moon Lake*, 45 F. Supp. 2d at 1085 (discussing the need to prove proximate causation to “obtain a guilty verdict”); e.g., Statement of Probable Cause, *supra* note 111, at 4–5 (noting that the charged company had previously observed dead birds on its property and received information regarding mitigation measures).

²⁰⁹ See *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (presenting migratory bird deaths as an issue of national interest and discouraging reliance on inconsistent state laws).

²¹⁰ See 16 U.S.C. § 703(a) (declaring it unlawful to kill or take birds); U.S.-Can. 1995 Protocol, *supra* note 38 (binding the parties to the conservation of birds through regulation and enforcement); U.S.-U.S.S.R. Treaty, *supra* note 37, at 4649, 4651 (promoting proper bird management and binding the parties to prohibit the taking of birds except in limited circumstances); U.S.-Japan Treaty, *supra* note 37, at 3331, 3333 (promoting proper bird management and binding the parties to prohibit the taking of birds except in limited circumstances); U.S.-Mex. Treaty, *supra* note 37, at 1312 (binding the parties to the conservation of birds through regulations and laws).

type of activity for prosecution, affected actors have little incentive to change their behavior and try to mitigate or eliminate the effects of their actions on birds.²¹¹

2. Existing Permits and Regulations

The only existing regulation under the MBTA that may apply to incidental takes outside of the military readiness context is the regulation allowing special purpose permits.²¹² Special purpose permits have some promise for regulating incidental takes, but they are ultimately insufficient because they have been used only in limited circumstances, and the requirements for approval might not fit well with various industries.²¹³

As the FWS noted, “[s]pecial purpose permits may be issued for actions whereby take of migratory birds could result as an unintended consequence. . . . [h]owever, the Service has previously issued such permits only in very limited circumstances.”²¹⁴ Special purpose permits are issued in conjunction with incidental take permits (ITPs) under the Endangered Species Act (ESA), but these permits only cover the incidental take of endangered bird species and not the hundreds of other non-endangered species.²¹⁵ The FWS has issued only a small number of special purpose permits outside of the ESA ITP context.²¹⁶ For example, the FWS issued a special purpose permit allowing the incidental take of birds in the course of a rat eradication program in the Pacific Islands.²¹⁷ The agency issued the permit because the eradication of the rats would lead to long-term benefits for migratory bird populations.²¹⁸ The FWS has also issued special purpose permits for raptor abatement programs,

²¹¹ See Lilley & Firestone, *supra* note 5, at 1209 (describing how the lack of proper enforcement by the FWS discourages the wind energy industry from “preventing or minimizing wildlife impacts”).

²¹² See 50 C.F.R. §§ 21.1–.61 (2012) (describing types of migratory bird permits and notably not including civilian incidental take permits).

²¹³ *Infra* notes 213–234 and accompanying text.

²¹⁴ Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. at 8947 (codified at 50 C.F.R. pt. 21 (2012)).

²¹⁵ See FWS ESA Incidental Take Memorandum, *supra* note 118.

²¹⁶ See Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. at 8947 (noting that the FWS has issued special purpose permits “only in very limited circumstances”).

²¹⁷ PALMYRA ATOLL ROD, *supra* note 128, at 2, 7.

²¹⁸ *Id.* at 6–7.

which train raptors to “take birds . . . to mitigate depredation and nuisance problems, including threats to human health and safety.”²¹⁹

Most recently, the FWS issued an incidental take permit to the National Marine Fisheries Service (NMFS) for the incidental take of birds at the Hawaii shallow-set longline fishery.²²⁰ This permit was the first incidental take special purpose permit issued by the FWS for a commercial, non-conservation activity.²²¹ A citizens group challenged the permit and claimed that the issuance of the permit was “arbitrary, capricious, and contrary to the [MBTA].”²²² The petitioners alleged that allowing incidental takes under the permit was beyond the scope of a special purpose permit because the fishery did not meet any of the criteria necessary to obtain such a permit.²²³ In August 2013, the U.S. District Court for the District of Hawaii disagreed with plaintiffs and upheld the use of special purpose permits for incidental takes related to commercial, non-conservation activities.²²⁴ This expansion of the special purpose permit is still new, however, and has seen limited use.²²⁵

Furthermore, under the special purpose permit regulation, an entity must apply for a special purpose permit *before* it may take a migratory bird in any way not allowed by other permits.²²⁶ In practice, however, special purpose permits have not been used for incidental takes nor have they always been required before the commencement of an activity that might result in incidental takes.²²⁷ For example, the Hawaii shal-

²¹⁹ Final Permit Conditions for Abatement Activities Using Raptors, 72 Fed. Reg. 69705 (Dec. 10, 2007).

²²⁰ Special Purpose Permit Application; Hawaii-Based Shallow-Set Longline Fishery; Final Environmental Assessment and Finding of No Significant Impact, 77 Fed. Reg. 50153, 50153 (Aug. 20, 2012); *Permit Issued for Hawaiian Fishery*, *supra* note 129.

²²¹ Special Purpose Permit Application; Draft Environmental Assessment; Hawaii-Based Shallow-Set Longline Fishery, 77 Fed. Reg. 1501, 1502 (Jan. 10, 2012).

²²² Complaint for Declaratory and Injunctive Relief at 2–4, *Turtle Island Restoration Network v. U.S. Dep’t of Commerce*, 1:12-cv-00594-SOM-RLP (D. Haw. filed Nov. 2, 2012) [hereinafter *Turtle Island Complaint*].

²²³ *Id.* at 26–27.

²²⁴ *Turtle Island Restoration Network v. U.S. Dep’t of Commerce*, No. 12–00594 SOM-RLP, 2013 WL 4511314, at *10–12 (D. Haw. 2013).

²²⁵ *See* Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. at 8947 (noting that the FWS has issued special purpose permits “only in very limited circumstances”); Special Purpose Permit Application; Draft Environmental Assessment; Hawaii-Based Shallow-Set Longline Fishery, 77 Fed. Reg. at 1501 (noting that, if issued, the Hawaii fishery permit will be the first commercial non-conservation special purpose permit).

²²⁶ 50 C.F.R. § 21.27(a) (2012).

²²⁷ *See* Special Purpose Permit Application; Hawaii-Based Shallow-Set Longline Fishery; Final Environmental Assessment and Finding of No Significant Impact, 77 Fed. Reg. at 50153–54 (notably lacking discussion of the time-lapse between the commencement of fishery operations and the permit application); Special Purpose Permit Application; Draft

low-set longline fishery had been in operation since the late 1980s but did not apply for a special purpose permit until 2012 and was not penalized for the delay.²²⁸

In addition, certain industries or entities whose operations result in incidental takes might have problems fulfilling the permit requirements for special purpose permits.²²⁹ First, a special purpose permit may only be issued for “special purpose activities *related* to migratory birds.”²³⁰ Whether the operation of wind turbines or communications towers is related to migratory birds, for example, is not immediately apparent.²³¹ The Department of the Interior and the U.S. District Court for the District of Hawaii however, have stated that because such activities can cause bird deaths, the activities are related to migratory birds.²³² Second, an applicant must also “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.”²³³ Applicants such as wind turbine or transmission line operators would most likely have to show a benefit to migratory birds, or a “compelling justification.”²³⁴ Currently, no standards exist for what con-

Environmental Assessment; Hawaii-Based Shallow-Set Longline Fishery, 77 Fed. Reg. at 1502 (stating that the fishery commenced operations in the 1980s); Incidental Take Memorandum from Solicitor, *supra* note 121, at 3 (noting that special purpose permits are not narrowly focused on incidental takes); DEP’T OF THE INTERIOR WIND TURBINE GUIDELINES ADVISORY COMM., WHITE PAPER 14 (Oct. 22, 2008), *available at* http://www.fws.gov/habitatconservation/windpower/Subcommittee/Legal/Reports/Wind_Turbine_Advisory_Committee_Legal_Subcommittee_White_Paper_%28Final_As_Posted%29.pdf and <http://www.perma.cc/0W27cH28Gs4> (noting that the FWS has not endorsed an interpretation of the special purpose permits that could allow the permits to be used for incidental takes).

²²⁸ See Special Purpose Permit Application; Hawaii-Based Shallow-Set Longline Fishery; Final Environmental Assessment and Finding of No Significant Impact, 77 Fed. Reg. at 50153–54 (notably lacking discussion of the time-lapse between the commencement of fishery operations and the permit application); Special Purpose Permit Application; Draft Environmental Assessment; Hawaii-Based Shallow-Set Longline Fishery, 77 Fed. Reg. at 1502 (stating that the fishery commenced operations in the 1980s).

²²⁹ See 50 C.F.R. § 21.27 (requiring that special purpose activities *relate* to migratory birds); Incidental Take Memorandum from Solicitor, *supra* note 121, at 2 (highlighting the difficulties that entities whose activities result in incidental takes may have with fulfilling special purpose permit requirements).

²³⁰ 50 C.F.R. § 21.27 (emphasis added).

²³¹ See Incidental Take Memorandum from Solicitor, *supra* note 121, at 2 (implying that some activities resulting in incidental takes will appear to be unrelated to birds).

²³² *Turtle Island Restoration Network*, 2013 WL 4511314, at *9; Incidental Take Memorandum from Solicitor, *supra* note 121, at 2.

²³³ 50 C.F.R. § 21.27.

²³⁴ See Incidental Take Memorandum from Solicitor, *supra* note 121, at 2–3 (noting that entities whose actions result in incidental takes require either a compelling justification or perhaps a showing of a benefit to migratory birds to receive a special purpose per-

stitutes a compelling justification, so absent a showing of a benefit to migratory birds, the FWS would have to engage in a cumbersome case-by-case analysis.²³⁵

3. Voluntary Guidelines

Voluntary guidelines that the FWS develops are an inadequate means of reducing incidental takes and do not provide a way for entities to comply with the MBTA.²³⁶ For example, the land-based wind energy guidelines are entirely voluntary and non-binding.²³⁷ The guidelines set forth an impressive five-tier plan involving frequent consultation and communication, but in practice the plan is not effective.²³⁸ Wind energy developers are not required to initiate the process delineated in the guidelines, and as a result the FWS frequently has problems collecting information and is sometimes wholly unaware of proposed wind projects.²³⁹ Furthermore, even if developers engage in communication with the FWS, they may still continue with high-risk projects against the will of the agency as long as they provide a reasoned explanation.²⁴⁰

mit); WHITE PAPER, *supra* note 226, at 14 (hypothesizing that a wind energy facility could receive a special purpose permit by showing a benefit to migratory birds or a compelling justification).

²³⁵ See NMFS PERMIT FINAL EA, *supra* note 125, at 5 (noting that “compelling justification” is undefined in the regulations and therefore is applied on a case-by-case basis).

²³⁶ *Infra* notes 236–243 and accompanying text; see Lilley & Firestone, *supra* note 5, at 1209 (describing how the voluntary guidelines are “not viewed as particularly helpful”); ABC RULEMAKING PETITION, *supra* note 14, at 51–57 (describing the inadequacy of voluntary wind guidelines).

²³⁷ LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 4.

²³⁸ *Id.* at 5; see ABC RULEMAKING PETITION, *supra* note 14, at 51–57 (describing the inadequacies of the voluntary wind guidelines). The FWS has attempted to weigh in on wind energy projects, but developers have not always been responsive to FWS criticism. See Southwest Power Pool, Inc., ER11–3833 (FERC Oct. 18, 2011) (letter from Michael D. George, Fish & Wildlife Serv., to Jay Prothro, BP Wind Energy North America, Inc.) (“British Petroleum representatives . . . have repeatedly been advised of the unacceptability of the proposed BP wind project . . . given its high risk to whooping cranes and other migratory birds.”) (emphasis added); Letter from Scott Hicks, Fish & Wildlife Serv., to Xio Cordoba, Heritage Sustainable Energy (Nov. 4, 2011), http://docs.wind-watch.org/Garden-Peninsula-Wind_2011-Nov-4-FWS.pdf, available at <http://www.perma.cc/0gWjXVTpfHk> (“[W]e must *once again* recommend that you not construct a commercial wind energy development . . . because of the high potential for avian mortalities.”) (emphasis added).

²³⁹ See ABC RULEMAKING PETITION, *supra* note 14, at 79–80 (citing examples where the FWS has been unaware of proposed wind projects); LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 4 (noting the voluntary nature of the guidelines).

²⁴⁰ ABC RULEMAKING PETITION, *supra* note 14, at 78; see LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 4 (noting the voluntary nature of the guidelines and the ability of developers to reject FWS advice).

The FWS cannot assure developers with certainty that they will not be prosecuted for incidental takes, but the FWS will consider adherence to the voluntary guidelines and communication with the FWS for enforcement purposes.²⁴¹ What constitutes adherence to the guidelines remains somewhat unclear, but a reasoned explanation rejecting FWS recommendations could count as adherence.²⁴² Nevertheless, if the FWS disagrees with the reasoned explanation and the project ends up incidentally taking birds, the FWS still has full authority to enforce the MBTA.²⁴³ If the FWS decides to forgo enforcement in light of the reasoned explanation, the FWS is essentially allowing the developer to take birds without a permit.²⁴⁴

C. *Incidental Take Permits: Furthering the Protection of Birds*

The current system for addressing incidental takes under the MBTA is a combination of enforcement discretion, limited regulations, and voluntary guidelines.²⁴⁵ The system is broken; it currently allows the incidental take of migratory birds without a permit and does not further the goals of the migratory bird treaties.²⁴⁶ An effective incidental take permit program would resolve many of the current issues with enforcement and judicial review.²⁴⁷

²⁴¹ LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 6; *supra* notes 159–161 and accompanying text.

²⁴² See ABC RULEMAKING PETITION, *supra* note 14, at 78 (arguing that communication with the FWS, even in the form of rejection of the FWS's advice, constitutes adherence to the guidelines); LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 4, 6 (noting that developers may accept or reject the non-binding advice from the FWS, and that communication with the FWS is included in enforcement discretion considerations).

²⁴³ See 16 U.S.C. § 703(a); LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 4 (noting that the FWS reserves the right to initiate enforcement proceedings for any unlawful takes that do not comply with FWS regulations or the guidelines).

²⁴⁴ See 16 U.S.C. § 703(a) (stating that it is unlawful to take migratory birds without a permit); ABC RULEMAKING PETITION, *supra* note 14, at 79 (noting that the FWS's decision not to enforce provides industries with a "free pass to violate federal wildlife law").

²⁴⁵ *Supra* notes 116–161, 196–197 and accompanying text.

²⁴⁶ See *Ctr. for Biological Diversity*, 191 F. Supp. 2d at 168, 174 (noting that the FWS assured the Navy that it would not enforce the MBTA against it, but also finding that a violation had occurred); *Lilley & Firestone*, *supra* note 5, at 1214 (concluding that the current system to address incidental takes is ineffective); *HOLLAND & HART, LLC*, *supra* note 11, at 1–2 (petitioning the FWS to promulgate meaningful regulations to reduce uncertainty for natural gas pipeline companies in complying with the MBTA); *supra* notes 38–50 and accompanying text (describing the migratory bird treaties and the commitments made by the contracting parties to the *conservation* of migratory birds).

²⁴⁷ See *infra* notes 247–269 and accompanying text (discussing the benefits of an incidental take permit program).

The FWS should promulgate incidental take permit regulations by industry or type of activity.²⁴⁸ Broad permits, such as a general incidental take permit, might be too expansive to address differences between the variety of activities that can cause incidental takes.²⁴⁹ An industry-based or activity-based permit system would be tailored more specifically towards various entities and their effects on migratory birds.²⁵⁰ Furthermore, the FWS has already expended a considerable amount of resources to research and develop voluntary guidelines on an individual basis by industry or activity.²⁵¹

An industry-wide wind energy incidental take permit would allow a developer to obtain a statutorily authorized permit that assures the developer that its project complies with the law.²⁵² Currently, a developer can attempt adherence to the voluntary guidelines, but the current guidelines do not provide assurance to developers that their conduct conforms with MBTA requirements.²⁵³ Developers can also theoretically apply for special purpose permits under the MBTA.²⁵⁴ Special purpose permits have traditionally been issued in limited circumstances, though.²⁵⁵

²⁴⁸ See HOLLAND & HART, LLC, *supra* note 11, at 33–36 (describing incidental take permit program options and their advantages and disadvantages); *infra* notes 248–250 and accompanying text.

²⁴⁹ See HOLLAND & HART, LLC, *supra* note 11, at 36 (noting the difficulties of a broad incidental take permit program).

²⁵⁰ *Id.* at 33. Each industry or activity that affects migratory birds is different and affects birds in different ways. See *id.* at 35 (recognizing the various impacts that different industries have on migratory birds). For example, in the wind industry, siting of projects has a great effect on bird mortality. LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 1 (noting the importance of siting in reducing bird mortality in wind projects). In the oil and gas industry, the type of equipment and techniques used affect mortality. *Apollo Energies*, 611 F.3d at 682 (finding that oil drilling equipment killed migratory birds).

²⁵¹ See Communication Tower Guidelines, *supra* note 115, at 2 (communication towers); AVIAN PROTECTION PLAN (APP) GUIDELINES (electric utilities), *supra* note 115, at 1; LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 1 (wind energy).

²⁵² See 16 U.S.C. § 703(a) (prohibiting the take of migratory birds *unless* authorized by regulations); Lilley & Firestone, *supra* note 5, at 1209 (emphasizing the need for “clear and concrete guidance” from the FWS).

²⁵³ See LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 6 (providing qualified assurances against enforcement for wind companies that adhere to the guidelines); *supra* notes 235–243 and accompanying text (discussing the inability of the guidelines to protect companies from MBTA enforcement).

²⁵⁴ 50 C.F.R. § 21.27 (2012); WHITE PAPER, *supra* note 226, at 14 (noting the possibility of using special purpose permits for wind projects, but that the FWS has not endorsed such a use).

²⁵⁵ See 50 C.F.R. §§ 21.1–.61 (describing the types of migratory bird permits and notably not including civilian incidental take permits); WHITE PAPER, *supra* note 226, at 14

The existence of an incidental take permit program would increase efficient enforcement of the MBTA.²⁵⁶ For example, if the FWS were to require wind developers to obtain permits before construction, the agency would be aware of proposed wind projects before they are sited.²⁵⁷ Furthermore, as part of the permit process, the FWS could require developers to meet certain conditions before approval.²⁵⁸ For example, a wind energy incidental take permit could require the FWS, before issuing a permit, to find that a developer will conduct adequate preconstruction monitoring, or that no practicable alternatives exist.²⁵⁹ A permit applicant would not be able to reject required permit conditions with a reasoned explanation, as a developer is currently able to do under the voluntary wind energy guidelines.²⁶⁰ Permits offer real and substantive bird protections that reduce the chance of incidental take.²⁶¹

The FWS may also create provisions, such as those found in the military incidental take authorization, for the suspension and withdrawal of permits.²⁶² This would allow the FWS to suspend or withdraw permits that it issued improperly, or permits that no longer further the conservation purposes of the treaties and the MBTA.²⁶³ Currently, the FWS cannot penalize entities solely for noncompliance with the volun-

(noting the possibility of using special purpose permits for wind projects, but that the FWS has not endorsed such a use).

²⁵⁶ *Infra* notes 256–269 and accompanying text; *see supra* notes 247–254 and accompanying text (discussing the benefits of an industry-based or activity-based permit system).

²⁵⁷ *See* ABC RULEMAKING PETITION, *supra* note 14, at 79–80 (noting that without mandatory permit requirements, the FWS is often unaware of proposed wind projects).

²⁵⁸ *See id.* at 102–04 (presenting model required permit conditions); HOLLAND & HART, LLC, *supra* note 11, at 39 (discussing the use of FWS information to develop permit conditions for natural gas transmission projects). Other migratory bird permits have conditions; for example, to obtain a special purpose permit, an applicant must show the FWS that the project is related to birds, and also benefits bird populations, has important research implications, concerns individual birds, or has another compelling justification. 50 C.F.R. § 21.27 (2012).

²⁵⁹ ABC RULEMAKING PETITION, *supra* note 14, at 103–04.

²⁶⁰ *See Ctr. for Biological Diversity*, 191 F. Supp. 2d at 167 (noting that the FWS denied the Navy a depredation permit because such a permit was inapplicable to the Navy's activities); NMFS PERMIT FINAL EA, *supra* note 125, at 5 (finding that the applicant will have to show a compelling justification for the FWS to issue a special purpose permit); LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 4 (noting that the guidelines are entirely voluntary and can be rejected with a “reasoned justification”).

²⁶¹ *See* Ejetland, *supra* note 15, at 67 (noting that an incidental take permit program would decrease bird mortality); ABC RULEMAKING PETITION, *supra* note 14, at 82 (recognizing that a permit program would increase information collection on bird impacts).

²⁶² *See* 50 C.F.R. § 21.15(b) (authorizing the suspension or withdrawal of military incidental take permits).

²⁶³ *See id.* (outlining the grounds for withdrawal or suspension of military incidental take permits).

tary guidelines before takes have occurred.²⁶⁴ Instead, the FWS must wait until birds have been killed before it can initiate action against a wind developer, and even then, the outcome is uncertain.²⁶⁵

Incidental take permits can also offer increased enforcement of the MBTA through citizen suits.²⁶⁶ Because the MBTA offers no private right of action, citizens must challenge violations of the MBTA through the Administrative Procedure Act.²⁶⁷ APA suits may only be brought against federal agency actions that are directly in violation of the MBTA.²⁶⁸ Incidental take permits would constitute a federal agency action, thereby allowing citizens to challenge the FWS's issuance of permits as arbitrary and capricious under the APA.²⁶⁹ Citizen involvement is an important factor in the enforcement and shaping of environmental statutes.²⁷⁰

²⁶⁴ See 16 U.S.C. § 703(a) (making it unlawful to *take* migratory birds); LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 4 (noting the voluntary nature of the guidelines).

²⁶⁵ See 16 U.S.C. § 703(a) (making it unlawful to *take* migratory birds); LAND-BASED WIND ENERGY GUIDELINES, *supra* note 115, at 4 (noting the FWS's right to initiate enforcement proceedings against any unlawful take regardless of an entity's compliance with the voluntary guidelines); *supra* notes 204–208 and accompanying text (discussing the uncertainty in the judicial review of current incidental take jurisprudence).

²⁶⁶ See *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 217 (D.D.C. 2003) (finding that using the APA's arbitrary and capricious standard, citizens may sue the FWS for issuing a permit that violates the MBTA regulations); ABC RULEMAKING PETITION, *supra* note 14, at 94 (noting that when a federal agency acts by issuing a permit, the action will trigger the possibility of suits under the APA).

²⁶⁷ See Administrative Procedure Act, 5 U.S.C. § 702 (2006) (allowing aggrieved citizens to challenge agency actions); 16 U.S.C. §§ 703–712 (notably lacking a citizen suit provision); *Fund for Animals*, 281 F. Supp. 2d at 217 (finding that using the APA's arbitrary and capricious standard, citizens may sue the FWS for issuing a permit that violates the MBTA regulations).

²⁶⁸ 5 U.S.C. § 702; see ABC RULEMAKING PETITION, *supra* note 14, at 93 (recognizing that the only way private citizens can enforce the MBTA is through the APA's citizen suit provision).

²⁶⁹ See 5 U.S.C. §§ 704, 706 (allowing challenged final federal agency actions to be reviewed under an “arbitrary and capricious” standard); ABC RULEMAKING PETITION, *supra* note 14, at 94 (recognizing that the “issuance of a federal incidental take permit under the MBTA will constitute a final federal agency action thereby triggering the availability of APA review”).

²⁷⁰ James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 3 (2003); Kerry D. Florio, *Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?*, 27 B.C. ENVTL. AFF. L. REV. 707, 709 (2000); see Lilley & Firestone, *supra* note 5, at 1212 (recognizing the need for citizen involvement in environmental law enforcement).

CONCLUSION

In the late 1800s, large-scale hunting and poaching combined with a lack of regulations created a grim situation for many migratory bird species. Birds were seen as an infinite source of food and income rather than a valuable resource in need of protection. In the early 1900s, after a series of failed attempts to regulate their slaughter at the federal level, the United States successfully negotiated and executed a treaty with Canada for the protection of migratory birds. The Migratory Bird Treaty Act (MBTA) now implements the terms of four migratory bird treaties and makes it unlawful to kill or take migratory birds without a permit.

Initially, the MBTA was used to prosecute purposeful conduct directed at birds such as hunting and poaching. Beginning in the 1970s, however, the United States began to prosecute bird deaths that resulted from activities not directed at birds. For example, the FWS has brought cases against oil companies, pesticide manufacturers, and electric companies. This expansion of MBTA prosecutions has been problematic because the FWS does not issue permits for the incidental take of birds. Thus, entities whose actions result in incidental takes of migratory birds are not able to comply with the MBTA.

Currently, to deal with incidental takes in violation of the MBTA, the FWS relies on its enforcement discretion, existing regulations, and voluntary guidelines. This current system neither furthers the protection of migratory birds nor provides entities with a means of fully complying with the MBTA. The FWS has the authority, however, to promulgate meaningful regulations regarding incidental takes, and should use this authority to develop incidental take permits. Incidental take permits, especially those focused on specific industries or activities, would provide entities with a means to comply with the MBTA, while at the same time offering stronger protections for migratory birds.

