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I. Introduction

On September 1, 1914, Martha, the last surviving passenger pigeon, died at the Cincinnati Zoo.[1] Martha's death marked the end of a species that was once the most populous bird in the United States, perhaps even the world.[2] In the centuries prior, the passenger pigeon had flown in flocks so thick that "hunting was easy—even waving a pole at the low-flying birds would kill some," and it nested by the thousands, routinely taking over forests and snapping branches with the weight of their nests.[3] In 1857, when a state legislature proposed a bill to protect the passenger pigeon, a Select Committee of the Senate rejected the proposal, stating "[t]he passenger pigeon needs no protection. Wonderfully prolific . . . it is here today and elsewhere tomorrow, and no ordinary destruction can lessen them, or be missed from the myriads that are yearly produced."[4]

Despite this bold declaration, in less than a hundred years the passenger pigeon was hunted to extinction.[5] "Researchers have agreed that the bird was hunted out of existence, victimized by the fallacy that no amount of exploitation could endanger a creature so abundant."[6] Conservationists and lawmakers at the turn of the century realized that even the most prolific of birds could be wiped out by overhunting and exploitation, and a

1. Barry Yeoman, *Why the Passenger Pigeon Went Extinct*, AUDUBON (May–June 2014), http://www.audubon.org/magazine/may-june-2014/why-passenger-pigeon-went-extinct (last visited Nov. 26, 2016) (on file with the Washington and Lee Law Review).

2. *See id.* (describing the large numbers of passenger pigeons and the impact the massive flocks had on society in the 1800s and early 1900s).

3. *Id.*

4. *Migratory Bird Treaty Centennial 1916–2016*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/mbtreaty100/timeline.php (last updated Jan. 26, 2016) (last visited Nov. 25, 2016) (on file with the Washington and Lee Law Review).

5. Yeoman, *supra* note 1.

6. *Id.*

movement quickly grew to save "interesting species from possible extinction."[7]

This movement culminated in the passing of the Migratory Bird Treaty Act (MBTA).[8] In many ways, the MBTA has been a success—the act stopped the wholesale slaughter of birds and unregulated hunting of many affected species of birds, allowing them to recover.[9] However, since its passing nearly a century ago, the MBTA has struggled to keep up with modern developments in industry.[10] Originally designed to combat the evils of overhunting, the MBTA has not adapted easily to regulating more modern threats to birds, which include buildings, power lines, and wind turbines.[11] Commentators have criticized the MBTA as being both under-enforced and over-inclusive, with courts and regulators disagreeing on how the MBTA can be used to combat these modern threats.[12]

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7. KURKPATRICK DORSEY, THE DAWN OF CONSERVATION DIPLOMACY 165 (1998).

8. The Migratory Bird Treaty Act, 16 U.S.C. §§ 703–12 (2006).

9. *See* Jennifer Howard, *Celebrating the Migratory Bird Treaty Act: A Pact That Transcends Borders*, AMER. BIRD CONSERVANCY (Aug. 15, 2016), https://abcbirds.org/celebrating-the-migratory-bird-treaty-a-pact-that-transcends-borders/ (last visited Nov. 29, 2016) (speaking to the "remarkable" success of the MBTA) (on file with the Washington and Lee Law Review).

10. *See* Andrew G. Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 WM. & MARY ENVTL. L. & POL'Y REV. 1, 1 (2013) ("The almost century-old Migratory Bird Treaty Act is straining to fulfill its statutory purpose of protecting migratory birds from the changing and growing threats of modern industrial society."); Gloria Dickie, *Will the Migratory Bird Treaty Act Survive in the Modern Era?*, HIGH COUNTRY NEWS (Oct. 26, 2015), http://www.hcn.org/issues/47.18/green-energys-dirty-secret/will-the-migratory-bird-treaty-act-survive-in-the-modern-era (last visited Jan. 7, 2017) (speaking to the serious challenges facing the MBTA following the Fifth Circuit's decision that narrowly interpreted the Act) (on file with the Washington and Lee Law Review).

11. *See Migratory Bird Mortality: How Many Human-Caused Threats Afflict Our Bird Populations*, U.S. FISH & WILDLIFE SERV. (Jan. 2002), https://www.bakerenergyblog.com/wp-content/uploads/sites/13/2015/09/2002_FWS-BIRD-MORTALITY-STUDY.pdf (last visited Feb. 25, 2017) (detailing the anthropogenic threats to birds that greatly strain the bird populations) (on file with the Washington and Lee Law Review).

12. *Compare* Ogden, *supra* note 10, at 1 (arguing that the MBTA is under-enforced and that the Fish and Wildlife Service should take more action against incidental take offenders), *with* Benjamin Means, Note, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 MICH. L. REV. 823, 824 (1998) (arguing that the MBTA should be

Much of the difficulty in understanding the scope of the MBTA arises from inconsistent interpretations of one of its main provisions prohibiting the "taking" of migratory birds.[13] Consequently, a circuit court split has developed over whether the term "taking" includes killings that are incidental to otherwise lawful activities.[14] The Fifth Circuit has issued the most recent opinion on the issue, in which it interpreted the word very narrowly in finding that a violation of the MBTA must involve the "intentional killing" of a known migratory bird.[15] In contrast, the Second Circuit's interpretation created strict liability for bird deaths, finding that any killing of a migratory bird was a violation, whether it was incidental, accidental, or unintentional.[16]

One result of the various interpretations of the meaning of "take" is that the MBTA is inconsistently enforced, leading to uncertainty over what type of conduct qualifies as an illegal

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interpreted narrowly).

13. *See generally Migratory Bird Treaty Act*, U.S. FISH & WILDLIFE SERVICE, https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php (last updated Sept. 16, 2015) (last visited Sept. 10, 2016) (on file with the Washington and Lee Law Review).

14. *See* Maxel Moreland, *Migratory Bird Act: What Does Taking Mean?*, UNIV. CIN. L. REV. (Dec. 8, 2015), https://uclawreview.org/2015/12/08/migratory-bird-act-what-does-taking-mean/ (last visited Nov. 18, 2016) (describing the split in interpretations of the word "taking" and arguing that the Fifth Circuit interpretation of "take" is the more persuasive interpretation) (on file with the Washington and Lee Law Review). For the purposes of this Note, the terms "incidental take" and "incidental taking" are used interchangeably. Both are terms of art derived from the definition of incidental take in the Endangered Species Act, which is "take that is incidental to, but not the purpose of, otherwise lawful activity." Endangered Species Act of 1973, 16 U.S.C. § 1539 (1982). This is the definition of incidental take or taking that applies to this paper.

15. *See* United States v. Citgo Petroleum Corp., 801 F.3d 477, 488–89 (5th Cir. 2015) ("[W]e agree with the Eighth and Ninth circuits that a 'taking' is limited to deliberate acts done directly and intentionally to migratory birds. Our conclusion is based on the statute's text, its common law origin, a comparison with other relevant statutes . . . .").

16. *See* United States v. FMC Corp., 572 F.2d 902, 908 (2d Cir. 1978) ("Imposing strict liability on FMC in this case does not dictate that every death of a bird will result in imposing strict criminal liability on some party. However, here the statute does not include as an element of the offense 'wilfully, knowingly, recklessly, or negligently . . . .'").

"taking."[17] In turn, this uncertainty has a detrimental affect on businesses, as many industrial projects necessarily have some incidental taking while operating.[18]

In response to this uncertainty, and growing concerns about how the MBTA is enforced, [19] in 2015, the Department of the Interior and the Fish and Wildlife Service (FWS) issued a notice of intent in the Federal Register to prepare a programmatic environmental impact statement.[20] According to the notice, the departments are considering rulemaking to address the incidental take of migratory birds, and "to provide legal clarity to Federal and State agencies, industry, and the public regarding compliance with the MBTA."[21]

While the FWS's proposed undertaking is commendable, several problems with the proposal could undermine its purpose. Significantly, many commentators anticipate that challenges to the rulemaking will "bring to a head the threshold question of

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17. *See* Ogden, *supra* note 10, at 11 ("[T]he FWS's current 'carrot and stick' practice of incentivizing compliance with non-regulatory 'guidelines' intended to mitigate incidental taking with vague assurances of prosecutorial discretion results in an uneven and inconsistent enforcement of the law.").

18. *See* Shippen Howe, *The Intersection of the Migratory Bird Act and Energy Companies: An Uncertain Crossroad*, VAN NESS FELDMAN LLP (May 2010), http://www.vnf.com/703 (last visited Sept. 10, 2016) ("Although the statute appears largely to be directed at hunters, it has been used to impose strict, misdemeanor liability on energy companies and has had repercussions on energy companies that intend to build new infrastructure.") (on file with the Washington and Lee Law Review).

19. *See id.* (noting that the increasing number of bird deaths from industrial activity has prompted the rulemaking, as well as the need to provide better legal certainty to affected industries); *see also* Nora Pincus, *U.S. Fish and Wildlife Service Announces Notice of Intent to Prepare Rulemaking for Migratory Bird Treaty Act Incidental Take Permits*, WELLBURN, SULLIVAN, MECK & TOOLEY P.C. BLOG (July 9, 2015), http://www.wsmtlaw.com/blog/u-s-fish-and-wildlife-service-announces-notice-of-intent-to-prepare-rulemaking-for-migratory-bird-treaty-act-incidental-take-permits.html (last visited Jan. 8, 2017) (stating that the MBTA currently does not have a mechanism for protection from prosecution for harm caused by common commercial and industrial activities, and the new proposal could provide some protections to industry) (on file with the Washington and Lee Law Review).

20. *See generally* Migratory Bird Permits; Programmatic Environmental Impact Statement, 80 Fed. Reg. 30032 (proposed May 26, 2015), https://www.federalregister.gov/articles/2015/05/26/2015-12666/migratory-bird-permits-programmatic-environmental-impact-statement (last visited Mar. 2, 2017) (on file with the Washington and Lee Law Review).

21. *Id.*

whether the MBTA even applies to incidental take."[22] Indeed, many argue that the FWS does not have the authority to regulate incidental taking of migratory birds protected under the MBTA because incidental taking is not prohibited by the MBTA.[23] The question of whether the MBTA applies to incidental take will have to be answered if FWS is to move forward with the rulemaking: FWS can only act pursuant to its congressionally delegated authority under the statute; if the MBTA does not cover incidental take, then FWS does not have the authority to regulate it.[24]

Following this introduction, Part II of this Note describes the history of the MBTA and the circumstances surrounding its enactment, as well as its mechanics.[25] Part III details the circuit split caused by varying judicial interpretations of the Act, the current regulatory landscape, and the impact of the current legal landscape on industry.[26] Part IV then discusses the 2015 proposal of the FWS and the problematic nature of the proposal.[27] Finally, Part V of this Note argues for a different solution to resolving the circuit split: a legislative amendment to the Act clarifying whether the MBTA covers incidental taking of birds.[28]

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22. Andrew Bell, *U.S. Fish & Wildlife Proposes Incidental Take Rule for Migratory Birds*, MARTEN LAW (June 17, 2015), http://www.martenlaw.com/newsletter/20150617-incidental-take-migratory-birds (last visited Sept. 20, 2016) (on file with the Washington and Lee Law Review).

23. *See* Moreland, *supra* note 14 ("The original enacting Congress likely meant to stop humans from purposefully taking these migratory birds . . . . [T]he 1918 Congress likely meant the traditional common law meaning of the word 'take,' [reinforcing the Fifth Circuit's holding] that Congress did not extend the MBTA to include incidental bird deaths.").

24. *See* 5 U.S.C. § 706 (2012) (stating that a reviewing court may set aside an agency action that is made in excess of statutory authority).

25. *Infra* Part II and accompanying notes.

26. *Infra* Part III and accompanying notes.

27. *Infra* Part IV and accompanying notes.

28. *Infra* Part V and accompanying notes.

II. The Migratory Bird Treaty Act

A. The Birth of the Migratory Bird Treaty Act

The extinction of the passenger pigeon was, sadly, just one of many warnings that conservation laws were needed to save native bird species.[29] Hunting for sport had become a popular pastime by the turn of the twentieth century, and the "increasing accessibility of the countryside severely reduced the undisturbed habitat where animals could hide, and better transportation allowed hunters to get to even the most remote area."[30] Hunting magazines "carried articles glorifying unrestrained slaughter" of migratory birds, and hunters filled railroad cars with dead pigeons.[31] Additionally, in response to the demand for fashionable feather hats, "the market for birds was dominated by the enormous demand . . . for feathers by the millinery industry."[32] Overhunting threatened not only birds, but seals, fish, and the American bison.[33]

In response to these losses, a conservation movement grew.[34] Audubon societies formed as bird lovers became concerned about the fate of species that were once prevalent throughout the

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29. *See* DORSEY, *supra* note 7, at 165 (explaining that the conviction "that wild birds were declining to the point that irreversible danger would occur" was strengthened by the extinction of the passenger pigeon and the near extinction of other species).

30. *Id.* at 172.

31. *Id.* at 170–71.

32. Kristina Rozan, *Detailed Discussion on the Migratory Bird Treaty Act*, MICH. ST. UNIV. ANIMAL LEGAL & HIST. CTR. (2014), https://www.animallaw.info/article/detailed-discussion-migratory-bird-treaty-act (last visited Nov. 27, 2016) (on file with the Washington and Lee Law Review); *see also* DORSEY, *supra* note 7, at 178–79 (discussing how the fashion trend that began with wearing feather hats transitioned into wearing entire birds on hats, which drove up the prices of certain birds, driving several species nearly to extinction).

33. *See* DORSEY, *supra* note 7, at 12–14 (detailing how the demise of the passenger pigeon and the bison provided an impetus for a conservation movement to protect birds, fish, and seals).

34. *See id*. at 176–177 (discussing the growth of a bird conservation movement that grew in reaction to the destruction of many natural species); *see generally Migratory Bird Treaty Centennial*, *supra* note 4 (providing a timeline that notes the emergence of protectionist groups around the turn of the 20th century).

United States.[35] The Audubon societies lobbied the states for legislation to restrict hunting, and persuaded ladies to "forgo the cruelly harvested plumage" that decorated their hats.[36] In 1900, Congress "made a 'very cautious first step [into] the field of federal wildlife regulation'" by passing the Lacey Act.[37] The Lacey Act, authorized by the Commerce Clause, made the interstate transport of wild animals or birds in violation of state law a federal crime.[38] Then in 1913, Congress passed its first national wildlife conservation law, the Weeks–McLean Act, which declared "all migratory games and insectivorous birds 'to be within the custody and protection of the United States.'"[39] Although the Act was immediately challenged for constitutional deficiencies,[40] it paved the way for more lasting legislation.[41]

It was against this backdrop that the United States and Great Britain, on behalf of Canada, negotiated for a treaty to protect migratory birds.[42] Despite heavy opposition, Congress

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35. *See id.* at 179 (describing how Audubon societies grew in strength and vilified the use of birds on hats); *see also Migratory Bird Treaty Centennial*, *supra* note 4 (speaking to the creation of various Audubon societies across the United States).

36. *Migratory Bird Treaty Centennial*, *supra* note 4; *see also* Rozan, *Detailed Discussion*, *supra* note 32 (explaining that the authority of the states to regulate hunting had been reinforced by the Supreme Court in 1896 when they held "that the states owned the wild animals within their borders in trust for their residents . . . .").

37. Rozan, *Detailed Discussion*, *supra* note 32 (citing MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 79 (3d ed. 1997)); *see also* DORSEY, *supra* note 7, at 180–81 ("In today's atmosphere of pervasive federal environmental laws, the Lacey Act seems frightfully weak . . . . But by passing it, Congress had agreed that the depredation of America's wildlife was not sustainable or acceptable.").

38. 16 U.S.C. §§ 701, 3371–3378 (2012).

39. Rozan, *Detailed Discussion*, *supra* note 32 (citing Weeks-McLean Act of Mar. 4, 1913, ch. 145, 37 Stat. 828 (superseded by the Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703–12 (2006)).

40. *See* United States v. McCullagh, 221 F. 288, 294–95 (D. Kan. 1915) (finding that the Weeks Act was not authorized by the Commerce Clause of the Constitution).

41. *See* DORSEY, *supra* note 7, at 188–89 (explaining that the Weeks-McLean Act opened the door for the MBTA as "Canadian conservationists saw the passage of Weeks-McLean as an opportunity to work with Americans to create a mutual scheme to protect birds").

42. *See id.* at 192–214 (describing at length the negotiations and considerations that went into the signing of the Migratory Bird Treaty and

ratified the Migratory Bird Treaty in 1916, much to the joy of bird lovers and conservationists. [43] The treaty governs migratory birds in the United States and Canada, with the intent of "saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless . . . ."[44] The treaty went on to serve as a model for similar treaties with Mexico, Japan, and the Soviet Union.[45]

B. The Migratory Bird Treaty Act

To implement the new accord with Canada, Congress passed the Migratory Bird Treaty Act of 1918.[46] Under the MBTA it is

> 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, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof . . . . [47]

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asserting that the failure of the Weeks-McLean Act was a driving in the negotiations).

43. *See id.* at 206–13 (detailing the problems encountered by the conservationists when the treaty arrived for ratification in Washington, in particular from groups in Missouri that would go on to challenge the MBTA).

44. Convention for the Protection of Migratory Birds, U.S.–U.K., Aug. 16, 1916, 39 Stat. 1702.

45. *See* ERIC T. FREYFOGLE & DALE D. GOBLE, WILDLIFE LAW: A PRIMER 192 (2009) (providing details of the treaties between Mexico, Japan, and the USSR); *see generally* Convention for the Protection of Migratory Birds and Game Mammals, U.S.–Mex., Feb. 7, 1936, 50 Stat. 1311; Convention 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; Convention Concerning the Conservation of Migratory Birds and Their Environment, U.S.–U.S.S.R., Nov. 18, 1976, 29 U.S.T. 4647.

46. 16 U.S.C. § 703 (2012); *Migratory Bird Treaty Centennial*, *supra* note 4.

47. 16 U.S.C. § 703(a), 704(a).

The MBTA has been amended several times since 1918.[48] Each time the United States entered into a new migratory bird treaty with another nation, the Act was updated to include the species covered by that new treaty.[49]

The Act is unusual in that it creates a blanket prohibition on all actions that kill or harm migratory birds and subsequently authorizes the Secretary of the Interior to issue permits or regulations for "hunting, wildlife control, or other measures."[50] Violators of the Act are subject to criminal penalties, which include fines and imprisonment.[51] In 1960, the Act was amended to create separate misdemeanor and felony crimes.[52] While the felony offenses require the actor to "knowingly" violate the MBTA, misdemeanor offenses, which are the focus of this article, are strict liability crimes.[53]

The criminal structure of the MBTA can be explained by the desire of its framers "to put an end to the commercial trade in birds and their feathers that . . . had wreaked havoc on the populations of many native bird species."[54] The MBTA has been

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48. *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service: Migratory Bird Treaty Act of 1918*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/laws/lawsdigest/migtrea.html (last visited Jan. 7, 2017) (on file with the Washington and Lee Law Review).

49. *See The Evolution of the Migratory Bird Treaty Act*, AUDUBON SOC'Y (May 22, 2015), http://www.audubon.org/news/the-evolution-migratory-bird-treaty-act (last visited Nov. 18, 2016) (providing a timeline of the evolution of the Migratory Bird Treaty Act) (on file with the Washington and Lee Law Review).

50. *See* FREYFOGLE, *supra* note 45, at 192 ("The Act's initial prohibition is as broadly (and redundantly) phrased as the statute's drafters could make it.").

51. *See* Ogden, *supra* note 10, at 14–15 (explaining how the misdemeanor and felony violations of the MBTA interact).

52. Act of Sept. 8, 1960, Pub. L. No. 86–732, 74 Stat. 866 (amending the Migratory Bird Treaty Act to increase the penalties for violation of the Act,); *see also* Rozan, *Detailed Discussion*, *supra* note 32 (providing an overview of major amendments to the Act).

53. Ogden, *supra* note 10, at 14–15. Currently, the only felonies under the MBTA are the sale or taking with the intent to sell of MBTA-protected species. *Id.*

54. Ogden, *supra* note 10, at 6 (quoting *A Guide to the Laws and Treaties of the United States for Protecting Migratory Birds*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/policies-and-regulations/laws-legislations.php (last updated Oct. 17, 2016) (last visited Jan. 28, 2017) (on file with the Washington and Lee Law Review)).

very successful in combating overhunting and poaching, and is credited with helping several species recover from near extinction.[55]

An example of how the FWS has achieved this success is the Federal Duck Stamp Program. Under the MBTA, the killing and hunting of migratory birds is only permitted by the FWS under certain conditions. One of these conditions is all hunters of migratory waterfowl must purchase a Federal Duck Stamp prior to hunting.[56] Ninety-eight percent of the proceeds from the purchase of a Duck Stamp goes to directly to migratory waterfowl conservation efforts.[57] The program has been hugely successful: "Waterfowl hunting . . . is now generating funds to support waterfowl population recovery."[58] This is just one example of how the MBTA, and its related legislation, has been successful in conserving migratory birds. However, for all its successes, the MBTA's construction has led to ambiguity that creates serious issues in enforcement of the Act against modern threats to birds.[59]

1. Construction of the Migratory Bird Act

The MBTA is a broad criminal statute that makes it illegal for anyone to interfere with protected migratory birds, absent a permit.[60] A species is protected under the Act if it meets one of the following criteria: (1) the species is covered by the Canadian Convention of 1916 (as amended in 1996); (2) the species is

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55. *See id.* ("For example, the Snowy Egret, once hunted extensively for its plumage, has rebounded due to the protections of the MBTA from dangerously low levels to an estimated current population of over 1.3 million individuals . . . .").

56. *History of the Federal Duck Stamp*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/get-involved/duck-stamp/history-of-the-federal-duck-stamp.php (last updated Feb. 9, 2017) (last visited Feb. 22, 2017) (on file with the Washington and Lee Law Review).

57. *Id.*

58. Alexandra Freeman, *How Hunters and Artists Helped Save North America's Waterfowl*, CORNELL LAB BIRD ACAD. (2015), https://academy.allaboutbirds.org/duck-stamps/ (last visited Feb. 26, 2017) (on file with the Washington and Lee Law Review).

59. *Infra* notes 76–81 and accompanying text.

60. *Supra* notes 47–51 and accompanying text.

covered by the Mexican Convention of 1936; (3) the species is listed in the annex of the Japanese Convention of 1972; or (4) the species is listed in the appendix to the Russian Convention of 1976.[61] The list is periodically revised, the most recent change being made in November 2013 when "when spellings were corrected, common names and scientific names were updated, and 23 species were added and 4 were removed for a variety of reasons . . . ."[62] The Act only protects native species, specifically "those that occur as a result of natural biological or ecological processes."[63]

The number of bird species covered by the MBTA is larger than one might think—it included 1,026 species of birds as of October 2016.[64] Legally speaking, whether a covered species is actually migratory is irrelevant; a bird is a migratory if FWS designates it as protected under the Act in a list published in the Federal Register.[65] While the list publication is a challengeable

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61. *Migratory Bird Treaty Act: Birds Protected*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php (last updated Sept. 16, 2015) (last visited Nov. 27, 2016) (on file with the Washington and Lee Law Review).

62. Migratory Bird Permits, *supra* note 20; Rozan, *Detailed Discussion*, *supra* note 32; FWS Revised List of Migratory Birds, 78 Fed. Reg. 65,844 (November 1, 2013).

63. *Migratory Bird Treaty Act: Birds Protected*, *supra* note 61; *see* FREYFOGLE, *supra* note 45, at 194–95 (describing the legal battle behind the issue of the MBTA's application to birds that are present in the United States only as a result of human efforts); *see also* Hill v. Norton, 275 F.3d 98, 103 (D.C. Cir. 2001) (considering whether the failure to include the mute swan as a protected bird under the MBTA was arbitrary and capricious), *superseded by statute*, Migratory Bird Treaty Reform Act, Pub. L. No. 108-447, 118 Stat. 2809 (2004) *as recognized in* Pub. Emp. for Envtl. Responsibility v. Hopper, 827 F.3d 1077 (D.C. Cir. 2016).

64. Kristina Rozan, *Brief Summary of the Migratory Bird Treaty Act*, MICH. ST. UNIV. ANIMAL LEGAL & HIST. CTR. (2014), https://www.animallaw.info/intro/migratory-bird-treaty-act-mbta (last visited Nov. 26, 2016) (on file with the Washington and Lee Law Review). For a complete list of all protected species, see generally *Migratory Bird Treaty Act Protected Species: MBTA as of December 2, 2013*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/management/managed-species/migratory-bird-treaty-act-protected-species.php (last updated Oct. 17, 2016) (last visited Nov. 28, 2016) (on file with the Washington and Lee Law Review).

65. *See* FREYFOGLE, *supra* note 45, at 192–93 (describing the types of migratory patterns of the species included in the Act, and declaring that the migratory pattern has little to do with whether a species is migratory under the Act).

agency action, once a species addition goes into effect "a person accused of violating the Act can not claim that a species was improperly included."[66]

The Secretary of the Interior is vested with the primary authority to administer and enforce the MBTA.[67] The Secretary then delegates that responsibility to the FWS. The FWS enforces the MBTA, and promulgates rules and regulations that are compatible with the conventions.[68]

The FWS has a great deal of discretion in deciding who to prosecute, and how, for violations of the MBTA.[69] The agency "relies on the discretion of its in-house law enforcement staff to select which MBTA violations to pursue."[70] The MBTA has no private right of action, which is "what gives the selective enforcement rule its value: if the [FWS] does not enforce then there be no enforcement of the MBTA."[71] As the harm to birds becomes more indirect, and thus the culprit more difficult to ascertain, this discretion over enforcement has grown.[72]

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66. *See id.* at 192 (describing a case in which a landowner was found guilty of killing Great Horned Owls that were killing his chickens: "Because the owl was on the official list, the court refused to consider the claim that the owls were year-round residents of the region and didn't actually migrate . . .").

67. 16 U.S.C. § 703 (2012); *see also* WILLIAM F. SIGLER, WILDLIFE LAW ENFORCEMENT 54–56 (3d ed. 1980) (detailing the mechanics of the MBTA and explaining that the Secretary of the Interior is authorized to administrate the Act).

68. 16 U.S.C. § 704.

69. *See* Ogden, *supra* note 10, at 32 ("The FWS has considerable discretion in deciding whom and when to prosecute for a violation of the MBTA."). *See generally* Kathy G. Beckett, *Migratory Bird Treaty Act Enforcement Questioned*, NAT'L L.R. (Sept. 19, 2015), http://www.natlawreview.com/article/migratory-bird-treaty-act-enforcement-questioned (last visited Sept. 20, 2016) (on file with the Washington and Lee Law Review).

70. Chris Clarke, *Expert: There's a Problem with Fish and Wildlife's Enforcement of Bird Law*, KCET (Feb. 4, 2014), https://www.kcet.org/redefine/expert-theres-a-problem-with-fish-and-wildlifes-enforcement-of-bird-law (last visited Jan. 31, 2017) (on file with the Washington and Lee Law Review).

71. John Arnold McKinsey, *Regulating Avian Impacts Under the Migratory Bird Treaty Act and Other Laws: The Wind Industry Collides with One of its Own, the Environmental Protection Movement*, 28 ENERGY L.J. 71, 78 (2007).

72. *See id.* ("When hunters were the biggest immediate threat to birds, enforcement of the MBTA was more straightforward: you cite the hunter. With more of the harm to birds being done inadvertently, enforcement gets more complex . . . ."); Ogden, *supra* note 10, at 29 (discussing the FWS's use of prosecutorial discretion to enforce the MBTA, and asserting that "prosecutorial

Commentators are wary of the FWS's broad prosecutorial discretion, with many arguing that it is being exercised unevenly[73] and that it is the most significant problem with the MBTA today.[74]

2. The Problem with Taking

The word "taking" plays a significant role in the enforcement of the MBTA.[75] According to the MBTA, it is "unlawful at any time, by any means or in any manner, to . . . take . . . any migratory bird."[76] It is not clear, however, what "taking" entails, and "amendments to the MBTA have yet to expressly clarify which acts the MBTA criminalizes."[77] Unlike the other MBTA-prohibited actions, such as hunting or trapping, the word take is open to interpretation.[78] Some argue that taking occurs only in relation to intentional acts,[79] while others argue that the MBTA's

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discretion is the primary incentive" for parties and corporations to cooperate with FWS regulations).

73. *See* Brian Palmer, *Angry Birds*, NAT'L RESOURCES DEF. COUNCIL (June 12, 2015), https://www.nrdc.org/onearth/angry-birds (last visited Oct. 12, 2016) ("Last year the House Natural Resources Committee accused the U.S. Fish and Wildlife Service of selectively targeting oil and gas companies and demanded that the agency supply records for every prosecution under the law. . . .") (on file with the Washington and Lee Law Review).

74. *See* Ogden, *supra* note 10, at 41–40 ("[T]he FWS's current MBTA enforcement policy that relies principally on prosecutorial discretion is indefensible and unsustainable.").

75. *See* Alexander Obrecht, *Migratory Bird Treaty Act: Question of Un-Intentional Take Primed for Potential Fifth Circuit en Banc or Supreme Court Review*, BAKER HOSTETLER (Sept. 30, 2015), https://www.bakerenergyblog.com/2015/09/30/migratory-bird-treaty-act-question-of-unintentional-take-primed-for-potential-fifth-circuit-en-banc-or-supreme-court-review/ (last visited Feb. 25, 2017) (explaining that the term take is often used in indictments against companies for MBTA violations) (on file with the Washington and Lee Law Review).

76. 16 U.S.C. § 703(a) (2012).

77. Rozan, *Detailed Discussion*, *supra* note 32.

78. *See* Means, *supra* note 12, at 826–28 (applying the rules of statutory construction to determine what actions are prohibited by the word "take" in the MBTA); Moreland, *supra* note 14 (describing the various interpretations of the word "take" and asserting that the term is ambiguous).

79. *See* United States v. Citgo Petroleum Corp., 801 F.3d 477, 494 (5th Cir. 2015) ("The MBTA's ban on 'takings' only prohibits intentional acts (not omissions) that directly (not indirectly or accidentally) kill migratory birds.");

ban on the taking of migratory birds applies to non-intentional actions as well.[80] Additionally, this distinction is critical because the modern threats to birds are not hunting and trapping because the MBTA was wildly successful in stopping those dangers. Today the threats to birds are otherwise lawful activities that unintentionally kill migratory birds, which is known as incidental taking.[81]

C. Modern Threats and Modern Industry

The MBTA was devised to combat the overhunting that decimated bird populations in the nineteenth and early twentieth centuries.[82] What the drafters could not have foreseen, however, are the threats currently facing the migratory bird populations.

Moreland, *supra* note 14 ("The Fifth Circuit's application of imaginative reconstruction, to explain that the 1918 Congress likely meant the traditional common law meaning of the word "take," reinforces its holding that Congress did not extend the MBTA to include incidental bird deaths."); *see also* Means, *supra* note 12, at 826 ("Statutory interpretation begins with the language of a statute and the plain language of the MBTA indicates that Congress meant only to regulate activity directed at wildlife.").

80. *See* United States v. FMC Corp., 572 F.2d 902, 908 (1978) (reasoning that a person who dumps chemicals should be held strictly liable for any bird deaths, even if there was no intent to harm birds); Dickie, *supra* note 10 ("Recent rulings in the 2nd and 10th circuits have taken the view that the law's prohibition on "take" applies to any activity that is likely to kill migratory birds.").

81. *See* Thomas Dimond, *Fifth Circuit Limits the Scope of "Take" Prohibition Under the Migratory Bird Treaty Act (MBTA), Rejecting Second and Tenth's Interpretation*, ICEMILLER LEGAL COUNS. (Sept. 17, 2015), http://www.icemiller.com/ice-on-fire-insights/publications/fifth-circuit-limits-the-scope-of-the-take-prohibi/ (last visited Jan. 8, 2017) ("As the Fifth Circuit observed, properly limiting the scope of liability under the MBTA is of significant concern to any commercial enterprise.") (on file with the Washington and Lee Law Review); Ogden, *supra* note 10, at 6–7 ("Today, all species of birds are far more likely to be killed by anthropogenic threats than the estimated fifteen million birds taken annually by hunters."); *see also* Rozan, *Detailed Discussion*, *supra* note 32 ("There is no question that the need for the protection of migratory birds has not abated in the last 100 years. But, it is clear that the nature of the threat has drastically changed.").

82. *See* Mahler v. U.S. Forest Serv., 927 F. Supp. 1559, 1574 (S.D. Ind. 1996) ("The MBTA was designed to forestall hunting of migratory birds and the sale of their parts. The court declines Mahler's invitation to extend the statute well beyond its language and the Congressional purpose behind its enactment."). *See generally supra* notes 33–42 and accompanying text.

According to the FWS, outside of habitat destruction, the leading causes of bird mortality are collisions with building windows (estimated 7 million to 600 million bird deaths per year), communications towers (6.5 million), high tension transmission and power lines (8–57 million), electrocutions (900 thousand to 11.6 million), impacts with vehicles (89–340 million), poisoning (72 million), and wind turbine rotors (140–500 thousand), as well as death in the hands (paws) of free-ranging domestic or feral cats (1.4 million–3.7 billion).[83] Additionally, "oil field production 'skim pits' and wastewater disposal facilities kill 500,000 birds annually,"[84] and large solar panel farms may be responsible for up to 28,000 deaths annually.[85] The difficulty of estimating mortality rates explains the great ranges in estimates, however, the FWS has synthesized the most recent studies to provide the best estimates of avian mortality.[86]

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83. *Threats to Birds*, U.S. FISH & WILDLIFE SERV. (May 26, 2016), https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php (last visited Jan. 24, 2017) (on file with the Washington and Lee Law Review); *see also* Scott R. Loss et al., *The Impact of Free-Ranging Domestic Cats on Wildlife in the United States*, NATURE COMM. Jan. 29, 2013, at 1–8 (presenting results of a study that found birds are more likely to be killed by free-ranging cats than any other cause).

84. Ogden, *supra* note 10, at 7.

85. *See* Eric Zerkel, *New Solar Power Plants are Incinerating Birds*, THE WEATHER CHANNEL (Aug. 18, 2014), https://weather.com/science/news/solar-plants-birds-20140818 (last visited Jan. 8, 2017) (reporting on deaths caused by birds flying across large solar panel firms and being "fried" mid-flight) (on file with the Washington and Lee Law Review); *see also* John Upton, *Solar Farms Threaten Birds*, SCI. AM. (Aug. 27, 2014), https://www.scientificamerican.com/article/solar-farms-threaten-birds/ (last visited Oct. 12, 2016) (providing statistics and details of how solar panel farms threaten birds protected by the MBTA) (on file with the Washington and Lee Law Review); Matt Vespa, *After Frying Thousands of Birds, World's Largest Solar Farm Catches Fire*, TOWNHALL (May 21, 2012, 2:00 PM), http://townhall.com/tipsheet/mattvespa/2016/05/21/icymi-after-frying-thousands-of-birds-worlds-largest-solar-farm-catches-fire-n2166718 (last visited on Oct. 12, 2016) (reporting on the harmful effects of the Ivanpah solar farm on migratory birds) (on file with the Washington and Lee Law Review).

86. *See Threats to Birds*, *supra* note 83 (providing statistics on the anthropomorphic threats to migratory birds). For the studies relied upon by the Fish and Wildlife Service in compiling these statistics, see generally U.S. DEP'T TRANSP., EVALUATION OF NEW OBSTRUCTION LIGHTING TECHNIQUES TO REDUCE AVIAN FATALITIES (2012), https://www.fws.gov/migratorybirds/pdf/ management/patterson2012.pdf; J. F Dwyer et al., *Predictive Model of Avian Electrocution Risk on Overhead Powerlines*, 28 CONSERVATION BIOLOGY 159 (2013); Daniel

Modern industry clearly has a large impact on migratory birds, and not surprisingly, the MBTA has an equally large impact on modern industry. Energy companies are frequently defendants in MBTA cases.[87] Enforcement actions have been taken against oil and gas producers,[88] electric utilities, [89] and wind energy producers.[90] State and local transportation agencies

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Klem, Jr. et al., *Architectural and Landscape Risks Factors Associated with Bird-glass Collisions in an Urban Environment*, 121 WILSON J. ORNITHOLOGY 126 (2009); Scott R. Loss et al., *Bird-building Collision in the United States: Estimates of Annual Mortality and Species Vulnerability*, 116 THE CONDOR: ORNITHOLOGICAL APPLICATIONS 8 (2014); Scott R. Loss et al., *Estimation of Bird-Vehicle Collision Mortality on U.S. Roads*, 78 J. WILDLIFE MGMT. 763 (2014); Scott R. Loss, *Estimates of Bird Collision Mortality at Wind Facilities in the Contiguous United States*, 168 BIOLOGICAL CONSERVATION 201 (2013); Travis Longcore et al., *An Estimate of Avian Mortality at Communication Towers in the United States and Canada*, PLOS ONE (Apr. 25, 2012), http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0034025 (last visited Jan. 27, 2017) (on file with the Washington and Lee Law Review); Scott R. Loss et al., *Refining Estimates of Bird Collision and Electrocution Mortality at Power Lines in the United States*, PLOS ONE (July 3, 2014), http://journals.plos.org/plosone/article?id=10.1371/journal.pone. 0101565 (last visited Jan. 27, 2017) (on file with the Washington and Lee Law Review).

87. *See* Rozan, *Detailed Description*, *supra* note 32 (describing typical plaintiffs and defendants in MBTA cases).

88. *See* United States v. Brigham Oil & Gas, 840 F. Supp. 2d 1202, 1211 (D.N. Dak. 2012) (finding that and oil and gas producer's use of reserve pits did not violate the MBTA because the deaths were unintentional); *see also* Brian K. Knox & Barry M. Hartman, *New Criminal Charges Under Migratory Bird Treaty Create More Complexity for Energy Companies*, K&L GATES (Sept. 8, 2011), http://www.klgates.com/new-criminal-charges-under-migratory-bird-treaty-act-09-07-2011/ (last visited Feb. 3, 2017) (reporting that "[t]he United States Department of Justice recently filed federal criminal charges against seven oil and gas producers operating in North Dakota's Williston Basin" for violations of the MBTA) (on file with the Washington and Lee Law Review).

89. *See* United States v. Moon Lake Electric Ass'n Inc., 45 F. Supp. 2d 1070, 1075 (D. Colo. 1999) (holding an electrical cooperative liable for killing birds that were making contact with its electrical poles).

90. *See Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Projects*, U.S. DEP'T OF JUST. (Nov. 22, 2013), https://www.justice.gov/opa/pr/utility-company-sentenced-wyoming-killing-protected-birds-wind-projects (last visited Feb. 4, 2017) (detailing the charges against Duke Energy Renewables Inc. for killing migratory birds in Wyoming) (on file with the Washington and Lee Law Review); John Kell, *Duke Energy Pays $1 Million Fine for Killing Birds*, WALL ST. J. (Nov. 22, 2013), https://www.wsj.com/articles/SB10001424052702304791704579214531944156744 (last visited Feb. 22, 2017) (reporting that Duke Energy Renewables Inc. pled guilty for killing golden eagles and other migratory birds at two of the company's wind projects in Wyoming) (on file with the Washington and Lee Law

are also susceptible to delays and increased costs associated with MBTA compliance.[91]

Despite this, it is not clear how far the MBTA extends over these industries and activities. As discussed, the word taking is ambiguous, and these activities all involve incidental take, which may or may not be covered by the MBTA.[92] As modern industry has developed, concern with the question of the MBTA's authority over incidental take has also developed.[93] It is in this context that the circuit courts of the United States have split in their interpretations of the Act, perhaps muddling the issue further.

Review).

91. *See* Oklahoma Department of Transportation, Comments from Oklahoma Department of Transportation (July 27, 2015), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-0067-0099&attachmentNumber=1&contentType=pdf ("Compliance with [MBTA] in avoiding all possible impacts to the common cliff and barn swallows annually costs taxpayers of Oklahoma up to $15,000,000. Due to Oklahoma's continued focus on addressing structurally deficient bridges, future costs attributable to compliance measures are projected to be as high as $21,500,000 in 2018."); Oregon Department of Transportation, Re: Docket No. FWS-HQ-MB-2014-0067 (July 27, 2015) https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-0067-0121&attachmentNumber=1&contentType=pdf ("Oregon's roadsides bridges and culverts are home to many nesting birds . . . ."); *Tiny Hummingbird Egg Stalls Project to Upgrade a Bay Area Bridge*, L.A. TIMES (Jan. 31, 2017), http://www.latimes.com/local/lanow/la-me-hummingbird-bridge-20170131-story.html (last visited Feb. 7, 2017) (reporting about a delay caused to a $92 million bridge repair because of a MBTA-protected hummingbird egg found on bridge when the work was set to begin) (on file with the Washington and Lee Law Review).

92. *Supra* Part II, subpart D, section 2 and accompanying notes.

93. *See* Alexander K. Obrecht, *Migrating Toward and Incidental Take Permit Program: Overhauling the Migratory Bird Treaty Act to Comport with Modern Industrial Operations*, 54 NATURAL RESOURCES J. 107, 108–09 (2014) (speaking about the expansion of the MBTA through FWS enforcement and the ensuing confusion over their authority to prosecute incidental take under the MBTA).

III. Current Legal Landscape

A. Judicial Interpretations

Given its breadth, it is not surprising that the MBTA has been called the "most-violated law in the United States."[94] Indeed, applying its provisions literally could lead to absurd results—such as criminal penalties being imposed on homeowners when a bird collides with their window.[95] "The MBTA would impose criminal liability on a person for the death of a bird under circumstances where no criminal liability would be imposed for even the death of another person."[96] Recognizing the potential for such absurdity, some circuit courts have been reluctant to extend the reach of the MBTA to incidental activities.[97] Others, however, have interpreted the MBTA to include incidental take, relying on the MBTA's take provision to hold defendant's criminally liable.[98] This circuit court split is immediately relevant today, as both the FWS and businesses look

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94. Chris Clarke, *Nation's Landmark Bird Protection Law Likely to See Major Changes*, KCET (Apr. 20, 2015), https://www.kcet.org/redefine/nations-landmark-bird-protection-law-likely-to-see-major-changes (last visited Feb. 7, 2017) (on file with the Washington and Lee Law Review).

95. *See* United States v. FMC Corp., 572 F.2d 902, 905 (1978) ("Certainly construction that would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential buildings into which birds fly, would offend reason and common sense."); Andrew W. Minikowski, *A Vision or a Waking Dream: Revising the Migratory Bird Treaty Act to Empower Citizens and Address Modern Threats to Avian Populations*, 16 VT. J. ENVTL. L. 152, 154 (2014) ("Some courts feared that criminal liability under MBTA could reach the point of absurdity by holding parties liable for bird deaths that were truly beyond their control."); Dickie, *supra* note 10 ("If it applies to human activity regardless of intent, then where do you draw the line?").

96. Means, *supra* note 12, at 832 (quoting Mahler v. U.S. Forest Serv., 927 F. Supp. 1559, 1578 (S. D. Ind. 1996)).

97. *See* Minikowski, *supra* note 95, at 154 ("[A]s the scope of criminal liability under MBTA began to increase, so did many of the federal courts' unease with it."); Obrecht, *supra* note 93, at 119–20 ("A recent body of case law, however, limits the MBTA's misdemeanor provisions to intentional actions directed at birds.").

98. *See* Minikowski, *supra* note 95, at 154 (discussing the history of the circuit split and the early decisions which relied on the take provision to expand the scope of the MBTA).

to the decisions of the courts to understand the meaning of the MBTA.

1. Circuits that Have Extended the Reach of the MTBA

The first judicial expansion of the MBTA came in 1978, when the Second Circuit held FMC Corporation (FMC) liable for bird deaths that occurred due to exposure to toxic chemicals.[99] FMC, a pesticide and chemical company, was storing wastewater in a ten acre pond, which was attractive to migrating waterfowl.[100] These birds began showing up dead, and the state and federal fish and wildlife services began an investigation.[101] Although the water was treated prior to entering the pond, large concentrations of a harmful chemical, which could cause "a significant probability of death" to birds, was found in the pond. Once the investigation was complete, FMC discovered that the process being used to treat the chemical was ineffective—the chemical was being directly pumped into the pond.[102] FMC was indicted on thirty-six counts for "unlawfully by means of toxic and noxious waters kill[ing] migratory birds included in the terms of the conventions between [the United States and Great Britain, Mexico and Japan], all in violation of Title 16, United States code, section 703."[103] The jury convicted FMC on eighteen counts, and fined the company $100 per count, although the fine was remitted on all but five counts.[104]

On appeal, FMC argued that "even if 'the killing of migratory birds need not be accompanied by knowledgeable violation of the law' (as in the hunter cases), there must be 'an intent to harm

99. United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978).

100. *Id.* at 904–05.

101. *Id.* at 905.

102. *Id.*

103. *Id.* at 903.

104. *Id.* The circuit judges reviewing the decision of the trial court were apparently "baffled" as to why the jury chose to convict on some, but not all of the counts. Judge Moore wrote "The 18 counts selected by the jury for conviction covering the alleged killings . . . and the 18 counts for acquittal . . . present no clue useful on appellate review unless there were jurors disposed favorably to the Ringbilled Gull and Shortbilled Dowicher . . . and less favorably to the Least Sandpiper and the Migratory Fringillid . . . ."). *Id.*

birds culminating in their death' for a conviction."[105] The court rejected this argument: "[H]ere the statute does not include as an element of the offense 'wilfully, knowingly, recklessly, or negligently.'"[106] The court found that FMC had "engaged in the manufacture of a pesticide known to be highly toxic" and then failed to take measures to prevent this chemical from reaching a pond where it could come into contact with birds and other animals, which was enough to impose strict liability on the company.[107]

In its analysis, the Second Circuit relied on "the rule of reason" and an analogy to tort law. In the court's words; "where there is no help to be had from legislative history or decisional authority, as in this specific situation, resort must be had to a rule of reason or even better, common sense."[108] This guiding "common sense" principle led the court to reason that extending the scope of the MBTA to cover every unintentional killing of birds would not be problematic because "such situations can be left to the sound discretion of the prosecutors and the courts."[109]

The *FMC* court also analogized the factual scenario to a principle of tort law to find the corporation liable. Explaining that the company failed to prevent the toxin from entering the pond, the court wrote; "Such a situation is analogous to the situations in the various tort notions of strict liability which have insinuated themselves into American Law since the English case of *Rylands v. Fletcher*."[110] In *Rylands v. Fletcher*, the English court found that a person would be prima facie answerable for damage caused by anything "likely to do mischief" that that person brought onto their land.[111] The court then noted that the notion of strict liability "has been deemed to apply" in this type of case (in tort law) and also "when a person engages in extrahazardous activites."[112] The court reasoned that FMC had

105. *Id.* at 906 (quoting Appellant's brief at 11).

106. *Id.* at 908.

107. *Id.* at 907.

108. *Id.* at 905.

109. *Id.*

110. Rylands v. Fletcher (1868) L.R. 3 H.L. 330.

111. United States v. FMC Corp., 572 F.2d 902, 907 (2d Cir. 1978) (citing Rylands v. Fletcher (1868) L.R. 3 H.L. 330).

112. *Id.*

engaged in the manufacturing of a highly toxic chemical, FMC failed to protect the chemical from escaping into the pond, where it then killed birds, and that "this is sufficient to impost strict liability on FMC." The Second Circuit's ruling thus appears to impose MBTA liability on incidental takings, although the court's ruling may be subject to some interpretation.[113]

The Tenth Circuit joined the Second Circuit's interpretation of the MBTA in 2010 when it "firmly established strict liability under the MBTA, even for unintentional killings."[114] In *United States. V. Apollo Energies, Inc.* (*Apollo*),[115] the Tenth Circuit reviewed the convictions of two oil drilling operators, Apollo Energies and Dale Walker, who were charged with violating the MBTA after dead migratory birds were "discovered lodged in a piece of their oil drilling equipment called a heater-treater."[116] FWS became involved after acting on an anonymous tip and finding ten protected birds lodged in the heater-treaters.[117] FWS did not immediately pursue action against the drilling operators.[118] Instead, FWS "embarked on a public education campaign to alert oil producers to the heater-treater problem," and gave the oil producers a "grace period" of time to correct the problem.[119] Apollo was one of the oil producers notified directly by FWS about the problem, but there was no evidence that Walker was notified.[120] When FWS inspected the heater-treaters again following the grace period, dead migratory birds were found in both Apollo's and Walker's systems.[121] Apollo was convicted of one violation of the MBTA, and Walker was convicted of two violations.[122]

On appeal, Apollo and Walker made several arguments. First, they argued that the MBTA is not a strict liability statute, and that they lacked the necessary mental state to commit a

113. *Infra* notes 168–169 and accompanying text.
114. Obrecht, *supra* note 93, at 126.
115. 611 F.3d 679 (10th Cir. 2010).
116. *Id.* at 682.
117. *Id.*
118. *Id.*
119. *Id.* at 682–83.
120. *Id.*
121. *Id.* at 683.
122. *Id.*

violation.[123] Second, they argued that the MBTA is unconstitutionally vague.[124] Lastly, Apollo and Walker argued that due process requires that they directly cause the bird deaths in order to be found guilty.[125]

The Tenth Circuit rejected the appellants' argument that the MBTA is not a strict liability statute; "As a matter of statutory construction, the 'take' provision of the Act does not contain a scienter requirement."[126] In the eyes of the court, the MBTA is not vague, and does not encourage the arbitrary enforcement of its provision.[127] "The actions criminalized by the MBTA may be legion, but they are not vague."[128] The court also held that a "strict liability interpretation of the MBTA for the conduct charged here satisfies due process concerns only if defendants proximately caused harm to protected birds," and that "due process requires criminal defendants have adequate notice that their conduct is in violation of the Act."[129]

In the opinion, the Tenth Circuit relied on the notion of proximate cause to cabin the possible absurd results that could occur by applying strict liability to even incidental take, and the potential resulting due process concerns.[130] The court noted that

> [c]entral to all of the Supreme Court's cases on the due process constraints on criminal statutes is foreseeability—whether it is framed as a constitutional constraint on causation and mental state, or whether it is framed as a presumption in statutory construction. When the MBTA is stretched to criminalize predicate acts that could not have been reasonably foreseen to result in a proscribed effect on birds, the statute reaches its constitutional breaking point.[131]

The court ultimately upheld the conviction of Apollo, who had known of the dangers of the heater-treaters to birds, but failed to

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 686.
127. *Id.* at 688–89.
128. *Id.* at 689.
129. *Id.* at 682.
130. *Id.* at 689–90.
131. *Id.* at 690 (citations omitted).

take any steps to mitigate the dangers.[132] Walker's conviction was overturned however, as there was no evidence that he knew of the danger the heater-treaters posed to migratory birds.[133] The Tenth Circuit was clear, however, that even without the intent, industrial activity that kills a migratory bird violates the MBTA.[134]

2. Circuits that Have Declined to Extend the Reach of the MBTA

Currently, the Eighth, Ninth, and Fifth Circuits have refused to extend MBTA liability to incidental take. The first of these decisions is *Seattle Audubon Soc'y v. Evans* (*Seattle Audubon*)[135], a Ninth Circuit case from 1991. In *Seattle Audubon*, the Ninth Circuit reviewed an appeal from an injunction enjoining timber sales in spotted owl habitats in national forests in Oregon, Washington, and Northern California.[136] The plaintiffs, an environmental group, argued that "timber sales which destroy owl habitat are tantamount to a proscribed 'taking' under the Act."[137] The court did not agree: "Habitat destruction causes 'harm' under the [Endangered Species Act] but does not 'take' them within the meaning of the MBTA."[138]

In reaching its conclusion, the Ninth Circuit relied on a classic tool of statutory construction by comparing the text of the MBTA with the text of the Endangered Species Act;

> Under the regulations promulgated pursuant to the MBTA, "take" is defined as to "pursue, hunt, shoot, wound, kill, trap, capture, or collect," or to attempt any such act . . . . Under the Endangered Species Act enacted in 1973, in contrast, the word "take" is defined in a broader way to include "harass," and "harm," in addition to the verbs included in the MBTA definition. The broadest term, "harm," which is not included in

132. *Id.* at 691.

133. *Id.*

134. *See id.* (discussing the equipment used by oil operators which are known to kill birds, and finding the deaths of the birds caused by the heater-treaters violated the MBTA).

135. 952 F.2d 297 (9th Cir. 1991).

136. *Id.* at 298.

137. *Id.* at 302.

138. *Id.* at 303.

> the regulations under the Migratory Bird Treaty Act, is defined by ESA Regulation to include habitat modification or degradation . . . . We agree with the Seattle district court that the differences in the proscribed conduct under ESA and the MBTA are "distinct and purposeful." The ESA was enacted in 1973. Congress amended the Migratory Bird Treaty Act the following year, but did not modify its prohibitions to include "harm."[139]

The Ninth Circuit also found that the legislative history of the statute did not support an expanded reading of the MBTA, and thus declined to extend the reach of the MBTA to cover actions that only indirectly lead to bird deaths.[140]

Not long after *Seattle Audubon*, the Eighth Circuit came to the same conclusion in a factually similar case that also involved a logging operation. In *Newton County Wildlife Ass'n v. U.S. Forest Serv.* (*Newton*),[141] the Eighth Circuit "considered whether the Forest Service's final action approving timber sales, which was subject to review under the National Forest Management Act, was arbitrary, capricious, or contrary to law because the agency ignored or violated its obligations under the MBTA."[142] The Wildlife Association argued that because the logging under the timber sale would disrupt nesting birds, killing some (a fact that the Forest Service did not contest), the sales would violate the taking provision of the MBTA unless the FWS obtained a permit.[143]

The court did not accept this argument. Looking to the historical context of the MBTA, the court concluded that "[s]trict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that indirectly

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139. *Id.* at 302–03.

140. *Id.* at 303.

141. 113 F.3d 110 (8th Cir. 1997).

142. Ogden, *supra* note 10, at 20.

143. Newton County Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997). The Court also found that the MBTA does not apply to federal agencies. *Id.* at 115. This is another contested issue in MBTA enforcement, for more see generally Robb Wolfson, Note, *Birds at a Crossroads: Strategies for Augmenting the MBTA's Sway Over Federal Lands*, 21 VA ENVTL. L.J. 535 (2003).

results in the death of migratory birds." [144] The court agreed with the Ninth Circuit, and ruled that "the ambiguous terms 'take' and 'kill' in 16 U.S.C. § 703 mean 'physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment . . . .'"[145]

Most recently, the Fifth Circuit has ruled that the scope of the MBTA does not encompass incidental take. In *United States v. Citgo Petroleum Corp.* (*Citgo*),[146] the Fifth Circuit reviewed Citgo's conviction under the MBTA for taking migratory birds. Citgo was convicted for the deaths of migratory birds that had been caused by open-air oil tanks.[147] The district court surveyed many MBTA cases and "adopted the Tenth Circuit's position and held it 'obvious' that 'unprotected oil field equipment can take or kill migratory birds.'"[148]

The Fifth Circuit was not swayed by the district court's interpretation of the statute; "We decline to adopt the broad, counter-textual reading of the MBTA by these circuits." To reach this conclusion, the court looked at the historical context of the MBTA,[149] its common law origin,[150] its text,[151] and a comparison with other relevant statutes.[152] These canons of statutory construction convinced the court that the word "take" maintained its common law meaning in the MBTA: "As applied to wildlife, to

144. *Id.* at 115 (citations omitted).

145. *Id.* (citing Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991)).

146. 801 F.3d 477 (5th Cir. 2015).

147. *Id.* at 481–82.

148. *Id.* at 493 (citing United States v. Citgo Petroleum Corp., 893 F. Supp. 2d 841, 847 (S.D. Tex. 2012)).

149. *See id.* at 488 (describing the history of the MBTA and its foundational treaties).

150. *See id.* at 489–90 (examining the common law definition of the term "take" and asserting that there is no evidence that Congress meant to deviate from that definition).

151. *See id.* at 490–91 (detailing the textual structure of the MBTA and concluding that nothing in the text points to an expanded meaning of the word "take" outside of the common law definition).

152. *See id.* at 489–91 (comparing the text of the MBTA, the Endangered Species Act, and the Marine Mammal Protection Act and finding the differences between the statutes "distinct and purposeful") (quoting Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991)).

'take' is to 'reduce those animals, by killing or capturing, to human control.'"[153]

The Fifth Circuit also directly confronted the Second and Tenth Circuit's reasoning in its decision:

> Courts that have read the MBTA broadly, mainly the Second and Tenth Circuits, disagree with our ultimate conclusion, but not our analysis of the MBTA's text. Instead, these courts hold that because the MBTA imposes strict liability, it must forbid acts that accidentally or indirectly kill birds . . . . These and like decisions confuse the *mens rea* and the *actus reus* requirements. Strict liability crimes dispense with the first requirement; the government need not prove the defendant had any criminal intent. But a defendant must still commit the act to be liable. Further, criminal law requires that the defendant commit the act voluntarily.[154]

Needless to say, Citgo's conviction was overturned.[155] The Fifth Circuit explicitly refused to extend the scope of the MBTA to incidental take.[156]

B. The District Courts

The federal district courts are also divided on the question of the scope of the MBTA, further complicating the issue. The district court for the District of Colorado found that the MBTA applies to incidental take, following the precedent set by *Apollo*.[157] The Eastern District of California, which is part of the Ninth Circuit has also found that the MBTA can be constitutionally applied to impose criminal penalties on those who did not intend to kill birds.[158] This would seem to be incongruous with the Ninth Circuit's opinion in *Seattle Audubon*,

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153. *Id.* at 489.

154. *Id.* at 491–92.

155. *Id.* at 494.

156. *See id.* ("Differing with the district court's conclusions, we hold that . . . the MBTA's ban on 'takings' only prohibits intentional acts (not omissions) that directly (not indirectly or accidentally) kill migratory birds.")

157. *See* United States v. Moon Lake Electric Ass'n, Inc., 45 F. Supp. 2d 1070, 1074) ("[W]hether Moon lake intended to cause the deaths of 17 protected birds is irrelevant to its prosecution under [the MBTA].").

158. *See* United States v. Corbin Farm Serv., 444 F. Supp. 510, 532 (E.D. Cal. 1978) (discussing the lack of a scienter or intent requirement in the MBTA).

but the Ninth Circuit distinguished the two factually, as one concerned poisoning and the other habitat destruction.[159]

Other district courts that have ruled on the issue, however, have found that the MBTA does not extend to incidental take. These include the District of New Mexico,[160] the Western District of Louisiana,[161] the Western District of Pennsylvania,[162] the Southern District of Indiana,[163] the District of North Dakota,[164] and the District of Oregon.[165] The MBTA has even been found to be unconstitutionally vague,[166] despite *Apollo's* assertion that the

159. *See* Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 303 (9th Cir. 1991) ("In *Corbin Farm Serv.,* the district court simply held that the MBTA can 'constitutionally be applied to impose criminal penalties on those who did not intend to kill migratory birds.' The reasoning of those cases is inapposite here. These cases do not suggest that habitat destruction . . . amounts to 'taking' . . . .") (citing United States v. Corbin Farm Serv., 444 F. Supp. 510, 536 (E.D. Cal. 1978)).

160. *See* United States v. Ray Westall Operating, Inc., No. CR-05-1516-MV, 2009 WL 8691615, at *7 (D.N.M. 2009) ("The Court concludes that Congress intended to prohibit only conduct directed towards birds and did not intend to criminalize negligent acts or omissions that are not directed at birds, but which incidentally and proximately cause bird deaths.").

161. *See* United States v. Chevron USA, Inc., Criminal No. 09-CR-0132, 2009 WL 3645170, at *3 (W.D. La. 2009) ("These regulations were clearly not intended to apply to commercial ventures where, occasionally, protected species might be incidentally killed as a result of totally legal and permissible activities, as happened here.").

162. *See* Curry v. U.S. Forest Serv., 988 F. Supp. 541, 549 (W.D. Pa. 1997) ("As noted in numerous cases, the loss of migratory birds as a result of timber sales of the type at issue in this case do not constitute a 'taking' or 'killing' within the meaning of the MBTA.").

163. *See* Mahler v. U.S. Forest Serv., 927 F. Supp. 1559, 1583 (S.D. Ind. 1996) (finding that the prohibitions of the MBTA only apply to activities that are intended to kill or capture birds or to traffic in their parts).

164. *See* United States v. Brigham Oil & Gas, 840 F. Supp. 2d 1202, 1211 (D.N. Dak. 2012) ("This Court expressly finds that the use of reserve pits in commercial oil development is legal, commercially-useful activity that stands outside the reach of the federal Migratory Bird Treaty Act.").

165. *See* Citizens Interested in Bull Run, Inc., v. Edrington, 781 F. Supp. 1502, 1510 (D. Or. 1991) ("Plaintiffs attempt to expand the MBTA's definition of a 'taking' by reference to the ESA definition of a 'taking' . . . . Identical attempts to expand the definition of a "taking" under the MBTA to include Forest Service activity have been rejected by at least two other district courts.").

166. *See* United States v. Rollins, 706 F. Supp. 742, 745 (D. Idaho 1989) (reversing the conviction under the MBTA of a farmer that used pesticides on an alfalfa crop which were then ingested by migratory birds, killing them, because the Act was unconstitutionally vague when applied to the facts of the case).

Act's terms "are capable of definition" that "ordinary people can understand."[167]

C. Making Sense of the Judicial Landscape

So, what can be gleaned from the varying interpretations of the MBTA at both the circuit and district court levels? Unfortunately, the only take away from the decisions is that there is no well-defined law regarding whether the MBTA applies to incidental take. Each of the decisions discussed above has been criticized, applauded, and distinguished, making the law even more unclear.

While the Second Circuit found FMC liable for the incidental take of birds, the decision has been criticized for applying tort principles inappropriately in a criminal prosecution and for being driven by policy, not by law.[168] Additionally, some commentators have asserted that FMC's holding applies in only the narrow factual circumstances of FMC where ultra-hazardous materials were responsible for the deaths,[169] while others have read the opinion to apply in a broader array of factual scenarios.[170]

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167. United States v. Apollo Industries, Inc., 611 F.3d 679, 688 (10th Cir. 2010).

168. *See* Obrecht, *supra* note 93, at 123 ("Ultimately, commentators and other courts criticized the Second Circuit's application of criminal strict liability based on tort principles.").

169. *See* Larry Martin Corcoran, *Migratory Bird Treaty Act: Strict Criminal Liability for Non-Hunting, Human Caused Bird Deaths*, 77 DEN. L. REV. 315, 333 (1999) (observing that the Second Circuit relied on the ultra-hazardous nature of the pesticide manufacture, and that the Circuit may not find less-hazardous activities that incidentally kill birds hazardous in the future); Means, *supra* note 12, at 837 ("Both FMC and Corbin have been distinguished in subsequent MBTA litigation on the grounds that they constituted an exception to the normal operation of the MBTA—a gentle way of dispensing with the quasi-tort principle that finds no support in the law."); Moreland, *supra* note 14 ("The Second Circuit's opinion is not overly persuasive, and did not adequately explain why the MBTA should include incidental takings . . . . While the court explained why the MBTA should include incidental deaths to promote many important policy concerns, these concerns do not explain why the MBTA includes incidental deaths.").

170. *See* Obrecht, *supra* note 93, at 123 ("*FMC Corp.* laid the groundwork as the first major circuit court decision upholding strict liability for industrial activities under the MBTA.").

Apollo has been heavily criticized for "inserting a mens rea requirement into a strict liability crime."[171] This judicial innovation was condemned as the nail in the coffin for strict liability under the MBTA; "If the MBTA is to maintain its strict liability standard . . . the reasoning of Apollo Energies simply cannot be accepted. Its current status as the latest and nearly exclusive appellate position on the issue renders it particularly dangerous."[172] Despite these criticisms, "[t]he Apollo Energies court's use of notice as a standard for determining what consequences are reasonably foreseeable has been incorporated in guidelines for federal prosecution."[173]

Criticism has also been levied against the decisions that have taken a narrow view of the MBTA. Some commentators believe that the outcomes of *Seattle Audubon* and *Newton* are part of an outdated and "untenable" viewpoint on environmental law,[174] while others, including other federal courts, have taken issue with the distinction the Ninth and Eighth Circuit courts drew between "direct" and "indirect" action.[175] Others interpreted the holdings of *Seattle Audubon* and *Newton* as narrowly focused and applicable only to circumstances involving habitat modification.[176]

Ultimately, the major problems with the case law speaking to the scope of the MBTA is that it is unclear. Considering this judicial landscape, how can businesses and industries predict the legality of their actions when they may conflict with the MBTA, especially those businesses that may be operating in multiple jurisdictions?

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171. Ogden, *supra* note 10, at 21.

172. Kalyani Robbins, *Paved with Good Intentions: The Fate of Strict Liability under the Migratory Bird Treaty Act*, 42 ENVTL. L. 579, 604 (2012).

173. Ogden, *supra* note 10, at 19.

174. *Id.* at 27.

175. *See* United States v. Moon Lake Elec. Ass'n, 45 F. Supp. 2d. 1070, 1076 (D. Colo. 1999) ("[The Ninth Circuit's] interpretation of the MBTA is unpersuasive. Foremost, the Ninth Circuit Court of Appeals' distinction between and 'indirect' and 'direct' 'taking' is illogical. By focusing on whether the taking is 'direct' or 'indirect,' the Court conflates the causation element with the actus reus element.").

176. *See id.* at 1076 ("To the extent *[Seattle Audubon]* holds that the MBTA does not preclude habitat modification or habitat destruction, it is inapposite and I express no opinion as to the correctness of that narrow holding.").

D. How Can Businesses Cope?

The short answer is that they can't. It is not clear what the law is on the MBTA, what is covered by the Act, and how it is enforced.[177] These are significant problems for businesses that may incur some incidental take.

For established businesses, the uncertainty around the law can be costly. For example, the MBTA's misdemeanor penalties subject "any person, association, or other business entity to a fine of not more the $15,000, imprisonment not to exceed six months, or both."[178] In some jurisdictions, the Department of Justice may impose this fine for each violation, which, in the case of large industrial operations, can add up a substantial industry-affecting fine.[179] For example, in 2009, Pacificorp, an electric utility, pleaded guilty to thirty-four misdemeanor violations of the MBTA.[180] The plea cost the company $510,000 in criminal fines, $900,000 in restitution, and the company was ordered to spend $9.1 million to repair or replace its equipment to prevent further avian deaths.[181] Although Pacificorp was not using best practices for mitigating these deaths,[182] in another jurisdiction it is

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177. *See infra* notes 195–212 (discussing the use of prosecutorial discretion to enforce the MBTA); *supra* notes 99–167 (discussing varying judicial interpretations of the MBTA).

178. Obrecht, *supra* note 93, at 119 (citing 16 U.S.C. § 707(a) (2012)).

179. *See id.* (speaking about the authority of the Department of Justice to impose violations for each violation, or each individual bird killing). *But see* United States v. Corbin Farm Serv., 578 F.2d 259, 260 (9th Cir. 1978) (holding that multiple bird deaths resulting from a single transaction cannot be separately charged under the MBTA).

180. *Press Release: Utility Giant to Pay Millions for Eagle Protection*, U.S. FISH & WILDLIFE SERV. (July 10, 2009), https://www.fws.gov/mountain-prairie/pressrel/09-47.html (last visited Feb. 8, 2017) (on file with the Washington and Lee Law Review). Pacificorp's wind energy division has since run afoul of the MBTA, *see Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Projects*, DEP'T OF JUST. (Dec. 19, 2014), https://www.justice.gov/opa/pr/utility-company-sentenced-wyoming-killing-protected-birds-wind-projects-0 (last visited Feb. 7, 2017) (reporting on Pacificorp's plea deal for violations of the MBTA at wind farms in Wyoming) (on file with the Washington and Lee Law Review).

181. *Id.*

182. *See id.* (explaining that Pacificorp was charged for killing 232 eagles in about two years and for failing to use readily available measures to mitigate avian electrocutions at the site).

possible that in another jurisdiction the company would have only been liable for only one fine for the single occasion of bird deaths,[183] or may not have been liable at all.[184]

The cost of criminal prosecution under the MBTA can also be measured in damage to a company's reputation. Enforcement actions against corporations, which violate the MBTA, are often widely publicized, but the average newsreader will likely not understand the intricacies of the legal landscape surrounding the MBTA. Thus, a corporation may find itself in a public relations nightmare, even if it followed best practices to avoid bird deaths: "Stigma may nonetheless endure based on factors beyond the corporation's control, such as public perceptions of the wrongdoing and the extent to which corporate values are seen as the culprit."[185] This reputational harm can damaging and lasting effects on a corporation.[186]

Uncertain liability also poses a significant problem for new industry. The legal ambiguity around the MBTA can be a major obstacle to developing and creating new infrastructure. This can be illustrated by looking at the effect of uncertainty on the development of a wind energy project:

> The development of a modern wind project costs tens of millions, and often hundreds of millions of dollars. Thus, the source of funds and the willingness of banks or holders of capital to support a project are critical factors in the success of a modern wind project . . . . For large electrical generating projects, the limits on rate of return . . . require limited risk before funding will be released to allow construction. Thus,

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183. Some jurisdictions do not allow separate charges for each dead bird, but rather allow only one charge for all of the bird deaths. *See* United States v. Corbin Farm Serv., 578 F.2d 259, 260 (9th Cir. 1978); *see also* Meredith B. Lilley & Jeremy Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, 28 ENVTL. L. 1167, 1183 (2008) ([B]ecause only one offending transaction was involved, only one charge could be brought against [the violators . . . ."); *supra* note 179 and accompanying text (discussing different interpretations of how to fine violators).

184. As discussed, there are courts that have refused to extend the MBTA to cover incidental take. *See supra* notes 135–156 and accompanying text.

185. David M. Uhlmann, *The Pendulum Swings: Reconsidering Criminal Corporate Prosecution*, 49 UC DAVIS L. REV. 1235, 1265 (2016).

186. *See id.* at 1264–66 (discussing the ways society reacts to corporate criminal prosecutions and condoning corporate prosecutions for their deterrent effect).

> there is low tolerance for uncertainty in wind energy projects . . . . The uncertainty brought on by unknown avian impacts, unknown possible consequences to the ability of the project to operate, and unknown mitigation costs . . . can be an unbearable burden on project financing. Avian impacts thus present several distinct challenges to wind energy developers . . . for instance, pre-project permitting uncertainty and post-operation risk of reduced operation, shutdown, or fines for avian impacts.[187]

For the wind energy industry, this problem is compounded by the fact that renewable energy is a priority for both the state and federal governments, which mandated development of this technology.[188] Additionally, these problems are likely to increase because as the wind and solar energy industries develop, the number of birds killed by these projects will rise.[189] It is likely that the problem of incidental take will hold back the development of these industries: "[W]hile [current legislation] promotes renewable energy . . . older laws, [such as the MBTA], with outdated value systems, have been left as barriers to renewable energy."[190] The long view is that this hindrance is counterproductive because the more significant harms of fossil fuels on migratory birds will be offset by ostensibly moving to renewable energy.[191]

These "older laws" present barriers to the development of industries outside of the wind sector as well. For example, Congress has encouraged the development of wireless broadband

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187. McKinsey, *supra* note 71, at 88–89.

188. *See* Ogden, *supra* note 10, at 9–10 (speaking about the commitment of the Obama administration, Congress, and the state governments to increasing wind energy generation and use of wind energy domestically).

189. *See* Scott R. Loss, *Estimates of Bird Collision Mortality at Wind Facilities in the Contiguous United States*, 168 BIOLOGICAL CONSERVATION 201, 208 (2013) (asserting that bird mortality will continue to grow along with wind energy development and estimating a mean annual mortality rate of 1.4 million birds).

190. McKinsey, *supra* note 71, at 89.

191. *See* NextEra Energy, Inc., Comments on May 26, 2015 Notice of Intent to Prepare Migratory Bird Permit (July 29, 2015), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-0067-0114&attachmentNumber=1&contentType=pdf (arguing that the FWS should "recognize and embrace" the long term benefit of renewable energy to migratory birds as using more renewable energy will offset the harmful impact of the fossil fuel industry).

connection.[192] The uncertainty concerning liability under the MBTA creates significant delay in advancing this directive.[193] Energy companies are also hindered if they are required to make habitat modifications that may affect migratory birds. While logging does not constitute take, other actions by energy producers may require significant steps and delays to avoid prosecution by the FWS.[194]

The challenges associated with uncertainty are compounded by the FWS's wide discretion in enforcing (or not enforcing) the MBTA.[195] As discussed, FWS has very broad discretion in enforcing the MBTA and largely uses this discretion to encourage mitigation and compliance with MBTA guidelines.[196] While the Second Circuit was comfortable with prosecutorial discretion acting as a limitation on the application of the MBTA,[197] other courts have not been uneasy with the range of discretion left to FWS.[198]

The first problem with prosecutorial discretion is that it is unpredictable in multiple ways.[199] "[E]nforcement policies might

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192. *See* Telecommunications Act of 1996, 47 U.S.C. § 1302 (1996) ("The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.").

193. *See* COMMENTS OF THE EDISON ELECTRIC INSTITUTE, QUADRENNIAL ENERGY REVIEW INFRASTRUCTURE SITING PUBLIC MEETING 3 (Aug. 21, 2104), https://www.energy.gov/sites/prod/files/2014/08/f18/d_loughery_statement_qer_cheyenne.pdf ("Inconsistent interpretations for implementing the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act amongst and within federal agencies add to the difficulty in building new transmission and maintaining existing facilities.").

194. *See* Howe, *supra* note 18 ("[A]lthough habitat modification is not expressly a 'take' under the MBTA, the FWS has utilized . . . its status as the MBTA implementing agency to seek to alter the footprint of a large energy infrastructure project in the environmental review process.").

195. *See* McKinsey, *supra* note 71, at 78 ("The MBTA is mostly accommodated in the United States by being ignored . . . .').

196. *Supra* notes 69–73 and accompanying text.

197. *Supra* note 109 and accompanying text.

198. *See* United States v. Moon Lake Electric Ass'n, 45 F. Supp. 2d 1070, 1085 (D. Colo. 1999) ("[C]ourts should not rely on prosecutorial discretion to ensure that a statute does not ensnare those beyond its proper confines."); Mahler v. U.S. Forest Serv., 927 F. Supp. 1559, 1582 (S.D. Ind. 1996) ("Such trust in prosecutorial discretion is not really an answer to the issue of statutory construction.").

199. *See* McKinsey, *supra* note 71, at 89 ("The uncertainty brought on by

vary from administration to administration in dramatic ways, making long-range planning much more difficult."[200] There is the constant problem of "over-enforcement" and "under-enforcement" of the Act, depending on the priorities of the current administration.[201] A recent development highlights this problem. During its final two weeks, the Obama Administration issued a legal opinion finding that the MBTA prohibits incidental takings.[202] This policy was in place for about a year before it was reversed by the Trump administration in late 2017.[203] Businesses can not plan for the future when the law is constantly changing, as is currently the case.

Second, prosecutorial discretion does not help businesses anticipate how their actions will be evaluated under the MBTA, and it does not answer the question of what the law actually is.[204] An interesting example of this is the history of enforcement against wind energy projects. The first criminal prosecution against a wind energy company came in 2013 against Duke Energy Renewables.[205] For years prior to this prosecution, commentators speculated on whether wind energy projects would ever be prosecuted under the MBTA, with many believing they would not be.[206] The prosecution was a surprise to the industry

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reliance on selective enforcement is perhaps the most difficult risk to precisely assess.").

200. Means, *supra* note 12, at 835.

201. Ogden, *supra* note 10, at 40.

202. *Birds of Regulatory Prey*, WALL ST. J. (Dec. 28, 2017), https://www.wsj.com/articles/birds-of-regulatory-prey-1514500651 (last visited Jan. 22, 2018) (on file with the Washington and Lee Law Review).

203. *Id.*

204. *See* Means, *supra* note 12, at 836 (discussing the expansion of the MBTA through prosecutorial discretion and the problems that are caused by this method of enforcement).

205. Kell, *supra* note 90. The Duke Energy case exemplifies another aspect of MBTA enforcements, which is the lack of coordination between executive actors. Duke Energy was fined for killing golden eagles and pled guilty to the charge in November, 2013. *Id.* However, in December 2013, the Obama administration issued a notice that it would allow wind energy developers to kill bald and golden eagles without penalty, in an effort to spur wind development. *See Wind Farms that Kill Bald Eagles Are Now Protected From Prosecution*, PBS NEWSHOUR (Dec. 6, 2013), http://www.pbs.org/newshour/rundown/wind-farms-that-kill-bald-eagles-are-now-protected-from-prosecution/ (last visited Feb. 26, 2017) (on file with the Washington and Lee Law Review).

206. *See* Lilley & Firestone, *supra* note 183, at 1186–90 (arguing that courts

and undoubtedly served as warning to others in the industry that they must take proactive steps to avoid avian take.[207] The fact that the prosecution was such a surprise is telling however; lack of wind energy prosecutions became accepted as the norm, so wind energy projects planned accordingly, until the FWS abruptly changed its policies.[208]

> A third problem with prosecutorial discretion is it creates suspicion that the MBTA is being enforced selectively, which has the potential to undermine the willingness of industries to comply with FWS guidelines and efforts.[209] This has been the concern of several members of congress in recent years,[210] and may have a significant impact on the FWS's credibility:

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will find that the MBTA does not reach wind energy takes).

207. *See* Arthur L. Haubenstock, *Takeaways from the First MBTA Criminal Prosecution*, LAW 360 (Dec. 10, 2013), https://www.law360.com/articles/494437/takeaways-from-the-first-mbta-criminal-prosecution (last visited Feb. 7, 2017) ("Renewable energy developers should take heed of the clear message presented by the guidelines and this recent settlement, and take proactive steps to identify and implement measures that follow the guidelines and avoid avian take.") (on file with the Washington and Lee Law Review).

208. *See* Ogden, *supra* note 10, at 33 (describing the adverse affects of failing to prosecute wind energy projects for bird deaths, including the disincentive to comply with voluntary guidelines because of the lack of a fear of prosecution). Andrew Ogden argues that this type of policy-making may be a violation of the National Environmental Policy Act. Ogden, *supra* note 10, at 38–40.

209. *See id.* at 37 ("[T]he lack of prosecutions of wind energy developers or operators creates a strong inference that prosecutorial discretion is being exercised unevenly to favor wind energy over other activities such as the oil and gas industry."); Paul Kerlinger, *Does the U.S. Fish and Wildlife Service Selectively Enforce Bird Laws?*, N. AM. WIND POWER (May 2016), http://nawindpower.com/online/issues/NAW1605/FEAT_02_Does-The-U.S.-Fish-And-Wildlife-Service-Selectively-Enforce-Bird-Laws.html (last visited Feb. 24, 2017) ("[T]he dollars and time spent by the FWS are not proportional to the damage to birds . . . . The fact that the FWS is spending disproportionately more time and money focusing on the wind industry strongly suggests that it is selectively regulating and enforcing the MBTA.") (on file with the Washington and Lee Law Review); Ogden, *supra* note 10, at 40 ("The result of such inaction, allegations, ambiguity, and opacity undermines the FWS's credibility, and possibility its legal authority, as the unbiased enforcer of the nation's wildlife laws . . . .").

210. *See* Ogden, *supra* note 10, at 37

> Republican Senators David Vitter and Lamar Alexander questioned the FWS's motivations for prosecuting MBTA cases against oil and gas producers in a letter to the Attorney General. Senator, and then–Republican presidential candidate Newt Gingrich, requested that the House Judiciary Committee investigate how the Obama

> Although these complaints may be more about politics than plovers, they do raise the valid question of what is the FWS's policy that dictates when, where, and against whom will an enforcement action for an incidental taking under the MBTA be referred for prosecution? From its own statements, the FWS has an internal practice that a violator's adherence to guidelines and implementation of FWS's recommendations will result in a lower likelihood of prosecution. But, the lack of clear guidelines for many industrial activities, and the failure to bring enforcement actions against wind energy producers when FWS guidelines may have been violated, give the appearance that prosecutorial discretion is being applied unevenly and with the possible intention of favoring a specific industry.[211]

This is a problem because as the pronounced law around the scope of the MBTA has become muddled through different interpretations by the courts, the main protection the birds have from incidental take is the willingness of companies and industries to work with FWS for best practices.[212] If animosity is brought about through a perception of unequal enforcement, then industries will be less likely to work with the FWS. This dimension takes on a new significance given the FWS's recent proposal to begin a rulemaking concerning incidental take.

IV. The Proposed Rulemaking

In light of the confusing judicial landscape surrounding the MBTA, and amid growing concern over how the FWS is enforcing the Act, FWS has issued a notice of intent to prepare an environmental impact statement to evaluate the "potential environmental impacts of a proposal to authorize incidental take of migratory birds" under the MBTA.[213] This notice of intent is the first step in the administrative process for creating an agency

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> administration chooses to enforce the MBTA, and then–Presidential candidate Mitt Romney brought up the subject of selective enforcement of the MBTA during the 2012 debates.

211. *Id.* at 37.

212. *See id.* at 33 ("[I]t is important to emphasize that compliance with . . . any advice or comments from the FWS regarding a particular project, is completely voluntary.").

213. *Migratory Bird Permits*, *supra* note 20.

rulemaking. The FWS is required under the National Environmental Policy Act to undertake an assessment of environmental effects of a proposed rulemaking prior to making a final decision.[214] Once FWS has evaluated the environmental impact and reviewed the comments submitted in regards to the notice of intent, it will likely issue a notice of rulemaking, which will then be subject to an additional notice-and-comment period.[215] Because the FWS action is in an early stage, it is not clear what form the proposed rule will take. However, what is apparent is that the possible rulemaking actions that are proposed in the notice of intent present a major question about the authority of the FWS to undertake this kind of rulemaking, and will not solve the current problems with the MBTA.

A. Proposal

The proposal lists several different possible rulemaking actions, and invites comments from interested parties, many of which have been submitted.[216] The potential approaches to enforcement include individual permits, general permits for certain industries, and memoranda of understanding with federal agencies.[217]

The first possible approach that FWS is considering is "to establish a general conditional authorization for incidental take by certain hazards to birds associated with particular industry sectors."[218] This would be subject to the condition that those sectors adhere to "appropriate" standards to mitigate their impact on migratory birds, including conservation methods and technologies that have been developed for this purpose.[219] The hazards and sectors being considered are oil, gas, and wastewater

214. National Environmental Policy Act, 42 U.S.C. § 4332 (1975).

215. Administrative Procedures Act, 5 U.S.C. § 553(c).

216. For access to all of the comments submitted, see generally *Docket Browser*, REGULATIONS.GOV, https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=FWS-HQ-MB-2014-0067 (last visited Nov. 28, 2016) (on file with the Washington and Lee Law Review).

217. *Migratory Bird Permits*, *supra* note 20.

218. *Id.*

219. *Id.*

disposal pits, gas burner pipes, communications towers, and electric transmission and distribution lines.[220] The FWS selected these hazards and sectors because FWS has a history of working with those sectors— "they consistently take birds and [the FWS has] substantial knowledge about measures these industries can take to prevent or reduce incidental bird deaths."[221]

The second approach being considered by FWS is the issuance of "individual incidental take permits for projects or activities not covered under the described general, conditional authorization . . . [or] for which there is limited information regarding adverse effects."[222] Under this approach, the FWS would not issue any actual individual permits, but would establish the authority and standards for the issuance of permits, and will also consider ways to minimize the administrative burdens of obtaining other Federal individual incidental take permits.[223]

The third option under consideration is "to establish a procedure for authorizing incidental take by Federal agencies that commit in a memorandum of understanding with [FWS] to consider impacts to migratory birds in their actions and to mitigate that take appropriately."[224]

The fourth possible approach would be the "development of voluntary guidance for industry sectors."[225] Under this approach, FWS "would continue to work closely with interested industry sectors to assess the extent that their their operations and facilities may pose hazards to migratory birds" and to evaluate mitigation guidelines.[226] This approach would not provide legal authorization for incidental take but FWS would, as a matter of

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220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* This proposed regulation is not pertinent for this article as it deals with federal agencies and not private parties. However, it is worth noting that there is a divide on whether the MBTA even applies to federal agencies, making this a problematic proposal in terms of FWS authority. *See generally* Robb Wolfson, Note, *Birds at a Crossroads: Strategies for Augmenting the MBTA's Sway Over Federal Lands*, 21 VA ENVTL. L. J. 535 (2003).

225. *Migratory Bird Permits*, *supra* note 20.

226. *Id.*

discretion, "consider the extent to which a company or individual had complied with that guidance as a substantial factor in assessing any potential enforcement action for violation of the Act."[227]

B. The Proposed Rulemaking's Shortcomings

Assuming that the FWS ultimately finds the authority to regulate incidental taking, the proposed rules leave several problems unresolved that will undermine the purpose of the rulemaking.[228] As discussed, the current problems with the MBTA and its myriad of interpretations are that the law is uncertain which leads to inconsistent (and possibly unequal) enforcement, it hinders development of new industry, and it is extremely costly and unpredictable.[229] These are problems that need to be resolved, but the FWS's proposed rulemaking will not solve them.

As a preliminary matter, the proposed "development of voluntary guidance for industry sectors" approach is the current state of MBTA enforcement. The MBTA is enforced via prosecutorial discretion, and the FWS has announced that it takes into account voluntary compliance with FWS guidelines when pursuing violations.[230] This suggested approach, therefore, is not a solution to the problems currently being created by uncertainty around the scope of the MBTA.

The remaining proposed permitting options, the general authorization, and the individual permits, also do not solve the problems associated with the legal uncertainty surrounding the MBTA. First, each of these potential permitting programs would

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227. *Id.*

228. *See* Bell, *supra* note 22 (speaking to the practical restraints of the proposed permitting programs, as well as their possible shortcomings); Juan Carlos Rodriguez, *FWS Migratory Bird Permits Could Benefit Industry, Wildlife,* LAW 360 (June 26, 2015), http://www.law360.com/articles/672441/fws-migratory-bird-permits-could-benefit-industry-wildlife (last visited Jan. 8, 2017) (reporting on what questions have been left unanswered by the FWS proposal, and what the possible problems these questions may cause for the proposal) (on file with the Washington and Lee Law Review).

229. *Supra* notes 178–212 and accompanying text.

230. *Supra* note 211 and accompanying text.

be unpredictable, much as enforcement is now.[231] Second, the proposed programs have the potential to hinder development in the affected industries.[232] Third, the permitting options would continue to rely heavily on prosecutorial discretion, and perhaps exacerbate the problems that are already associated with this discretion.[233] Finally, and most significantly, the FWS may not have the authority under the MBTA to enforce a permitting program for incidental take, as the MBTA may not cover incidental take.[234]

1. Unpredictablity

According to the notice of intent, the general authorization and individual permits would be optional for those that are hoping to comply with the MBTA.[235] Such a lack of mandate leaves open questions as to how the government will apply its enforcement provisions to projects that have incidental taking, but do not have a permit.[236] This uncertainty is similar to the uncertainty currently facing the industry—a great deal of discretion is left to FWS to determine who to prosecute which makes it very difficult for industrial planners to know what to do to avoid prosecution. Additionally, the notice makes it clear that FWS's position is that the MBTA covers every unpermitted migratory bird death,[237] although several courts have found otherwise.[238] Even with these permitting programs in place, industries would be subject to different liabilities depending on where they are located—in a jurisdiction where incidental take is covered by the MBTA, or in a jurisdiction where it is not. Presumably, those industries located in a jurisdiction where the MBTA has not been found to include incidental take would not

231. *Infra* Part IV, subpart B, section 1.

232. *Infra* Part IV, subpart B, section 2.

233. *Infra* Part IV, subpart B, section 3.

234. *Infra* Part IV, subpart B, section 4.

235. *Migratory Bird Permits*, *supra* note 20.

236. Rodriguez, *supra* note 228; *see generally Migratory Bird Permits*, *supra* note 20.

237. *Migratory Bird Permits*, *supra* note 20.

238. *Supra* notes 135–176 and accompanying text.

need a permit, but what of the many industries with operations and a presence in multiple jurisdictions? Some companies will find that the costs of the permitting programs will not be worth it, and thus some industries may continue with relying on the current status quo assume the risks associated with the current framework of enforcement.[239]

These proposals also include the possibility of compensatory mitigation.[240] Again, this would create similar problems to what the industry is facing currently; without strict guidelines as to when and what amounts of payments are expected, the enforcement may continue to be arbitrary because of the discretion left to FWS in choosing how to enforce the rule.[241] If the permit system "becomes a methodology for the service to get a lot of compensatory mitigation where it otherwise wouldn't have been able to request it or impose it, then the industry will probably push back and say this is so burdensome it's really not worth it."[242] Additionally, wind and solar industries are currently not under consideration for the general authorization, which will do nothing to bring legal certainty to these industries as they continue to grow in size and importance to the national and global economies.[243]

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239. *See* Rodriguez, *supra* note 228 ("If the project developer decides that a permit is not necessary or cost-effective, for example, the service should address whether that increases the risk of prosecution under the MBTA is there is a take of migratory birds . . . .").

240. *Migratory Bird Permits*, *supra* note 20.

241. *See* Gerald George, *Migratory Bird Treaty Act Narrowly Interpreted: The Fifth Circuit Joins the Eighth and Ninth Circuits*, ENERGY & ENVTL. L. BLOG (Sept. 10, 2015), http://www.energyenvironmentallaw.com/2015/09/10/migratory-bird-treaty-act-narrowly-interpreted-the-fifth-circuit-joins-the-eighth-and-ninth-circuits/ (last visited Jan. 28, 2017) (speaking to the FWS's wide discretion in enforcing the MBTA, and how the Fifth Circuit refused to extend the meaning to give the Act a broad meaning in light of that wide discretion) (on file with the Washington and Lee Law Review).

242. Rodriguez, *supra* note 236.

243. *See* Scott R. Loss, *Estimates of Bird Collision Mortality at Wind Facilities in the Contiguous United States*, 168 BIOLOGICAL CONSERVATION 201, 202 (2013) (speaking to the growing reliance on and investment in wind energy and asserting that the impact of the wind energy development is expected to grow in light of both federal and state incentives for investment in the industry); Rodriguez, *supra* note 236 ("Notably absent from the sectors under consideration for a general permit program are the growing renewable energy sources of wind and solar power . . . ."); *see generally* Migratory Bird Permits,

2. Hindrance of Development

> Each of the proposed rulemaking paths would likely hinder development in the affected industries. Most obviously, the permit programs and the mitigation requirements have the potential to be quite costly to both existing industry facilities and those looking to develop.[244] The costs associated with the permitting program may effectively undermine key federal and state policies to encourage the development of certain industries, such as broadband wireless[245] and wind energy.[246]

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supra note 20.

244. *See* Rodriguez, *supra* note 236 (discussing the necessity of a "grandfathering mechanism" to prevent the unfair, costly, and inefficient result of requiring projects that are already complying with the FWS voluntary guidelines to apply for new permits); *see also* NextEra Energy, Inc., Comments on May 26, 2015 Notice of Intent to Prepare Migratory Bird Permit (July 29, 2015), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-0067-0114&attachmentNumber=1&contentType=pdf ("[T]he program should not be retroactive. Requiring existing facilities that are not causing significant impacts to bird populations to install additional equipment or take action at considerable cost in order to retrofit equipment would be an inefficient use of time and resources.").

245. *See* National Association of Broadcasters, Comments of the National Association of Broadcasters (July 27, 2015), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-0067-0084&attachment Number=1&contentType=pdf ("Imposing new tower siting hurdles on the deployment of broadcast and wireless infrastructure at this time will hinder the post-incentive auction transition, frustrate federal spectrum policy, and delay the offering of new mobile broadband services, contrary to congressional intent."); PCIA—The Wireless Infrastructure Association, In the Matter of Migratory Bird Permits; Programmatic Environmental Impact Statement (July 27, 2015), https://www.regulations.gov/ contentStreamer?documentId=FWS-HQ-MB-2014-00670112&attachmentNumber=1&contentType=pdf

> Rather than expedite wireless broadband deployment and availability, the [programmatic environmental impact statement] approach would only produce further delay . . . . These new obligations would slow broadband deployment and would increase the costs associated with deployment, which ultimately would discourage that investment.

246. *See* NextEra Energy, Inc., Comments on May 26, 2015 Notice of Intent to Prepare Migratory Bird Permit (July 29, 2015), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-0067-0114&attachmentNumber=1&contentType=pdf ("[Next Era Energy] believes the FWS should recognize, as the President's Climate Change Plan recognizes, the importance of expanding wind and solar renewable energy . . . . If designed improperly, the proposed MBTA rule . . . would be a deterrent to the desired growth of renewable energy.").

> Several of the comments to the notice of intent raise the question of whether these permitting programs are even feasible, given the limited resources of FWS.[247] The limited resources of FWS pose a problem to development because delays caused by waiting for a permit can be costly, and possibly fatal, to new projects.[248] Delays, burdensome review processes, and inconsistent administration may also cause fewer industry actors to apply for permits, as the risk of operating without one will simply outweigh the cost of trying to obtain a permit.[249]

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247. *See* American Electric Power, Re: Comments Regarding the May 26, 2015 Notice of Intent to Prepare a Programmatic Environmental Impact Statement to Evaluate the Potential Environmental Impacts of a Proposal to Authorize Incidental Take of Migratory Birds (July 24, 2015), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-0067-0043&attachmentNumber=1&contentType=pdf ("AEP has concerns that the agency does not have the resources to manage another permit program."); American Wind Energy Association, Re: Comments regarding the May 26, 2015 Notice of Intent to Prepare a Programmatic Environmental Impact Statement to Evaluate the Potential Environmental Impacts of a Proposal to Authorize Incidental Take of Migratory Birds (July 27, 2015), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-0067-0139&attachmentNumber=1&contentType=pdf ("[W]e remain skeptical of the Service's ability to fashion a permit process that is sufficiently streamlined as to be workable for the regulated community. The Service simply does not have the resources to effectively implement a permitting program . . . .").

248. *See* NextEra Energy, Inc., Comments on May 26, 2015 Notice of Intent to Prepare Migratory Bird Permit (July 29, 2015), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-0067-0114&attachmentNumber=1&contentType=pdf.

> Our experience with FWS permitting has been that despite the best of intentions, FWS permit programs results in significant delays to the advancement of effected projects. For example, the existing Special Purpose Utility Salvage permit . . . is a relatively straightforward voluntary permit that has now become unusable by industry due to unacceptable delays. It has been the experience of the wind industry that the salvage permit application, review, and approval process has been unnecessarily bloated by requiring multiple reviews by understaffed field offices, with no clear review deadline or issuance timeline.

249. *See* American Wind Energy Association, Re: Comments regarding the May 26, 2015 Notice of Intent to Prepare a Programmatic Environmental Impact Statement to Evaluate the Potential Environmental Impacts of a Proposal to Authorize Incidental Take of Migratory Birds (July 27, 2015), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-0067-0139&attachment Number=1&contentType=pdf.

> The Service arguably has a poor track record of implementing new (or existing) permit programs, which are much less ambitious in the

3. Prosecutorial Discretion

The proposed permitting programs would continue to rely in large part on prosecutorial discretion. This is problematic because the FWS's prosecutorial discretion is currently contributing to the problem of legal uncertainty around the MBTA, so continued reliance on that discretion is not an appropriate way to resolve that uncertainty.

The FWS intends to focus on "sectors whose impacts on migratory birds is well known and where practical avoidance measures are possible."[250] As is evident by FWS's incredible ranges of estimated bird deaths,[251] there is no clear consensus on what impact various industries or hazards have on avian populations. Certainly there is some evidence that some industries have more of an impact than others, but creating a permitting program based on such nebulous estimations could easily be seen as arbitrary and capricious.[252] FWS will ostensibly

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> scope of their coverage. The wind industry is fully aware of how costly and lengthy the incidental take permit process has become under the ESA, despite more than three decades of permitting experience. More recently, in the preambles to both the proposed and final rules establishing the programmatic take permit program under BGEPA, the Service asserted that the permit process would not be burdensome for permit applicants. Yet, the opposite has occurred. The process is indeed so burdensome that very few programmatic eagle take permits have been issued, and none have been issued under the December 2013 amendments to those BGEPA permitting rules. In fact, only one permit has been issued for a wind project . . . .

250. Phillip Taylor, *Energy Policy: FWS Moves to Regulate Bird Kills from Oil Wells, Power Lines*, E&E PUBLISHING, LLC (May 22, 2015), http://www.eenews.net/stories/1060019062 (last visited Sept. 20, 2016) (on file with the Washington and Lee Law Review).

251. *Supra* Part II, subpart C and accompanying notes.

252. *See* Devon Energy Production Company, Comments on Incidental Take of Migratory Birds—Programmatic Impact Statement (July 27, 2015), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-0067-0078&attachmentNumber=1&contentType=pdf ("In its notice of intent for the PEIS, the Service stated that it focuses its MBTA enforcement activities on industries or activities that 'chronically kill birds.' Oil and gas operations do not, however, chronically kill birds."); National Association of Broadcasters, Comments of the National Association of Broadcasters (July 27, 2015), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-0067-0084&attachmentNumber=1&contentType=pdf ("[T]he notice provides virtually no factual basis to support a conclusion that broadcast towers have a significant impact on migratory birds . . . . [T]he Notice's assertions bout

use its discretion to determine a "threshold for impact" to determine when a permit is required, and what measures must be taken to obtain one.[253]

Furthermore, it appears FWS is unsure of the ability to regulate or the impact of the wind energy industry, so wind hazards are not currently included as a hazard being considered, despite recent wind energy prosecutions that would suggest FWS recognizes wind energy as a hazard.[254] The solar industry is completely absent from this permitting consideration.[255] The combined effect of omitting solar and wind energy from consideration, along with FWS's claim to focus on sectors where the impacts are well known, undermines FWS's credibility because it appears that FWS is choosing to favor enforcement against some industries and not others.[256] "FWS clearly contemplates leaving at least some industrial sectors and activities out of its permitting program and addressing their impacts on migratory birds through the exercise of enforcement discretion. The Notice does not indicate the criteria the agency will use to draw this line."[257]

Industries do not like to rely on prosecutorial discretion[258]—it has become something of a "sword of Damocles," with no one

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communications towers' impact on birds are contrary to directly relevant evidence found in [a Federal Communications Commission final environmental assessment]."); PCIA—The Wireless Infrastructure Association, In the Matter of Migratory Bird Permits; Programmatic Environmental Impact Statement (July 27, 2015), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-0067-0112&attachmentNumber=1&contentType=pdf ("[T]he FWS lacks the factual underpinning necessary to support its proposed actions . . . .").

253. Rodriguez, *supra* note 228.

254. The FWS has solicited comments addressing the feasibility of permitting the wind energy sector. *Migratory Bird Permits*, *supra* note 20. *See also supra* notes 205–211 and accompanying text (discussing recent prosecutions against wind energy developers for violations of the MBTA).

255. *Migratory Bird Permits*, *supra* note 20.

256. *See* Robert Bryce, *Windmills vs. Birds*, WALL ST. J. (Mar. 7, 2012), https://www.wsj.com/articles/SB10001424052970204781804577267114294838328 (last visited Feb. 20, 2017) (criticizing the presidential administrations for not prosecuting wind energy projects that kill birds while vigorously pursuing claims against fossil fuel projects) (on file with the Washington and Lee Law Review).

257. Bell, *supra* note 22.

258. *See* THOMAS R. LUNDQUIST ET AL., CROWELL & MORING, THE MIGRATORY BIRD TREATY ACT: AN OVERVIEW (2015), https://www.crowell.com/files/The-

quite sure when or where it will fall next.[259] The proposed regulations simply do not alleviate that problem.

4. The Problem of Authority

The most significant problem with the proposed rulemaking is that the FWS may not have the authority to regulate incidental take in the first place.[260] Clearly this is an unresolved question given the disagreement in the courts, and FWS can not regulate incidental take without the authority to do so given to them by statute.

The issue essentially becomes, whose interpretation of the MBTA is the more persuasive? This author asserts that the answer is the limited interpretation. Using the canons of statutory construction, it becomes clear that the MBTA, as it is currently written, does not cover incidental take.

Migratory-Bird-Treaty-Act-An-Overview-Crowell-Moring.pdf ("At present, persons, and companies conducting activities that do inadvertently cause migratory bird deaths . . . . are subject to a crazy quilt of MBTA interpretations that vary circuit-by-circuit . . . and dependent on the government's exercise of prosecutorial discretion. For many in the private sector, this legal uncertainty and risk is unacceptable . . . .") (on file with the Washington and Lee Law Review).

259. McKinsey, *supra* note 71, at 75.

260. This issue has been raised by several of the comments submitted to the Notice of Intent. *See* NextEra Energy, Inc., Comments on May 26, 2015 Notice of Intent to Prepare Migratory Bird Permit (July 29, 2015), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-0067-0114&attachmentNumber=1&contentType=pdf ("We believe the weight of judicial authority in the U.S. overwhelmingly runs counter to the FWS's position regarding authority over incidental take . . . ."); AES U.S. Services, Re: Incidental Take of Migratory Birds (July 27, 2015), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-0067-0077&attachment Number =1&contentType=pdf ("AES does not agree with the Service that the MBTA take prohibition was intended to apply to the incidental take of birds during otherwise lawful industrial or commercial activity . . . ."); PCIA—The Wireless Infrastructure Association, In the Matter of Migratory Bird Permits; Programmatic Environmental Impact Statement (July 27, 2015), https://www.regulations.gov/ contentStreamer?documentId=FWS-HQ-MB-2014-0067-0112&attachmentNumber=1&contentType=pdf ("As recognized by the United States Courts of Appeals for the Eighth and Ninth Circuits, the MBTA applies only to hunting and poaching activities and does not apply to lawful commercial activity . . . .").

First, "when confronted with issues of statutory construction, courts begin by examining the plain language of the statute."[261] To find the plain meaning of the statute, courts "look not only to the particular statutory language, but to the design of the statute as a whole and to is object and policy."[262] When a particular term has not been defined in the statute, the court then looks to its ordinary meaning, or meaning under common law.[263]

> Take is not defined in the MBTA,[264] so the term must be construed according to its ordinary meaning or common law meaning, unless the legislature has indicated that the term does not retain its common law meaning for the purposes of this statute. The ordinary meaning of the word take, in the context of wildlife, us "to get into one's hands or into one's possession, power, or control."[265] A further dictionary definition is "to get possession of (as fish or game) by killing or capturing."[266] The plain meaning of take, which was well-understood at the time the MBTA was passed,[267] conveys that take necessitates intentional action that results in taking possession of wildlife. Incidental take is not such an action.[268] The plain meaning of take thus supports a narrow interpretation of the MBTA.[269]

Furthermore, a court must interpret a criminal statute narrowly. "When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate,

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261. United States v. Brigham Oil & Gas, 840 F. Supp. 2d 1202, 1208 (D.N. Dak. 2012).

262. Crandon v. United States 494 U.S. 152, 158 (1990).

263. *See* United States v. Shahani, 513 U.S. 10, 13 (1995) ("[Courts] follow the settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms.").

264. *See generally*, 16 U.S.C. §§ 703 (2012).

265. *Take*, Merriam-Webster Dictionary (2016).

266. *Id.*

267. *See* Geer v. Connecticut, 161 U.S. 519, 523 (1896) (using the word take as a term of art in the context of determining whether the right to reduce animals to possession is one subject to lawmaking).

268. *See* United States v. Citgo Petroleum Corp., 801 F.3d 477, 489 (5th Cir. 2015) ("One does not reduce an animal to human control accidentally or by omission; he does so affirmatively.").

269. This definition is further supported by the MBTA's implementing regulations. *See* 50 C.F.R. § 10.12 (2017) ("Take means to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.").

before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."[270] This serves an important constitutional purpose; "because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'"[271] Thus, as a criminal statute, the MBTA must be construed narrowly, absent a clear direction from the legislature.

There is no such clear direction from the legislature in the MBTA concerning whether the MBTA creates liability for incidental take or not as is evident from the circuit split over whether the statute encompasses incidental take: "[t]he current law . . . is vague and ambiguous as it relates to sanctions for lawful, commercial activity that may indirectly injure or kill birds."[272] This ambiguity should be resolved in favor of a narrow meaning, one that does not encompass incidental take, and one which better comports with the strict liability nature of the statute. Strict liability means that one can be convicted of violating the MBTA without doing so knowingly or intentionally. However, in order to be convicted, that person must still commit the act voluntarily, or affirmatively.[273] By its very definition, incidental take is not an affirmative action. Including incidental take in the scope of liability under MBTA is thus not consistent with the strict liability nature of the statute.

A narrow interpretation is further supported by the context, purpose, and legislative history of the MBTA. As discussed, the MBTA was enacted to combat overhunting and poaching.[274] This

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270. United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952).

271. United States v. Bass, 404 U.S. 336, 348 (1971) (further citations omitted).

272. United States v. Brigham Oil & Gas, 840 F. Supp. 2d 1202, 1212 (D. N. Dak. 2012).

273. *See* United States v. Citgo Petroleum Corp., 801 F.3d 477, 492 (5th Cir. 2015) ("[R]equiring defendants, as an element of an MBTA misdemeanor crime, to take an affirmative action to cause migratory bird deaths is consistent with the imposition of strict liability.") (citing WAYNE LEFAVE, CRIMINAL LAW § 5.2(e) (5th ed. 2010)).

274. *Supra* notes 29–44 and accompanying text.

is evident not only from the historical context of the Act, but also its legislative history.[275] The Senator who introduced the bill stated that "this law is aimed at the professional pothunter,"[276] while the opposition to the bill focused on its breadth and potential to conflict with property rights.[277] This debate emphasizes the implausibility of an expansive meaning of the statute: "In the wake of court decisions finding earlier laws designed to regulate bird hunting unconstitutional, it seems unlikely that Congress would have attempted a law so expansive as to affect farming, timber harvesting, and window installation."[278] This reading is supported by the repeated refusal of Congress to expand the law. Congress had the opportunity to clarify or extend the statute in 1960 when the "market hunter" penalties were added, and in 1974 when the Act was amended to include a prohibition on selling illicitly obtained bird parts.[279]

The 1974 amendment would have been an opportune time to extend or clarify the MBTA, as it was undertaken only a year after Congress passed the Endangered Species Act (ESA).[280] The ESA definition of take includes "harass, harm, pursue, hunt, shoot, wound, capture, or collect."[281] The ESA also explicitly defines and prohibits incidental take.[282] These definitions are

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275. *See* 56 CONG. REC. 7357 (1918) (statement of Rep. Fess) (stating that annual food losses caused by insects require protection of birds from "the market hunter"); 56 CONG. REC. 7360 (1918) (statement of Rep. Anthony) ("[T]he people who are against this bill are the market shooters, who want to go out and kill a lot of birds in the spring, when they ought not to kill them, and some so-called city sportsmen, who want spring shooting just to gratify a lust for slaughter."); 56 CONG. REC. 7376 (1918) (statement of Rep. Kincheloe) ("If you want the pothunters to disregard this solemn treaty we made with Canada and kill these migratory birds and stop their propagation, then you want to vote against this bill.").

276. 55 CONG. REC. 4402 (statement of Sen. Smith). A pothunter is someone who hunts merely to achieve a kill, rather than for sport.

277. *See* 55 CONG. REC. 4813 (July 9, 1917) (statement of Sen. Reed) ("[The MBTA] proposes to turn ... powers over to the Secretary of Agriculture for the creation of zones, to tell white men when and where they can hunt, to make it a crime for a man to shoot game on his own farm . . . .").

278. Means, *supra* note 12, at 831–32.

279. Endangered Species Act of 1973, 16 U.S.C. § 1539 (1982).

280. Means, *supra* note 12, at 832–33.

281. 16 U.S.C. § 1532.

282. 16 U.S.C. § 1539.

clear deviations from the common law meaning of the term take, a sign that if Congress intended for the MBTA meaning of take to deviate from the common law definition, they would have done so.

In conclusion, the evidence supports a narrow reading of the MBTA. However, while the MBTA does not currently cover incidental take, there is nothing preventing the legislature from amending the MBTA to expand its reach.

V. The Need for a Legislative Solution

The MBTA has a legal problem—there is inconsistent and unpredictable enforcement of a statute that has an enormous impact on industry. This problem can be resolved judicially, through regulations, or legislatively.[283] The courts are divided,[284] and unless the Supreme Court chooses to weigh in, do not have the power to fix the problem nationwide because their decisions are binding only in their jurisdictions. The agencies do not have the authority to fix the problem, and by continuing to use prosecutorial discretion to enforce the MBTA, may in fact be contributing to the issue.[285] FWS is attempting to bring more certainty to the arena,[286] but their chosen method is extremely flawed. The best and only reasonable solution is for the legislature to amend the MBTA.

This is a proposal that has been suggested previously,[287] but it takes on new urgency as these industries are growing and FWS

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283. *See* Ogden, *supra* note 10, at 46–54 (discussing the possibility of legislative, judicial, or regulatory changes that could reshape the legal landscape of the MBTA).

284. *See supra* notes 99–167 (discussing various ways Courts have interpreted the MBTA).

285. *Supra* notes 247–281 and accompanying text; *see* McKinsey, *supra* note 71, at 89 (arguing that the uncertainty brought on by reliance on selective enforcement creates risks for industries).

286. *See supra* Part V, subpart A and accompanying notes (discussing FWS's proposal for incidental take permits).

287. *See* McKinsey, *supra* note 71, at 91 (suggesting that Congress create a statutory MBTA take permit); Minikowski, *supra* note 95, at 157–58 (proposing that Congress amend the MBTA to include a civil penalty provision and a citizen suit provision); Obrecht, *supra* note 93, at 141–42 (advocating that Congress should issue a mandate authorizing an incidental take permit program); Ogden, *supra* note 10, at 46–48 (discussing the possibility of legislative amendment to the MBTA, but noting that Congress is slow to act).

is attempting to greatly expand their authority through rulemaking.

First, Congress should amend the MBTA to make it clear that the criminal provisions do not apply to incidental take. This is consistent with the meaning of the statute, and will greatly alleviate any legal uncertainty. Congress has amended the MBTA before to exclude specific groups or activities from MBTA liability,[288] so it is not unreasonable for Congress to make this type of amendment. The prior amendments to the MBTA implicitly recognized that the blanket prohibition and criminal penalties imposed by the Act are not an appropriate way to protect migratory birds in every scenario, and that the Act must adapt.[289]

Second, legislators should add a civil penalty provision to the MBTA that specifically governs incidental take. In this provision incidental take should be defined as it is in the ESA: "take that is incidental to, but not the purpose of, otherwise lawful activity."[290] A clear definition of incidental take is important to the success of an amendment so that there is not potential ambiguity over whether a violation falls under the criminal or the civil provisions.[291]

The civil provisions should allow for the FWS to take civil action against an actor that has had incidental take, but the

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288. In 1972, Section 712 was added to the Act to allow the indigenous people of the State of Alaska to take migratory birds and their eggs in order to satisfy "nutritional and other essential needs, as determined by the Secretary of the Interior." 16 U.S.C. § 712 (2012). In 2002, the National Defense Authorization Act, Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458 (2002), authorized the Secretary of the Interior to amend the MBTA to exempt the Armed Forces for incidental take. *Id.* The final regulation declares that the MBTA "does not apply to the incidental taking of a migratory bird by a member of the Armed Forces during a military readiness activity authorized by the Secretary of Defense or the Secretary of the military department concerned." 50 C.F.R. § 21.15 (2017).

289. *See* Minikowski, *supra* note 95, at 168 ("The issue is that environmental statutes—MBTA being a prime example—have the ability to become frozen in the age in which they were enacted and not provide ways to address modern environmental threats . . . .").

290. 16 U.S.C. § 1539 (2012).

291. For a more thorough discussion, see Minikowski, *supra* note 95, at 159–60 (arguing that the MBTA needs to be amended to include a definition of take that includes the qualifiers "harass" and "harm" so there is no doubt as to whether take is incidental or not).

provision should reduce or eliminate liability based on whether the deaths were foreseeable, or if the violator had been following established best practices for minimizing incidental take. Incidental take would be therefore be allowed in specific circumstances, subject to specific conditions—a type of enforcement that FWS is familiar with, as is evidenced by the conditions attached to hunting and the Duck Stamp Program.[292]

A civil penalty provision has several benefits. Foremost, civil penalties resolve the issue of whether the statute is unconstitutionally vague and the potential due process concerns.[293] Civil penalties would also alleviate corporation's fears of reputational harm that accompany criminal prosecutions, although civil fines would encourage corporations to take measures to prevent incidental take.[294]

Furthermore, civil penalties are more adapted to curing the problems of reconciling concern for developing modern industry and concern for conserving avian life. Criminal penalties serve to "deter the criminal conduct at which it is aimed," however, it is not possible to deter the unintentional bird deaths that are caused by incidental take.[295] Civil penalties better serve the aims of the MBTA because they "could include monetary fines, as well as injunctive relief to cease the action or remedy the condition causing the taking," and could also help mitigate future taking.[296] The monetary fines can then be channeled directly to the FWS for use in conservation efforts. The FWS has successfully run the Duck Stamp Program by using hunters to pay for conservation efforts[297]—fines for incidental take can be channeled into conservation in a similar fashion.

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292. *Supra* notes 56–58 and accompanying text.

293. *See* Ogden, *supra* note 10, at 47 (discussing the benefits of civil penalties in comparison to criminal penalties, which carry the possibility of imprisonment and stigma in addition to fines).

294. *See* Minikowski, *supra* note 95, at 160–61 ("Though civil penalties under MBTA would not be designed to expressly deter incidental takes, the penalties would inadvertently do just that due to the strong economic incentive that the possibility of such fines would create.").

295. *Id.* at 160.

296. Ogden, *supra* note 10, at 47

297. *Supra* notes 56–58 and accompanying text.

Finally, civil penalties can be structured in a way that removes some of the prosecutorial discretion of FWS. The civil provisions should contain an element of foreseeability, and there should be a reduction or elimination of liability if the violator has followed FWS guidelines for mitigating incidental take. The foreseeability requirement is essential; "a civil penalty provision with a foreseeability requirement would operate most justly by only fining those that realized incidental bird deaths were possible, yet did nothing to reasonably prevent them from happening."[298] This is also essential to prevent absurd results—truly unforeseeable bird deaths should not become a basis for liability.

Violators who have followed "best practices" for preventing bird deaths should not be liable for incidental take. FWS can issue industry-specific standards that detail the best practices in each affected industry for minimizing bird deaths, and those actors that adhere to those practices and are not negligent will have reduced or no liability under the civil provisions. These best practice guidelines should undergo notice and comment because they will have the force of law, but also because it is important for industry actors to weigh in on how best to mitigate bird deaths. This solution may be slow, but it is possible—FWS has issued voluntary guidelines to industry sectors, showing that they are capable of creating such guidelines.[299] While these guidelines may necessarily have to be updated as industry changes, they would provide a much higher level of legal certainty to those who may have some incidental take than the current situation. Some industries will almost necessarily have incidental take as a consequence of their existence—the wind industry is an obvious example. However, the solution to this problem is not to paralyze those industries with an uncertain legal landscape, but to delineate under what conditions these industries may operate. This strategy would allow industry actors to determine the

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298. *Minikowski, supra* note 95, at 161.

299. *See Guidance Documents*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/management/project-assessment-tools-and-guidance/guidance-documents.php (last updated Feb. 29, 2016) (last visited Feb. 27, 2017) (providing access to activity-specific guidance documents for communications towers, electric utilities lines, oil and gas, and wind energy) (on file with the Washington and Lee Law Review).

legality of their actions prior to acting, and would thus unencumber desirable development, while not sacrificing migratory birds.

The civil penalties approach would be in accord with judicial decisions on both sides of the circuit split. In the case of *FMC*, FMC was likely negligent in not testing the water discharge and ensuring that the chemical treatment was in fact working.[300] Under the proposed civil penalties, FMC would still be found in violation of the MBTA, but for negligence and failure to take reasonable steps to mitigate bird deaths. In the cases of *Seattle Audubon* and *Newton*, however, the impact of logging on migratory birds was not only indirect, but not obviously foreseeable.[301] Thus, under the proposed civil provisions, the actors would not be liable.

Civil provisions would greatly alleviate the problems with the current legal landscape surrounding the MBTA. They would create certainty where there currently is none.

VI. Conclusion

Whether they believe that the MBTA should be read broadly or narrowly, or if they come from the energy sector, the Audubon society, or the government, every commentator and academic agrees on one thing: the MBTA must be revised. The century-old statute is designed to combat overhunting and poaching; it is not designed to deal with the problems facing bird populations today. Moreover, it is clear that today's MBTA is not structured to properly protect bird populations in today's industrial society.[302] FWS is attempting to deal with this problem of enforcement and legal predictability by promulgating rules that would allow interested parties to get permits for incidental take. This is problematic because the FWS does not have the authority under the current MBTA to regulate incidental taking. This action will

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300. *Supra* notes 99–104.

301. *Supra* notes 138–145.

302. *See* Ogden, *supra* note 10, at 1 ("The result [of applying the MBTA to combat modern threats to birds] has been uneven enforcement . . . legal uncertainty for potential violators, lack of compliance with voluntary guidelines, and steady escalating bird deaths.").

inevitably be challenged, bringing many of the underlying problems of the current legal landscape around the MBTA to the forefront.

The solution to the problem of uncertainty around the MBTA, its enforcement, and its interpretation cannot be regulatory—most obviously because the MBTA does not confer on the agencies the authority to do so.[303] The most appropriate solution to these problems is legislative.

303. *See supra* Part IV, subpart B, section 4 and accompanying notes.