

ONE J

Oil and Gas, Natural Resources, and Energy Journal

VOLUME 8

NUMBER 1

TO KILL A MOCKINGBIRD: A LOOK INTO THE MIGRATORY BIRD TREATY ACT AND ITS APPLICATION TO UNINTENTIONAL TAKINGS

BEN DAVIS*

I. Introduction

“I’m as free as a bird now, and this bird you cannot change.”¹ These iconic lyrics from legendary rock band Lynyrd Skynyrd illustrate the freedom birds naturally experience in the wild. Unfortunately, these creatures of the wild have suffered unforeseen challenges and tragic loss as a result of human urbanization. A study from 2005 estimated 500 million to 1 billion birds are killed each year in the United States alone due to humans.² This estimate includes “collisions with human-made structures such as vehicles, buildings and windows, power lines, communication towers, wind turbines, oil spills and other contaminants.”³ These mass deaths, particularly among endangered and migratory birds, have resulted in extensive legislation and executive actions such as the Migratory Bird

* University of Oklahoma College of Law, J.D. Candidate 2023. I would like to dedicate this article to Abbie Davis, as I am eternally grateful for her constant support and encouragement. Special thanks to Prof. Zachary Schmook for teaching me how to write critically, and Prof. Chris Tytanic for inspiring my interest in the Migratory Bird Treaty Act.

1. Lynyrd Skynyrd, *Free Bird*, on (Pronounced 'Lěh-'nérd 'Skin-'nérd) (MCA Records 1973).

2. Erickson et al., *A Summary and Comparison of Bird Mortality from Anthropogenic Causes with an Emphasis on Collisions*, USDA Forest Service Gen. Tech. Rep. PSW-GTR-191 (2005).

3. *Id.*

Treaty Act⁴ and the Bald and Golden Eagle Protection Act.⁵ Although there are multiple pieces of legislation currently in place to protect migratory birds and other species from human endangerment, controversy regarding the policing of incidental killing of these birds remains heavily prevalent today.

The purpose of this article is to analyze the Migratory Bird Treaty Act's interpretation of the word "take" and its impact on the energy industry, particularly wind energy production. Section II of this article discusses the background and history of American bird protection legislation. Section III discusses the general history of the Migratory Bird Treaty Act's scope and enforcement. Section IV addresses current circuit splits regarding the interpretation of "take," beginning with intentional "take" circuits, and ending with strict scrutiny "take" circuits. Section V focuses on different policy approaches by recent presidential administrations. Section VI analyzes implications from new policy and enforcement approaches, while exploring alternative recommendations. Finally, Section VII provides policy recommendations to ensure a balance between protecting migratory birds and respecting industry practices.

II. Background

There are currently multiple pieces of legislation in place designed to protect birds throughout the United States from environmental and ecological harms. First, the Migratory Bird Treaty Act ("MBTA") specifically outlaws the "hunt[ing], tak[ing], captur[ing], [and] kill[ing] . . . [of] any migratory bird, any part, nest, or egg of such bird, or any product . . . which consists, or is composed in whole or part, of [such birds]."⁶ The MBTA was enacted in 1918, and currently protects nearly 1,100 bird species.⁷ It is a landmark piece of legislation designed to protect migratory birds from being overhunted and threatened.

Second, the Bald and Golden Eagle Protection Act ("BGEPA"), enacted in 1940, makes it illegal to "knowingly, or with wanton disregard for the consequences . . . take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import . . . any bald eagle . . . or any golden eagle . . . or any part, nest, or egg [of such eagle]."⁸ Unlike the MBTA, the

4. 16 U.S.C. §§ 703–712.

5. 16 U.S.C. § 668.

6. 16 U.S.C. § 703(a).

7. 50 C.F.R. § 10.13.

8. 16 U.S.C. § 668.

BGEPA states that the Secretary of the Interior may authorize permits for the takings of bald or golden eagles.⁹ This important distinction will be addressed later, as it creates the opportunity for federal agencies to work with energy producers and other businesses in mitigating damages to bird populations, while protecting such businesses from extensive criminal liability.

Finally, The Endangered Species Act of 1973 (“ESA”) establishes, “all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance [of the ESA] . . . [and] shall cooperate with State and local agencies [in order to do so]”¹⁰ The ESA was written to protect endangered species and their ecosystems.¹¹ This significant act gives federal agencies a general authority to protect fish, wildlife, and plants. Together, the MBTA, the BGEPA, and the ESA provide the current framework for the protection of many species of birds throughout the United States. Energy companies must continue to adapt to these policies, or face the legal ramifications laid out within them.

III. MBTA Enforcement and Scope

The MBTA provides various forms of accountability for different levels of violations. There are currently no civil causes of action for violating the MBTA. However, the general crime of “violat[ing] or fail[ing] to comply with” the MBTA is classified as a misdemeanor with a punishment of up to \$15,000 in fines and/or up to six months’ incarceration.¹² The MBTA also lays out penalties for acts related to intentional killing, such as baiting.¹³ Baiting is defined as the “placement of bait on or adjacent to an area for the purpose of causing, inducing, or allowing any person to take or attempt to take any migratory bird by the aid of baiting on or over the baited area.”¹⁴ Anyone who violates the MBTA through baiting “shall be fined under Title 18, imprisoned not more than 1 year, or both.”¹⁵ Further, anyone who “knowingly” violates the MBTA by taking migratory birds “with the intent to sell [or] barter [them] . . . shall be guilty of a felony and shall be fined

9. 16 U.S.C. § 668a.

10. 16 U.S.C. §§ 1531(c)(1)–(2).

11. *See* 16 U.S.C. § 1531(b).

12. 16 U.S.C. § 707(a).

13. 16 U.S.C. § 704(b)(2).

14. *Id.*

15. 16 U.S.C. § 707(c).

not more than \$2,000 or imprisoned not more than two years, or both.”¹⁶ Any person employed by the Department of the Interior has the power to enforce the MBTA.¹⁷

While the MBTA explicitly lays out these punishments, those enforcing the MBTA still face challenges in interpreting the Act. The primary challenge the Department of the Interior and wildlife officials face when enforcing the MBTA is how to interpret the term “take.” The Code of Federal Regulations defines take as to “pursue, hunt, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.”¹⁸ While this statute identifies actions that may be defined as a take, it does not address whether “take” requires a mental element. This creates a massive gray area surrounding incidental takings. Examples of incidental takings include birds flying into cars on highways, birds flying into buildings, or the primary issue of this comment—birds flying into wind energy production equipment such as wind turbines. Wind producers are therefore left with two options: (1) maximize energy production by placing windmills wherever is determined to be most efficient, or (2) address the MBTA requirements for incidental takings through strategic planning, selective implementation, and potentially reduced production. This is a relatively new and upcoming issue, as windmills were not widely used for energy production until the 1980s in parts of California, and the 1990s and early 2000s for the rest of the United States.¹⁹ Further, wind and other renewable energy production industries may grow exponentially within our lifetimes. In the United States, wind energy is expected to double along with other renewable industries by 2050.²⁰ This expected growth in wind and other renewable energies, along with increasing efforts in environmental policies, creates a major need for a clear way to define and enforce incidental migratory bird takings.

16. 16 U.S.C. § 707(b).

17. 16 U.S.C. § 706.

18. 50 C.F.R. § 10.12.

19. U.S. Energy Information Administration, *Wind explained* (Mar. 17, 2021), <https://www.eia.gov/energyexplained/wind/history-of-wind-power.php>.

20. Kenneth Dubin, *EIA projects renewables share of U.S. electricity generation mix will double by 2050*, U.S. Energy Information Administration (Feb. 8, 2021), <https://www.eia.gov/todayinenergy/detail.php?id=46676>.

IV. MBTA “Take” Interpretation Circuit Splits

A. Intentional “Take” Circuits

The term “take” has been a focal point of confusion and controversy throughout most of the history of the MBTA. A circuit split currently exists over the interpretation of “take,” specifically those that are incidental.

In the Fifth Circuit, it is clear incidental takings do not fall under the MBTA’s criminal scope. In *United States v. CITGO Petroleum Corp.*,²¹ CITGO Petroleum Corporation (“CITGO”) owned and operated an oil separation refinery in Corpus Christi.²² The refinery contained two circular “equalization tanks,” each measuring approximately “thirty feet tall and 240 feet in diameter.”²³ The tanks were left uncovered, and included around 130,000 barrels of oil floating on top.²⁴ CITGO was accused of violating the MBTA for “taking” the migratory birds who perished in the oil.²⁵ The United States Southern District Court of Texas convicted CITGO of “three (out of five) counts for ‘taking’ migratory birds,” prompting CITGO to appeal.²⁶ The Court of Appeals for the Fifth Circuit reversed the lower court’s decision, holding MBTA takings should be “limited to deliberate acts done directly and intentionally to migratory birds.”²⁷ The Fifth Circuit reasoned “as applied to wildlife, to ‘take’ is to reduce those animals, by killing or capturing, to human control,”²⁸ and “[o]ne [cannot] reduce an animal to human control accidentally or by omission;” it must be done “affirmatively.”²⁹ The court added that a taking “even without mens rea, is not something that is done unknowingly or involuntarily.”³⁰

The Fifth Circuit further reasoned that if the MBTA applied to involuntary takings, bizarre outcomes might be enabled. For example, “all owners of big windows, communication towers, wind turbines, solar energy farms, cars, cats, and even church steeples may be found guilty of violating the MBTA.”³¹ In lumping together day-to-day individual practices with the actions of corporate energy producers, the Fifth Circuit expressed its clear

21. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015).

22. *Id.* at 480.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 488–89.

28. *Id.* at 489 (citations omitted).

29. *Id.* at 489.

30. *Id.* at 492.

31. *Id.* at 494.

disdain for pursuing incidental takings in any circumstance. Thus, the Fifth Circuit's opinion in *CITGO* presents a strong position against criminalizing incidental takings.

In the Eighth Circuit, the line of criminal liability for MBTA takings has been drawn at hunting and poaching, with a general exception for all actions by governmental agencies. In *Newton County Wildlife Association v. United States Forest Service*, an environmental organization and other individuals sued the United States Forest Service over timber harvesting in the Ozark National Forest.³² The environmentalists claimed that the harvesting of forest timber was a violation of the MBTA, prompting them to file motions to "preliminarily enjoin the sales" of timber.³³ The Eastern District Court of Arkansas denied these motions, resulting in an appeal by the Wildlife Association.³⁴

In affirming the district court's decision, the Eighth Circuit Court of Appeals held it would be a stretch "far beyond the bounds of reason to construe [the MBTA] as an absolute criminal prohibition on conduct, such as timber harvesting, that indirectly results in the death of migratory birds."³⁵ The *Newton* court further added the "MBTA does not appear to apply to the actions of federal government agencies," because the act only applies to people, associations, partnerships, and corporations.³⁶ Thus, under the Eighth Circuit standard, the MBTA applies to energy production corporations, but not federal government agencies.

While this interpretation of the MBTA is not as extensive as *CITGO*, it still creates exceptions for certain involuntary takings. Further, this opinion displays the Eighth Circuit's stance that a majority of involuntary takings are not subject to criminal prosecution. It could be argued that this doctrine is inconsistent because hunters or poachers could involuntarily or accidentally kill migratory birds while trying to kill other animals, and avoid liability. However, the *Newton* court specifically addressed this issue by stating "strict liability may only be appropriate when dealing with hunters and poachers."³⁷ Thus, in the Eighth Circuit, strict liability for involuntary takings of migratory birds only applies to hunters and poachers. Additionally, strict liability may never be applied to federal government

32. *Newton Cty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 111 (8th Cir. 1997).

33. *Id.*

34. *Id.*

35. *Id.* at 115.

36. *Id.*

37. *Id.*

agencies. This ruling further damaged efforts and arguments presented by environmental groups to outlaw all forms of MBTA incidental takings.

Prior to contemporary case law, the Ninth Circuit held that incidental killing of migratory birds could be prosecuted. In *United States v. Corbin Farm Service*,³⁸ a pesticides producer (“Producer”) was charged with violating the MBTA after multiple migratory birds died from pesticides Producer sprayed.³⁹ Producer argued the MBTA did not apply because (1) where there is only one act (the application of pesticides), violators should be only charged with one count of MBTA infringement, “no matter how many birds [were] killed in the act,”⁴⁰ (2) the MBTA should not apply to the poisoning of migratory birds,⁴¹ and (3) the MBTA “cannot be interpreted to create criminal penalties for those who did not intend to kill migratory birds.”⁴² The *Corbin* court accepted Producer’s initial point, stating Congress did not show a clear statutory intent “for multiple counts in prosecutions under the MBTA in the circumstances of this case.”⁴³ Accordingly, the *Corbin* court held in situations where one act causes multiple migratory bird deaths, the violator(s) should only receive one MBTA violation.⁴⁴ The *Corbin* court then rejected Producer’s second argument, holding poisoning birds *does* fall under MBTA protection because the act does not just apply to hunting and trapping.⁴⁵ Finally, in addressing Producer’s third argument, the *Corbin* court held, “the MBTA can constitutionally be applied to impose criminal penalties on those who did not intend to kill migratory birds.”⁴⁶ Thus, under *Corbin*, the Eastern District Court of California established a precedent of strict liability for involuntary MBTA takings. This was ultimately overruled in the Ninth Circuit by *Seattle Audubon Society v. Evans*, as discussed below.

Similar to the Eighth Circuit, current Ninth Circuit precedent holds certain forms of incidental takings may not be banned under the MBTA. In *Seattle Audubon Society v. Evans*, an environmentalist group sued a group of defendants for “logging [activity] in old-growth national forests,” claiming the logging violated the MBTA by disrupting the habitats of the

38. 444 F.Supp. 510 (E.D. Cal.), *aff’d on other grounds*, 578 F.2d 259 (9th Cir. 1978).

39. *Id.* at 522–24.

40. *Id.* at 527.

41. *Id.* at 531.

42. *Id.* at 532.

43. *Id.* at 531.

44. *Id.*

45. *Id.* at 532.

46. *Id.* at 536.

northern spotted owl.⁴⁷ In affirming a lower court's decision, the Ninth Circuit Court of Appeals ruled *against* the environmentalist group, holding "habitat destruction, leading indirectly to bird deaths, [does not] amount to the 'taking' of migratory birds" under the MBTA.⁴⁸ The *Seattle* court further ruled while the logging activity did "cause[] 'harm' to the owls under the ESA," it did not constitute a taking under the MBTA.⁴⁹ The court reasoned that although the MBTA's definition of take "describes physical conduct of the sort engaged in hunters and poachers . . . [the act] make[s] no mention of habitat modification or destruction."⁵⁰ The *Seattle* court relied on the fact that the ESA's definition of the word "take" was much broader than the MBTA because it "include[d] 'harass,' and 'harm' in addition to the verbs included in the MBTA definition."⁵¹ This difference, the court reasoned, was "'distinct and purposeful,'"⁵² because congress amended the MBTA the year after it passed the ESA, "but did not modify its prohibitions to include 'harm.'"⁵³ Thus, similar to the Fifth and Eighth Circuits, the Ninth Circuit's opinion in *Seattle* limited the scope of MBTA "takings".

B. Unintentional "Take" Circuits

While the Fifth, Eighth, and Ninth Circuits decline to apply strict liability to the incidental "take" of migratory birds, other circuits have ruled in strong favor of enforcing MBTA unintentional takings. The most notorious are the Second and Tenth Circuits.

In *United States v. FMC Corporation* (a Second Circuit case), FMC Corporation ("FMC"), a pesticides manufacturer, killed 92 migratory birds "by means of toxic and noxious waters."⁵⁴ Prior to these deaths, FMC took measures to mitigate bird deaths by using Styrofoam floats on the water, shooting loud cannons to scare birds away, placing netting over the pond, and hiring guards to keep birds out of the water.⁵⁵ Ultimately, these measures failed and resulted in the federal indictment of FMC under the MBTA.⁵⁶ In affirming the lower court's decision, the Second Circuit ruled

47. *Seattle Audubon Society v. Evans*, 952 F.2d 297, 298 (8th Cir. 1991).

48. *Id.* at 303.

49. *Id.*

50. *Id.* at 302.

51. *Id.* at 303.

52. *Id.* (quoting the *Seattle* district court).

53. *Id.* at 303.

54. *U.S. V. FMC Corp.*, 572 F.2d 902, 903 (2nd Cir. 1978).

55. *Id.* at 905.

56. *Id.*

against FMC.⁵⁷ The Second Circuit imposed strict liability on FMC because they “engaged in an activity involving the manufacture of a highly toxic chemical; and [] failed to prevent this chemical from escaping into the pond and killing birds.”⁵⁸ The court reasoned where legislative history such as the MBTA offers no help, “resort must be had to a rule of reason or even better, common sense.”⁵⁹ The *FMC* court did acknowledge “construction that would bring every killing within the [MBTA], such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense.”⁶⁰ However, the Second Circuit did not draw a distinction between individuals and corporations. Nevertheless, the Second Circuit in *FMC* chose to align with other jurisdictions in holding that incidental takings can be prosecuted under the MBTA.

Similar to the Second Circuit, the Tenth Circuit currently holds incidental takings can be prosecuted under the MBTA. In *United States v. Apollo Energies, Inc.*, the defendants (“Apollo”) were “two Kansas oil drilling operators who were charged with violating the [MBTA] after dead migratory birds were discovered lodged in a piece of their drilling equipment called a heater-treater.”⁶¹ Over 300 birds were found dead in the heater-treaters, “10 of which were identified as protected species under the MBTA.”⁶² As a result, Apollo was convicted and fined for violating the MBTA.⁶³ In affirming a lower court’s decision, the Tenth Circuit ruled against Apollo, holding “[a]s a matter of statutory construction,” the MBTA does not require a mental element, and incidental takings can be prosecuted.⁶⁴ The court reasoned migratory bird deaths as a result of unprotected oil field equipment should qualify as takings because unlike in *Newton County Wildlife Ass’n v. U.S. Forest Service*, the damage was not simply a modification of the birds’ habitats.⁶⁵ Instead, it was a killing of multiple birds through preventable negligible practices. Thus, incidental takings in the Tenth Circuit may fall under the MBTA, especially in cases where the damage caused is more serious than modification to the birds’

57. *Id.* at 908.

58. *Id.*

59. *Id.* at 905.

60. *Id.*

61. *U.S. v. Apollo Energies, Inc.*, 611 F.3d 679, 682 (10th Cir. 2010).

62. *Id.*

63. *Id.*

64. *Id.* at 686.

65. *Id.*

habitats. In addressing the constitutional issue of fair notice to production companies, the *Apollo* court held the MBTA “is not unconstitutionally vague,” because it does not encourage arbitrary enforcement, and its terms are “capable of definition without turning to the subjective judgment of officers.”⁶⁶ Thus, the Tenth Circuit falls in line with the Second Circuit in holding the MBTA applies to incidental takings, specifically in cases involving more than just simple destruction of bird habitats.

V. Policy Approaches to Tackling Incidental Takings

A. Obama Administration and M-37041

Just as the circuit courts are divided on how to enforce incidental MBTA “takings”, different political administrations have used conflicting approaches to address this issue. Under President Barack Obama, the government leaned heavily in favor of prosecuting incidental takings.

In a 2017 memorandum issued from the Department of the Interior (“DOI”) to the United States Fish and Wildlife Service (“M-37041”), the DOI declared, “the MBTA’s prohibitions on taking and killing migratory birds apply broadly to any activity, subject to the limits of proximate causation, and are not limited to factual contexts. Therefore, [these] prohibitions can and do apply to direct incidental take.”⁶⁷ The DOI reasoned “interpreting the MBTA to apply to incidental take directly furthers Congress’s broad purpose to conserve migratory birds.”⁶⁸ The DOI further justified their stance by stating the impact of applying the MBTA to incidental take “has been minimal, and largely positive. Oil pits have been netted, power lines made less dangerous, and bird mortality reduced from what it would otherwise be, all at little societal cost.”⁶⁹ The DOI did not provide any explicit data for this claim.

Additionally, in M-37041, the DOI relied heavily on the defense that “the MBTA did not, in its original form, expressly distinguish between incidental take and intentional take or require a particular mental state to violate the statute.”⁷⁰ To support its position, the DOI provided examples where exceptions have been made under the MBTA for incidental take. The

66. *Id.* at 688–89.

67. Memorandum from Solicitor, to Director, Fish and Wildlife Service, Incidental Take Prohibited Under the Migratory Bird Treaty Act, 2017 DEP SO LEXIS 6 (Jan. 10, 2017), https://legacy-assets.eenews.net/open_files/assets/2017/02/21/document_ew_01.pdf.

68. *Id.* at 24.

69. *Id.* at 29.

70. *Id.* at 6.

DOI reasoned these “authorizations would not be necessary if the MBTA did not apply to incidental take.”⁷¹ One of these exceptions was the 2003 National Defense Authorization Act (“NDAA”), which directed the United States Fish and Wildlife Service to “authorize the incidental taking of migratory birds by the Armed Forces during military-readiness activities.”⁷² The DOI reasoned because special authorization was needed for incidental taking, the action must have been prohibited. Another example of authorized incidental take was the issuing of “Special Purpose permits for incidental take of migratory birds to Federal agencies . . . during projects to eradicate toxic, invasive species that [are] degrading habitat for native species, including migratory birds” by the United States Fish and Wildlife Service.⁷³ These examples of MBTA incidental take exceptions, along with the previously mentioned case law supporting the criminalization of incidental MBTA takings, served as the base of logic for the DOI’s issuance of M-37041. By releasing M-37041 in the last days of Obama’s presidency, the DOI set the stage for what has become an administrative clash regarding the policy and enforcement of MBTA incidental takings.

B. Trump Administration

The Trump Administration took a significantly different approach to interpreting MBTA incidental takings than any previous administration. On February 6, 2017, the DOI suspended and withdrew M-37041, along with other Opinions of the DOI Solicitor.⁷⁴ In a new opinion, the DOI stated the decision to withdraw M-37041 “should remain in place until the Secretary, Deputy Secretary, or Solicitor has completed their review, and determined whether the opinion should be reinstated, modified, or revoked.”⁷⁵ By withdrawing M-37041, the DOI effectively decriminalized incidental migratory bird takings. This policy remained in effect through the rest of President Trump’s term. The DOI took further steps to decriminalize migratory bird takings by issuing additional memorandums.

71. *Id.* at 13.

72. *Id.* (citing Pub. L. No. 107-314, 116 Stat. 2509 (2002)).

73. *Id.* at 14.

74. Memorandum from K. Jack Haugrud, Acting Secretary, to Acting Solicitor, *Temporary Suspension of Certain Solicitor M-Opinions Pending Review*, 2017 DEP SO LEXIS 8 (Feb. 6, 2017), https://legacy-assets.eenews.net/open_files/assets/2017/02/21/document_ew_04.pdf.

75. *Id.*

1. M-37050

The most significant step towards decriminalizing migratory bird incidental takings occurred on December 22, 2017, when the DOI issued a new memorandum titled “The Migratory Bird Treaty Act Does Not Prohibit Incidental Take” (“M-37050”).⁷⁶ This memorandum marked a historically proactive step by the DOI to change the enforcement of MBTA incidental takings. The new opinion “permanently withdr[ew] and replace[d] Opinion M-37041.”⁷⁷ Additionally, the DOI stated the MBTA’s “prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same only appl[ies] to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs.”⁷⁸ In its opinion, the DOI provided multiple forms of justification.

a) Historical Context of the MBTA

First, the DOI addressed the legislative history of the MBTA and the historical context surrounding the act. Prior to the MBTA, migratory birds were open to virtually anyone to hunt and kill. During the 19th and 20th centuries, migratory bird populations fell significantly due to overhunting.⁷⁹ Such hunting “was not limited to traditional game birds—estimates indicated that 50 species of North American birds were hunted for their feathers in 1886.”⁸⁰ Congress thus first attempted to combat these issues by passing the Lacey Act of 1900, which “sought to limit the damaging effects of commercial hunting by prohibiting game taken illegally from being transported across state lines.”⁸¹ The Lacey Act, however, ultimately proved to be ineffective in decreasing the illegal shipment of game.⁸² As a result, Congress passed the Weeks-McLean Law in 1913, which “gave the Secretary of Agriculture [the] authority to regulate hunting seasons

76. Memorandum from Principal Deputy Solicitor Exercising the Authority of the Solicitor Pursuant to Secretary’s Order 3345, to Secretary, Deputy Secretary, Assistant Secretary for Land and Minerals Management, and Assistant Secretary for Fish and Wildlife and Parks, *The Migratory Bird Treaty Act Does Not Prohibit Incidental Take* (Dec. 22, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf>.

77. *Id.* at 1.

78. *Id.* at 2 (footnote excluded).

79. *Id.*

80. *Id.* (citing William Sounder, How Two Women Ended the Deadly Feather Trade, *SMITHSONIAN MAGAZINE* (Mar. 2013), <http://www.smithsonianmag.com/science-nature/how-two-women-ended-the-deadly-feather-trade-23187277/?all>).

81. *Id.* (footnote excluded).

82. *Id.* at 3.

nationwide for migratory birds.”⁸³ This congressional delegation of power sought to aid migratory bird populations by creating new hunting periods. In addition to the Weeks-McLean Law, the Senate adopted a resolution in 1913, “requesting that the President ‘propose to the Governments of other countries the negotiation of a convention for the protection and preservation of birds.’”⁸⁴

Shortly after the Weeks-McLean Law was adopted, Congress challenged its constitutionality.⁸⁵ Ultimately, the Weeks-McLean Law was declared unconstitutional by multiple state supreme courts and federal district courts.⁸⁶ This left a clear need for some sort of action to address the remaining plight of migratory birds in America. Congress recognized this need, and encouraged the federal government to join a treaty to protect migratory birds.⁸⁷ Thus, in 1916, the United States entered into the “Migratory Bird Treaty” with the United Kingdom, acting on behalf of Canada.⁸⁸ The new treaty created designated hunting seasons for some birds, while creating “continuous closed seasons” for many other birds.⁸⁹ Congress codified this treaty by passing the MBTA in 1918, which is still in effect today.⁹⁰ Congress also later passed additional legislation to support the MBTA, such as the Migratory Bird Conservation Act of 1929,⁹¹ and the “Convention between the United States and Mexico for the protection of migratory birds and game mammals” in 1936.⁹² Moreover, the MBTA was amended in 1960, and again in 1986 to create felony charges for those who

83. *Id.*

84. *Id.* (quoting Senate Journal, 63rd Cong. 1st Sess. 108 (Apr. 7, 1913)).

85. *Id.* at 4.

86. *Id.* (citing *Protection of Migratory Birds: Hearing on H.R. 20080 Before the House Comm. on Foreign Affairs*, 64th Cong. 25 (1917) (statement of R.W. Williams, Solicitor's Office, Department of Agriculture) (“There were three Federal courts, two State supreme courts; the Maine and Kansas supreme courts have declared [the Weeks-McLean Law unconstitutional]. In the eastern district of Arkansas Judge Trieber declared it unconstitutional; in the district of Kansas Judge Pollock declared it unconstitutional; and in the district of Nebraska Judge Lewis, of Colorado, who was sitting in place of one of the regular judges, sustained a motion in arrest of judgment. . . . They all followed the first decision in the eastern district of Arkansas. . . . The government removed the Arkansas case—the Shauver case—to the Supreme Court direct.”)).

87. *Id.*

88. *Id.* at 4.

89. *Id.* at 5–6 (footnotes excluded).

90. *Id.* at 6.

91. *Id.* at 7.

92. *Id.*

“knowingly” violate the act, and fines up to \$15,000 for misdemeanor charges.⁹³

The DOI cited these examples in its opinion, stating, “[e]ven if the text of the statute were ambiguous, the history of the MBTA and the debate surrounding its adoption illustrate that the Act was part of Congress’ efforts to regulate the hunting of migratory birds in direct response to the extreme over-hunting”⁹⁴ Statements by congressmen, the Department of Agriculture, “outside interest groups,” and others at the time of the MBTA’s enactment all illustrate the significant focus on hunting, not incidental takings.⁹⁵ Further, the DOI emphasized that the enactment of the Migratory Bird Conservation Act of 1929 proved the MBTA did not apply to incidental take. The DOI reasoned if the MBTA’s original purpose was “to protect migratory bird habitats from incidental destruction,” the “enactment of the Migratory Bird Conservation Act nine years later would have been largely superfluous.”⁹⁶ Thus, because both political and social controversy existed at the time of the MBTA’s enactment, the DOI stated, “it is highly unlikely that Congress intended to confer authority upon the executive branch to regulate all manner of economic activity that had an accidental or unintended impact on migratory birds.”⁹⁷

b) Textual Interpretation of the MBTA

Next, the DOI analyzed the text of the MBTA. According to the DOI, “the relevant text indicates that the MBTA only criminalizes purposeful and affirmative actions intended to reduce migratory birds to human control.”⁹⁸ Further, “[t]he phrase ‘incidental take’ does not appear either in the MBTA or regulations implementing the act.”⁹⁹ Additionally, there are different statutory punishments applied to misdemeanor violations of strict liability, and felony violations.¹⁰⁰ While both violations are “criminal offenses,”

93. *Id.* at 10–11.

94. *Id.* at 24.

95. *Id.* at 25 (citing *Protection of Migratory Birds: Hearing on H.R. 20080 Before the House Comm. On Foreign Affairs*, 64th Cong. 11 (1917) (statement of E. W. Nelson, Chief Bureau of Biological Survey, Department of Agriculture)) (citing *Leaders in Recent Successful Fight for the Migratory Bird Treaty Act*, BULLETIN–THE AMERICAN GAME PROTECTION ASSOCIATION, July 1918 at 5) (citing 55 CONG. REC. 4816 (statement of Sen. Smith) (1917)).

96. *Id.* at 27.

97. *Id.* at 29.

98. *Id.* at 18.

99. *Id.* at 11.

100. *Id.*

misdemeanor offenses are “punishable by imprisonment of no more than six months, a fine of no more than \$15,000, or both,”¹⁰¹ while felony offenses are “punishable by imprisonment for no more than two years, a fine of no more than \$2,000, or both.”¹⁰² Referencing the text of the MBTA, the DOI stated that by grouping together the verbs “pursue, hunt, take, capture, and kill,” Congress intended “each verb to have a related meaning.”¹⁰³ Thus, according to the DOI, since three of the verbs (pursue, hunt, and capture) require intent, the other verbs (take and kill) should be read to require intent as well.

The DOI even went a step further, asserting the previous opinion, M-37041, incorrectly assumed the MBTA was a strict liability law.¹⁰⁴ According to the DOI, the previous opinion M-37041 “conflated” the definition of take and “the mental status, or lack thereof, required to establish a violation.”¹⁰⁵ Further, “liability does not attach to actions the plain object of which does not include rendering an animal subject to human control.”¹⁰⁶ Examples of these actions are “driving a car, allowing a pet cat to roam outdoors, or erecting a windowed building.”¹⁰⁷ While these actions “could directly and foreseeably result in the deaths of protected birds . . . none of [them] have as their object rendering any animal subject to human control.” Thus, the DOI reasoned the prior opinion M-37041 erred by missing the key analysis: whether an act served to render an animal subject to human control. Accordingly, the DOI stated M-37041 should be vacated, and incidental take would not be criminally penalized.

c) Existing Case Law Relating to the MBTA

The DOI also justified its position by citing applicable case law involving incidental take. Starting with cases in favor of criminalizing incidental migratory bird takings, the DOI identified the Second Circuit’s decision in *United States v. FMC Corporation*¹⁰⁸ and the Tenth Circuit’s decision in *United States v. Apollo Energies, Inc.*¹⁰⁹ Next, the DOI addressed cases against extending the MBTA over incidental take of

101. *Id.* (footnote omitted).

102. *Id.* (footnote omitted).

103. *Id.* at 19 (footnote omitted).

104. *Id.* at 22.

105. *Id.*

106. *Id.*

107. *Id.* at 22–23.

108. *Id.* at 14.

109. *Id.* at 15.

migratory birds, citing the Ninth Circuit's decision in *Seattle Audubon Society v. Evans*,¹¹⁰ the Eighth Circuit's decision in *Newton County Wildlife Association v. United States Forest Service*,¹¹¹ and the Fifth Circuit's decision in *United States v. CITGO Petroleum Corporation*.¹¹² After weighing varying judicial interpretations, the DOI stated that "the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same only criminalize affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs."¹¹³ The DOI further relied on *CITGO* to reason that "[t]he use of the words 'affirmative' and 'purposeful' serve to limit the range of actions prohibited under the MBTA to activities akin to hunting and trapping and exclude more attenuated conduct, such as lawful commercial activity that unintentionally and indirectly results in the death of migratory birds."¹¹⁴

d) Policy Considerations of Criminalizing Incidental Take

Finally, the DOI justified its new position by pointing to the "virtually unlimited" liability that punishing incidental take under the MBTA would create.¹¹⁵ The MBTA applies to "over 1000 species of birds."¹¹⁶ Common causes of death for these birds include "cats, collisions with buildings, poisons, collisions with electrical lines, collisions with communication towers, electrocutions, oil pits, and collisions with wind turbines."¹¹⁷ Interpreting the MBTA to criminalize these acts would "turn every American who owns a cat, drives a car, or owns a home . . . into a potential criminal."¹¹⁸ Thus, policing every incidental migratory bird death would be absurd. The DOI noted such absurd results would negatively impact industries such as wind energy and oil production because companies would not know what to anticipate as potential punishments.¹¹⁹ Further, this uncertainty would likely implicate potential due process violations.¹²⁰ "Even if [impacted industries] comply with every [r]equest [from] the Fish

110. *Id.* at 15–16.

111. *Id.* at 16–17.

112. *Id.* at 17.

113. *Id.* at 18.

114. *Id.* at 24.

115. *Id.* at 33.

116. *Id.* at 34.

117. *Id.*

118. *Id.*

119. *Id.* at 34–35.

120. *Id.* at 32.

and Wildlife Service, they may still be prosecuted, and [f]ound guilty of criminal conduct.”¹²¹

Thus, in M-37050, the DOI concluded the “text, history, and purpose of the MBTA demonstrate it is a law limited in relevant part to affirmative and purposeful actions, such as hunting and poaching, that reduce migratory birds and their nests and eggs, by killing or capturing, to human control.”¹²² As a result, the DOI stated incidental takings of migratory birds would not be punished moving forward.

2. U.S. Fish and Wildlife Service Proposed Rule

As a result of M-37050, the DOI effectively stopped all prosecution and criminal pursuit of incidental migratory bird takings. This lasted for the remainder of President Trump’s term. On February 3, 2020, the U.S. Fish and Wildlife Service (“the Service”) proposed a rule to “define[] the scope of the Migratory Bird Treaty Act . . . consistent with the Solicitor’s Opinion M-37050.”¹²³ Additionally, the Service provided preliminary analysis on the potential impact of the proposed rule on affected industries.¹²⁴ Surprisingly, the Service stated the “economic impact of the proposed rule on small entities [would] likely not [be] significant.”¹²⁵

In evaluating the energy industry, the Service determined that nearly all businesses affected by the rule would be small businesses.¹²⁶ To qualify as a small business, a company must employ less than a predefined number of employees.¹²⁷ This predefined number varies by industry.¹²⁸ For solar and wind electric power generation companies, the cutoff is 250 employees.¹²⁹ Companies in other industries, such as electric bulk power transmission and oil and gas well drilling, may identify as a small business with up to 1,000 employees.¹³⁰ The highest employee number cutoffs for small businesses are for crude petroleum and natural gas extraction companies and wireless telecommunications carriers (except satellite), with 1,250 and 1,500

121. *Id.* at 39–40 (footnote excluded).

122. *Id.* at 41.

123. Regulations Governing Take of Migratory Birds, 85 Fed. Reg. 22, 5915 (Feb. 3, 2020).

124. *Id.* at 5924.

125. *Id.*

126. *Id.* at 5924–5925.

127. *Id.* at Table 1.

128. *Id.*

129. *Id.*

130. *Id.*

employees respectively.¹³¹ In particular, 6,868 of 6,878 crude petroleum and natural gas extraction companies, 2,092 of 2,097 drilling oil and gas well companies, 153 of 153 solar electric power generation companies, and 263 of 264 wind electric power generation companies were all small businesses.¹³²

The Service added that although it was “unknown how many businesses continued or reduced practices to reduce the take of birds” since M-37050, the proposed rule was “likely to have a positive economic impact on *all* regulated industries.”¹³³ According to the Service, the proposed rule would facilitate these positive economic impacts through the removal of “uncertainty about the potential impacts of proposed projects.”¹³⁴ Although the economic benefits would be positive in nature, they were not likely to be significant.¹³⁵ The Service stated:

[t]he costs of actions businesses typically implement to reduce effects on birds are small compared to the economic impact output of business, including small businesses, in these sectors. In addition, many businesses will continue to take actions to reduce effects on birds because these actions are best management practices for their industry or are required by other Federal or State regulations, there is a public desire to continue them, or the businesses simply desire to reduce their effects on migratory birds.¹³⁶

The Service then analyzed energy industries and identified several bird death mitigation measures already in place that would likely continue under the new proposed rule. First, the Service examined petroleum and natural gas production. The Service found that the use of “closed waste water systems or netting of oil pits and ponds” already existed due to state regulations.¹³⁷ This growing industry practice to use “closed systems [does] not pose a risk to birds.”¹³⁸ Accordingly, the Service reasoned “the

131. *Id.*

132. *Id.*

133. *Id.* at 5924 (emphasis added).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at Table 2.

138. *Id.*

proposed rule is unlikely to affect a significant number of small entities” in the oil and gas production industry.¹³⁹

Next, the Service analyzed solar power generation businesses. Once again, the Service stated the proposed rule’s effects would be minimal because the “monitoring [of] bird use and mortality at facilities, [along with] limited use of deterrent systems such as streamers and reflectors,” was already required by other state policies, and would likely continue.¹⁴⁰ Additionally, the “monitoring costs [were] likely not significant compared to overall project costs.”¹⁴¹ Thus, the impact of the proposed rule on solar power production companies was likely to be minimal as well.

Finally, the Service examined wind electric power generating businesses. According to the Service, these businesses would also have limited financial effects from the proposed rule.¹⁴² The Service noted, “[f]ollowing the Wind Energy Guidelines has become industry best practice and would likely continue. In addition, the industry uses these guidelines to aid in reducing effects on other regulated species like eagles and threatened and endangered bats.”¹⁴³ Thus, there would be minimal financial effects on wind electricity production businesses.

From February 3 to March 19 of 2020, the Service provided a public comment period on the proposed rule.¹⁴⁴ During this period, individuals and organizations could provide commentary and feedback to the proposed rule and its results. Following this period, the Service analyzed the public comments and prepared an Environmental Impact Statement (“EIS”).¹⁴⁵ The first draft of the EIS was released on June 5 and was open for public comment for 45 days.¹⁴⁶ The EIS considered three options moving forward: No Action, Alternative A, and Alternative B.¹⁴⁷

Under the first option (“No Action Alternative”), the Service “would continue to implement the MBTA consistent with the direction given in M-Opinion 37050, which defines the scope of the MBTA to exclude incidental

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 5915.

145. U.S. Department of the Interior Fish and Wildlife Service, Draft Environmental Impact Statement, *Regulations Governing Take of Migratory Birds* (June 5, 2020), <https://www.regulations.gov/document/FWS-HQ-MB-2018-0090-8631>.

146. *Id.*

147. *Id.*

take.”¹⁴⁸ While incidental takings wouldn’t be prosecuted, intentional takes would still be enforced.¹⁴⁹ This alternative would effectively keep the agency directions and practices taking place since M-37050.

Under the second option (“Alternative A”), the Service “would promulgate a regulation that defines the scope of the MBTA take prohibitions to include only actions directed at migratory birds.”¹⁵⁰ This alternative was not expected to impact “the current implementation or enforcement of the MBTA,” since there was currently no criminalization of unintentional take of migratory birds.¹⁵¹ It was a step further than the No Action Alternative because it created a federal rule.

Finally, under the third option (“Alternative B”), “M-37050 would be withdrawn and the Service would promulgate a regulation to implement the MBTA as it applied to incidental take under the prior interpretation outlined in M-Opinion 37041.”¹⁵² This would mark a shift back to prosecuting incidental take as a violation of the MBTA.

In presenting these three alternatives, the Service identified various facts and data to help determine the best option. Among the incidental take investigations opened from 2010–2018, “the majority . . . were of electrical or oil and gas businesses,” while only “4 percent of average annual incidental take investigations were of wind-energy companies.”¹⁵³ The total in fines during this period was \$178.8 million, \$100 million of which was a result of the BP Deepwater Horizon Gulf Oil Spill.¹⁵⁴ In regards to migratory bird populations, there was a 29% decrease in overall bird numbers from 1970 to 2017.¹⁵⁵ Many of these decreases in numbers were due to loss of habitat space and breeding grounds.¹⁵⁶ In addition to loss of habitat space, other forms of human activity, such as hunting and incidental take, contributed to the decline in migratory birds.¹⁵⁷ It was estimated that on average, 750,000 migratory birds die from oil pits per year, 550,000 die from open pipes, and 234,012 perish from wind turbine collisions.¹⁵⁸ These numbers pale by comparison, however, to building glass collisions—killing

148. *Id.* at 4.

149. *Id.*

150. *Id.* at 5.

151. *Id.*

152. *Id.*

153. *Id.* at 18.

154. *Id.* at 18–19.

155. *Id.* at 22.

156. *Id.*

157. *Id.* at 27–30.

158. *Id.* at 29.

an average of 599,000,000 migratory birds per year—and vehicle collisions—killing an average of 214,500,000 migratory birds per year.¹⁵⁹

While these migratory bird deaths may be the result of a variety of factors, their environmental impacts cannot be understated. The loss of migratory birds has been attributed to a loss of food for some populations, financial losses in bird watching and hunting industries, an increase in pests such as insects and rodents, and a decrease in seed dispersal and pollination, among other things.¹⁶⁰ These statistics and reference points provide a strong argument for protecting migratory birds under federal law. The period for public comment on the EIS draft ended on July 20, 2020.¹⁶¹ Following the public comment period, the Service analyzed and revised the EIS.

3. Court Vacates M-37050

During the U.S. Fish and Wildlife Service’s rulemaking process, the United States District Court for the Southern District of New York vacated M-37050.¹⁶² In *Natural Resources Defense Council, Inc. v. U.S. Department of the Interior* (“NRDC”), a group of environmental plaintiffs filed lawsuits to challenge M-37050.¹⁶³ The environmentalists claimed that M-3750 was “‘arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law’ in violation of the APA,” and sought “vacatur of the Opinion and subsequent agency guidance.”¹⁶⁴ In granting summary judgment for the environmentalists, the NRDC court vacated M-37050 and remanded the case to the agency.¹⁶⁵ The court held, “a plain reading of [M-37050] and subsequent communications and guidance strongly suggest that it imposes a mens rea requirement on the MBTA’s misdemeanor provision.”¹⁶⁶ However, M-37050 incorrectly “relie[d] heavily on two judicial decisions that slice the MBTA along more pure actus reus lines.”¹⁶⁷ Because of this reliance, the court assumed M-37050 “only limits the MBTA to actions ‘directed at’ birds in the sense that hunting birds, poaching birds, throwing rocks at birds, pressure washing bird nests off a

159. *Id.*

160. *Id.* at 31–34.

161. U.S. Fish & Wildlife Service, Rulemaking process and timeline (last visited Dec. 30, 2021), <https://www.fws.gov/regulations/mbta/process>.

162. *Natural Resources Defense Council, Inc. v. U.S. Dep’t of the Interior*, 478 F.Supp.3d 469 (S.D.N.Y. 2020).

163. *Id.* at 474.

164. *Id.*

165. *Id.* at 489.

166. *Id.* at 476.

167. *Id.* at 477.

bridge, or setting poison traps for birds are activities ‘directed at’ birds.”¹⁶⁸ Accordingly, the *NRDC* court found the Department of the Interior’s arguments unpersuasive and sided with the environmentalists.¹⁶⁹ Thus, the *NRDC* court vacated M-37050, reasoning the MBTA’s definition of “take” was unambiguous, and the Department of the Interior’s instructions were clearly against it.¹⁷⁰ This marked the first court reversal of M-37050.

4. Final EIS and Record of Decision

Even with the *Natural Resources Defense Council* decision vacating M-37050, the Service pushed through with its rulemaking process. After reviewing public comments on the initial EIS, the Service published a final EIS on November 27, 2020 and a Record of Decision on December 31, 2020.¹⁷¹ The Record of Decision marked the Service’s response to public comments, and provided a decision on the alternatives proposed in the draft of the EIS.¹⁷² The Service ultimately chose to implement Alternative A, limiting the MBTA to exclude incidental takings of migratory birds through regulation.¹⁷³ The Service reasoned although the alternative “may have more negative environmental consequences than the No Action Alternative or Alternative B, it meets the purpose and need better than those alternatives.”¹⁷⁴ The chosen Alternative A “creates legal certainty” by clarifying that incidental take is allowable under the MBTA.¹⁷⁵ Further, the Service vowed to enact “all practicable means to avoid or minimize environmental harms from Alternative A” through education, encouragement of best practices, and monitoring of migratory bird populations.¹⁷⁶

The Service declined to choose Alternative B because it (1) would require a “change [in] its current interpretation” of the MBTA, (2) would not increase legal certainty, and (3) would result in increased costs by businesses.¹⁷⁷ Similarly, the Service declined to choose the No Action

168. *Id.* at 477–478.

169. *Id.*

170. *Id.*

171. U.S. Fish and Wildlife Service, RECORD OF DECISION, *Regulations Governing Take of Migratory Birds* (Dec. 31, 2020), https://www.fws.gov/regulations/mbta/sites/default/files/2021-01/FWS_MBTA_Rule_Record_of_Decision_31Dec2020.pdf.

172. *Id.*

173. *Id.* at 8.

174. *Id.*

175. *Id.*

176. *Id.* at 9.

177. *Id.*

Alternative because it would only maintain the prior legal uncertainty. Thus, the Service chose Alternative A as the preferred policy going forward.

5. Final Regulation

The final rule was issued on January 7, 2021, and was set to go into effect on February 8, 2021.¹⁷⁸ The rule mirrored Alternative A from the Record of Decision, and stated the “MBTA’s prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same only criminalize actions that are specifically directed at migratory birds, their nests, or their eggs.”¹⁷⁹ Thus, the Service determined “the scope of the MBTA does not include incidental take.”¹⁸⁰

The Service also analyzed potential costs to industries in implementing migratory bird mitigation policies. The estimated expense for wind electric power producers to comply with additional state mitigation measures was an annual \$17.6 million in labor and an annual \$36.9 million in non-labor.¹⁸¹ Even without MBTA incidental takings, industries such as wind electricity producers would still likely implement these mitigation measures to ensure compliance with state policies and other national policies such as the BGEPA. The final rule marked the last action under the Trump Administration.

C. Biden Administration

Under President Biden, the MBTA has seen a gradual return to the prior practice of criminalizing incidental takings of migratory birds in the United States. While the final rule issued by the Biden Administration Service had an effective date of February 8, 2021, the Service delayed the final rule to go into effect on March 8, 2021.¹⁸² Then, on March 8, 2021, the DOI issued a memorandum (“M-37065”) permanently revoking and withdrawing M-37050.¹⁸³ This drastic change welcomed the return of criminalizing

178. Regulations Governing Take of Migratory Birds, 86 Fed. Reg. 4, 1134–1165 (Jan. 7, 2021).

179. *Id.* at 1134.

180. *Id.* at 1141.

181. *Id.* at 1162.

182. U.S. Fish & Wildlife Service, *Rulemaking process and timeline*, <https://www.fws.gov/regulations/mbta/process> (last visited Dec. 30, 2021).

183. Memorandum from Principal Deputy Solicitor, to Secretary, Assistant Secretary – Fish and Wildlife and Parks, *Permanent Withdrawal of Solicitor Opinion M-37050 “The Migratory Bird Treaty Act Does Not Prohibit Incidental Take”* 2021 DEP SO LEXIS 5

incidental migratory bird takings under the MBTA. In the new memorandum, M-37065, the DOI relied on *Natural Resources Defense Council v. U.S. Department of the Interior*, stating that the court's decision was "consistent with the Department of the Interior's long-standing interpretation of the MBTA."¹⁸⁴ Additionally, the DOI cited concerns from Canada that M-37050 was in violation of the 1916 Migratory Bird Treaty.¹⁸⁵ Accordingly, the DOI revoked and withdrew M-37050.¹⁸⁶

Shortly after M-37065 was issued, the Service proposed a new rule to revoke the previous final rule that limited the MBTA to exclude unintentional takings.¹⁸⁷ This this new rule would be consistent with M-37065, prohibiting both intentional and incidental takings. Currently, the new rule is under administrative review, and is following the same path as the previous rule instituted under the Trump Administration.¹⁸⁸

On July 20, 2021, two economic analysis documents were issued.¹⁸⁹ These documents presented a new path to codifying the previous rule.¹⁹⁰ This new alternative suggests the "remov[al] [of] the regulation at 50 CFR 10.14, which states [t]he MBTA does not prohibit incidental take."¹⁹¹ This would return the Service to its previous policy of investigating incidental take at sites where it believed unlawful take may have occurred.¹⁹² While the proposed rule does not provide any authorization of incidental takings, the Service noted that it "would consider good faith attempts to meet voluntary standards when making enforcement decisions under the MBTA to provide an incentive to implement those voluntary measures."¹⁹³ The Service acknowledged the new rule may cause a "greater burden on regulated entities and the Service's law enforcement officers," but that there

(Mar. 8, 2021), <https://www.doi.gov/sites/doi.gov/files/permanent-withdrawl-of-sol-m-37050-mbta-3.8.2021.pdf>.

184. *Id.*

185. *Id.*

186. *Id.*

187. Regulations Governing Take of Migratory Birds; Proposed Rule, 86 Fed. Reg. 87, 24573 (May 7, 2021).

188. *Id.*

189. Economic Analysis for Proposed Regulations Governing the Take of Migratory Birds, 86 Fed. Reg. 136, 38354 (Jul. 20, 2021).

190. U.S. Fish & Wildlife Service, Regulatory Impact Analysis, Proposed Rulemaking for Regulations Governing Take of Migratory Birds (Jul. 20, 2021), <https://www.regulations.gov/document/FWS-HQ-MB-2018-0090-19181>.

191. *Id.* at 12.

192. *Id.*

193. *Id.* at 15.

remained the possibility of “developing an official enforcement policy and a system of regulatory authorization in the future.”¹⁹⁴ Thus, the new proposed rule would return the country to pre-Trump Administration practices regarding incidental take, and punt the issue of incidental take permits to a later time.

This new rule was published on October 4, 2021, and went into effect on December 3, 2021.¹⁹⁵ Additionally, the Service issued a director’s order to provide guidance to its employees on how to enforce the MBTA.¹⁹⁶ The director’s order instructed employees to “focus our enforcement efforts on specific types of activities that both foreseeably cause incidental take and where the proponent fails to implement known beneficial practices to avoid or minimize incidental take.”¹⁹⁷ The director’s order also noted it intended to “apply a transparent and consistent approach” to policing incidental takings.¹⁹⁸ The director’s order went into effect on December 3, 2021.

VI. Remedies Looking Forward

A. Advanced Notice of Proposed Rulemaking General and Specific Permits

Even with the new rule and director’s order set to go into effect soon, there still lingers a lack of clarity on how incidental take will be regulated moving forward. The Service took a step to address these concerns by publishing the Advanced Notice of Proposed Rulemaking (“ANPR”) in October, 2021.¹⁹⁹ The goal of the ANPR is “to better protect migratory bird populations through addressing human-caused mortality with common-sense regulations that are not unduly burdensome.”²⁰⁰ The Service plans to advance the ANPR by “develop[ing] an approach to authorizing incidental take of migratory birds.”²⁰¹ This would be accomplished through the issuance of general take permits, specific permits, and individual permits.²⁰²

194. *Id.*

195. Regulations Governing Take of Migratory Birds; Revocation of Provisions, 86 Fed. Reg. 189, 54642 (Oct. 4, 2021).

196. U.S. Fish and Wildlife Service, Director’s Order No.: 225, Incidental Take of Migratory Birds (Oct. 5, 2021). Available at <https://www.regulations.gov/document/FWS-HQ-MB-2018-0090-19194>.

197. *Id.*

198. *Id.*

199. Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds, 86 Fed. Reg. 189, 54667 (Oct. 4, 2021).

200. *Id.* at 54668.

201. *Id.*

202. *Id.*

In addition to these permits, “noncommercial activities, including most activities by individuals, [for example,] homeowner activities that take birds,” and “certain activities where activity-specific beneficial practices or technologies sufficiently avoid and minimize incidental take” would be exempted from requiring permits.²⁰³

The general permit system could work a number of different ways. By and large, “[a]n entity would register, pay a required fee, and agree to abide by general permit conditions.”²⁰⁴ These general permits “would be effective upon submission of the request,” and could require permittees to monitor and report bird death numbers.²⁰⁵ While entities would be required to report these death numbers, the Service would review the general permit system, and would not provide a “separate review for each individual permit authorization.”²⁰⁶ Thus, the general permit system would provide a way for businesses and entities to receive authorization to take, but not overwhelm the administrative capacity of the Service.

Under the ANPR, specific take permits could also be available “for projects that do not meet the criteria for eligibility for a general permit.”²⁰⁷ Similar to general permits, the specific permit system would require entities to file an application and pay a fee to the Service.²⁰⁸ However, unlike general permits, “[s]ervice staff would review the application and develop customized permit conditions” for each accepted applicant.²⁰⁹ These specific permits would be “limited to situations where case-by-case evaluation and customization is necessary and appropriate” in order to maximize efficiency and prevent the Service from being overwhelmed.²¹⁰

While the Service identified potential measures to allow migratory bird takings (*i.e.*, exclusion from needing authorization, general permits, specific permits), they did not provide set criteria for each category.²¹¹ Instead of using “the number of birds found dead” as a criteria, the Service plans to seek “information on [other] appropriate criteria, such as infrastructure design, beneficial practices, geographic features, and others.”²¹² In addition

203. *Id.* at 54669.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

to these potential criteria, the Service is “considering developing individual, general-permit-authorization regulations” for wind turbines, solar power production facilities, oil and gas disposal pits, and others.²¹³ These permits would be tailored closer to the needs of each industry group, and would provide effective ways to reduce migratory bird deaths without crippling businesses. The ANPR is currently open for public comment while the Service prepares an Environmental Impact Statement.²¹⁴

B. Policy Suggestions Moving Forward

1. Mitigation over Permits

While the ANPR presents viable alternatives for instituting migratory bird take permits, it also possesses noteworthy drawbacks. First, the creation of a permit system would likely increase administrative workload and overhead costs for the Service. The ANPR briefly addressed this concern by identifying potential general permits, which are effective upon application and require no administrative overview. However, any potential specific and individual permits would still require review by the Service. Moreover, any general permit authorizations for industry groups lack set criteria and would also require manpower and funding to develop solutions. Thus, a preliminary drawback to potential migratory bird permits is the increase in cost and administrative work.

Migratory bird incidental take permits may also be costly for applicants. There are currently no set application fees for potential incidental take permits. However, a comparison may be made to a similar program, the BGEPA incidental take program. The BGEPA outlaws taking, possessing, selling, purchasing, bartering, offering to sell, and transporting any bald or golden eagle in the United States.²¹⁵ The BGEPA defines “take” as to “pursue, shoot at, poison, wound, capture, trap, molest, or disturb.”²¹⁶ Unlike the MBTA, the BGEPA allows permits for a variety of purposes. Examples of these purposes include scientific and exhibition endeavors,²¹⁷ Indian religious purposes,²¹⁸ elimination of depredating eagles and eagles that pose a risk to human or eagle health and safety,²¹⁹ falconry purposes,²²⁰

213. *Id.*

214. *Id.* at 54671–54672.

215. 16 U.S.C. § 668 (1972).

216. 50 C.F.R. § 22.3 (2016).

217. 50 C.F.R. § 22.21 (2014).

218. 50 C.F.R. § 22.22 (1999).

219. 50 C.F.R. § 22.23 (2009).

220. 50 C.F.R. § 22.24 (2010).

and more. Under the BGEPA incidental take permit program, non-commercial applicants may only apply for short term (less than five years) take permits, each one costing \$500.²²¹ For commercial applicants, the fee is \$2,500 for short-term takings (less than five years), and \$36,000 for long-term incidental takings (up to thirty years).²²² These costs may be just a drop in the bucket for some businesses and individuals, but for others, it may be more significant. This same logic may be applied to migratory bird incidental take permits. Thus, application fees may present financial challenges for future permit applicants.

Another potential drawback of migratory bird incidental take permits is the processing time between applications and responses. When looking at the BGEPA take permits, processing times can vary between two to twenty-four months.²²³ Migratory bird take applications could take at least this long, if not longer, since there is no precedent currently set. Lengthy processing times could hurt potential applicants who would be forced to delay project site development for unknown periods of time. These lengthy wait times would likely cause additional hurdles in wind lease negotiations and project site planning. Thus, the processing time for non-general incidental take applications could have negative impacts on wind producers, and the energy industry as a whole.

Another current example of an incidental take permit system can be seen in the ESA. The ESA allows permits for incidental take if certain conditions are met.²²⁴ The statute provides an exception to allow permits as long as the applicant is carrying out “an otherwise lawful activity.”²²⁵ Further, the applicant must submit a conservation plan that shows the likely impact of the take, steps that will be taken to minimize and mitigate the impacts, any alternative actions available, and anything else requested.²²⁶ Approval of an incidental take permit creates a legally binding agreement between the applicant and the Service.²²⁷ Should an applicant violate the permit, they violate the ESA, and would be criminally liable.²²⁸ The time period for

221. U.S. Fish & Wildlife Service, *Bald Eagle Permit: Incidental Take* (Feb. 11, 2020), <https://www.fws.gov/midwest/eagle/permits/baeatake/application.html>.

222. *Id.*

223. *Id.*

224. 16 U.S.C. § 1539 (Current through P.L. 117-90).

225. 16 U.S.C. §1539(a)(1)(B).

226. 16 U.S.C. § 1539(a)(2)(A).

227. U.S. Fish & Wildlife Service, Midwest Region Endangered Species, *Endangered Species Permits* (May 22, 2019), https://www.fws.gov/midwest/endangered/permits/hcp/hcp_faqs.html.

228. *Id.*

obtaining an Endangered Species Act take permit is six to twelve months, and the cost varies.²²⁹

While the ESA and the BGEPA provide examples of currently implemented incidental take systems, the MBTA should not follow suit for several reasons. First, the resources needed to research, design, and fully execute a new MBTA permit system could be costly and time consuming. As previously discussed, the Service is evaluating options for a proposed system to allow take in specific circumstances. This process has likely been delayed due to genuine unforeseen challenges arising from COVID-19. However, there is still no clear timeline on when the proposed rule will be implemented. This delay could be detrimental to some businesses, because they may not know what regulations to expect or how to plan for future operations. These challenges could particularly impact businesses who are working to develop new work sites because it may be difficult for said businesses to foresee and plan for future accommodations without knowing the standard of expectations under the MBTA.

As a result of such challenges, the Service should move away from incidental take permits and focus on incentivizing mitigation practices. Incidental take permits may be slow, costly, and require significant resources to implement. However, businesses and industries should still be required to do their part and cooperate with the Service in order to reduce migratory bird deaths within their practices. Examples of these mitigation efforts could be recording and monitoring annual bird death numbers, complying with established industry best practices to avoid bird deaths, and contacting the Service prior to new projects in order to formulate effective mitigation plans. With these techniques, businesses and industries can comply with the new interpretation of the MBTA without crippling themselves with excessive fees and unknown waiting periods.

While many businesses already follow mitigation practices, the push for incidental take permits is still strongly supported by some environmental groups.²³⁰ These environmental groups claim that implementing a structured system to allow incidental take in certain situations would provide clarity and effectiveness in reducing migratory bird deaths.²³¹ On the other hand, many energy producers and manufacturer groups stand

229. *Id.*

230. Michael Doyle, *Feds Hatch notion of permits to kill migratory birds*, E&E NEWS (Sept. 30, 2021, 12:38 PM), <https://www.eenews.net/articles/feds-hatch-notion-of-permits-to-kill-migratory-birds/>.

231. *Id.*

against implementing an incidental take permit system.²³² These producers argue that incidental take permits would generate unnecessary burdens on businesses and produce further confusion that would not solve the issues already surrounding incidental migratory bird deaths.²³³ Such burdens could include application costs. As previously discussed, the requirement of new incidental take applications could make projects and businesses turn from profitable to bankrupt. With the risk of losing money on a new endeavor, businesses could be less likely to take on new developments. This could lead to negative impacts on environmentally beneficial industries, such as wind and solar energy production.

Additionally, other industries such as agriculture are concerned about potential negative repercussions from such permits.²³⁴ Examples of these burdens include penalties for the use of crop-protecting pesticides, even when such pesticides are legally administered.²³⁵ Without well-defined expectations and standards, these industries will likely face undesirable burdens. Furthermore, without a clear explanation for these burdens, farmers and other industry members will grow frustrated.

In addition to potential financial ramifications and other unnecessary burdens, the permit system could create additional confusion and inefficiencies for businesses. As previously discussed, a time delay from application to issuance of an incidental take permit could mean the difference between pursuing a project and abandoning one. Accordingly, the mitigation alternative is likely the superior option to increase protection for migratory bird populations while providing clarity for what is expected of businesses.

The Service currently suggests industry groups implement migratory bird death mitigation practices. However, further legislative action might be necessary to adequately protect migratory bird populations. For example, Congress could implement a tax plan to further incentivize migratory bird death mitigation efforts. Such a tax plan could provide rebates to companies that fully cooperate with pre-determined mitigation practices. Companies that accurately record and report migratory bird deaths while implementing applicable industry mitigation practices would receive rebates proportional to the costs of mitigation. Further, additional rebates could be provided for companies that reduce migratory bird deaths by predetermined percentages.

232. *Id.*

233. *Id.*

234. Sarah Falen, *The government's word: Should we trust it*, the Fence Post (Dec. 22, 2021), <https://www.thefencepost.com/opinion/the-governments-word-should-we-trust-it/>.

235. *Id.*

For example, companies that reduce recorded migratory bird deaths by five percent annually would receive an extra \$10,000 rebate, companies that reduce recorded deaths by ten percent annually would receive an extra \$20,000 rebate, and so forth. These added tax incentives could help decrease migratory bird deaths without turning to a flawed incidental take permit system. Accordingly, the Service should consider implementing tax benefits along with mitigation policies in order to reduce migratory bird deaths.

2. Reducing Regulatory Whiplash

Two important issues that have yet to be fully addressed are (1) how to prevent future regulatory whiplash among industries adjusting to policy changes, and (2) how to provide consistency and stability to such industries during presidential changes. Perhaps the most straight-forward solution to the first issue would be for Congress to enact legislation geared towards enforcing incidental take of migratory birds in order to create a black and white statutory rule. Congress could accomplish this by passing legislation that mirrors the Service's proposed rules and regulations, thus creating a united stance on incidental migratory bird takings. While this answer sounds relatively simple in theory, there are several reasons why it could be unlikely to occur. The most pressing of these issues is a potential conflict of ideology between Congress and the Service that could lead to a bureaucratic logjam and failure to operate.

The relationship between administrative agencies and Congress is not easy to define. Federal agencies reside in the executive branch of government.²³⁶ Their primary goal is to carry out laws created by the legislative branch—Congress.²³⁷ However, agencies are generally *created* by Congress, and they “get their authority to issue regulations from laws (statutes) enacted by Congress.”²³⁸ It should be noted that while Congress gives agencies general powers to “regulate certain activities within our society,” agencies cannot go beyond their statutory power or violate the

236. USAGov, Branches of the U.S. Government, <https://www.usa.gov/branches-of-government> (last visited Feb. 13, 2022).

237. *Id.*

238. The Office of the Federal Register, *A Guide to the Rulemaking Process*, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Feb. 13, 2022).

Constitution.²³⁹ Congress may also pass laws directing agencies to act on particular issues.²⁴⁰

However, while Congress has the general power to control the scope of federal agencies' discretion and power, agencies ultimately fall under the executive branch. This means they are heavily influenced by the office of the President. Before an agency may issue a new final rule, they must send the rule to both Congress and the President for approval.²⁴¹ Similar to laws, a regulatory rule cannot be published without congressional approval and a presidential signature (or congressional override of a presidential veto).²⁴² The Secretary of the Interior may create and suggest a new rule for incidental take permits, similar to the BGEPA take permits, because they are a federal agency with powers granted to them by Congress. However, if the Secretary of the Interior wants to be successful in creating clear expectations for businesses, they will likely have to cooperate with Congress and the President. This is not always easy, as there are often different political majorities in power in each branch of government. For example, the house of representatives may be a republican party majority while the senate is a democratic majority. Additionally, the majority of both chambers of congress may represent different political parties than the president. Thus, the general issue of government politics presents a potential roadblock to Congress cooperating with the Secretary of the Interior to formulate a timely and effective plan for migratory bird unintentional take permits.

Regarding the best way to provide consistency and stability to businesses during presidential changes, there may not be a clear answer. With the seemingly recent shift towards extreme polarization of political parties, the likelihood of extreme policy changes during presidential transitions is high. One way to quantify these rapid policy changes is to measure the number of executive orders issued by a new president in their first few weeks of office. During the recent transition of presidential power, President Biden issued thirty-two executive orders in his first month of office.²⁴³ This set the record for the most executive orders in a president's first month in office, breaking

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. Federal Register, 2021 Joseph R. Biden Jr. Executive Orders, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Feb. 13, 2022).

Franklin D. Roosevelt's previous mark of 30.²⁴⁴ A number of President Biden's executive orders were explicit reversals of previous Trump policies.²⁴⁵ While the merits behind Biden's executive orders will not be addressed in this article, the record breaking number of actions illustrates the challenges of instability and uncertainty many businesses experience during presidential transitions. Rapid changes in policy like these could negatively impact industries such as wind power generation and oil and gas drilling. For example, a wind power generating company might spend significant funding to meet new environmental regulations under one president, then discover such requirements are totally obsolete after the first month of the next president's term. Such companies are at risk of losing significant amounts of money by reacting too quickly to regulations. This could provide a competitive disadvantage to companies that *do* cooperate with heightened regulations because they have to make a bigger margin of profit to break even. While this may be a net positive for the environment, industries such as wind energy production and oil and gas production will likely resent such rapid changes in policy because it will make it harder to keep their businesses and investments afloat. These companies would likely prefer a steadier alternative such as gradual phasing out of outdated policies, or grace periods of a few years to start adjusting to new environmental requirements. Unfortunately, these options do not currently exist. Much can change within the first few weeks of a new president's time in office. In the words of William L. Marcy, "to the victor belong the spoils of the enemy."²⁴⁶

Ultimately, there may not be a clear way to prevent legislative whiplash on businesses and provide consistency amid presidential transitions. However, we can hope to improve these issues by growing into a country and society that values progress over political differences. Doing so may be the only way to effectively address the saga of incidental take under the MBTA.

244. Tamara Keith, *With 28 Executive Orders Signed, President Biden is Off to A Record Start*, N.P.R. (Feb. 3, 2021, 5:00 AM ET), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

245. *Id.*

246. The Editors of Encyclopaedia Britannica, *William L. Marcey, American politician*, Britannica, <https://www.britannica.com/biography/William-L-Marcy> (last viewed Feb. 13, 2022).

VII. Conclusion & Industry Outlook

The interpretation and policing of incidental take under the MBTA has seen drastic changes during the past four years. Previous longstanding precedent considered MBTA incidental take as a criminally punishable offense. However, this precedent was upended in 2017 under President Trump's Administration when the Service issued a memorandum declaring "take" did not include unintentional acts. In stark contrast, under the new Biden Administration, the Service has taken new steps to reinforce old precedent and re-criminalize incidental take.

With the current momentum towards pre-Trump Administration policy, the Service, as well as energy industry businesses, are presented with an opportunity to clearly define how incidental take will be policed. With this opportunity comes undeniable challenges. The Service should act cautiously and thoughtfully to avoid further confusion and burdens on businesses. Doing so could end the MBTA incidental take confusion and controversy for good. Instead of pursuing incidental take permits similar to the BGEPA and the ESA, the Service should implement a mitigation incentive system. This would be the fairest and most effective way to police migratory bird deaths while respecting current industry practices.

Energy industry groups such as wind energy producers and oil and gas businesses should be aware of policy changes and look for opportunities to voice their opinions. By providing feedback during public comment periods and other periods of lobbying, these groups can have active voices in the decision making process while reducing confusion regarding regulation of MBTA incidental take.