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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 10

[Docket No. FWS–HQ–MB–2018–0090; FF09M29000–156–FXMB1232090BPP0]

RIN 1018–BD76

Regulations Governing Take of Migratory Birds

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS, Service, we), propose to adopt a regulation that defines the scope of the Migratory Bird Treaty Act (MBTA or Act) as it applies to conduct resulting in the injury or death of migratory birds protected by the Act. This proposed rule is consistent with the Solicitor's Opinion, M-37050, which concludes that the MBTA's

prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same, apply only to actions directed at migratory birds, their nests, or their eggs.

DATES: We will accept written comments on this proposed rule until [INSERT DATE 45 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by either one of the following methods. Please do not submit comments by both.

• Federal eRulemaking Portal: http:// www.regulations.gov. Follow the instructions for submitting comments to Docket No. FWS–HQ–MB–2018–0090.

• U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS–HQ–MB–2018–0090; U.S. Fish and Wildlife Service; MS: JAO/1N; 5275 Leesburg Pike; Falls Church, VA 22041–3803.

We will not accept email or faxes. We will post all comments on http:// www.regulations.gov, including any personal information you provide. See **Public Comments**, below, for more information.

FOR FURTHER INFORMATION CONTACT: Jerome Ford, Assistant Director, Migratory Birds, at 202-208-1050.

SUPPLEMENTARY INFORMATION:

Background

The Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703 *et seq*.) was enacted in 1918 to help fulfill the United States' obligations under the 1916 "Convention between the United States and Great Britain for the protection of Migratory Birds." 39 Stat. 1702 (Aug. 16, 1916) (ratified Dec. 7, 1916) (Migratory Bird Treaty). The list of applicable migratory birds protected by the MBTA is currently codified in title 50 of the Code of Federal Regulations at 50 CFR 10.13. In its current form, section 2(a) of the MBTA provides that, unless permitted by regulations, 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.

16 U.S.C. 703(a).

Section 3(a) of the MBTA authorizes and directs the Secretary of the Interior to "adopt suitable regulations" allowing "hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof" while considering ("having due regard to") temperature zones and "distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds." 16 U.S.C. 704(a). Section 3(a) also requires the Secretary to "determine when, to what extent, if at all, and by what

means, it is compatible with the terms of the conventions" to adopt such regulations allowing these otherwise-prohibited activities. *Id*.

On December 22, 2017, the Principal Deputy Solicitor of the Department of the Interior, exercising the authority of the Solicitor pursuant to Secretary's Order 3345, issued a legal opinion, M-37050, "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take" (M-37050 or M-Opinion). This opinion thoroughly examined the text, history, and purpose of the MBTA and concluded that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to actions that are directed at migratory birds, their nests, or their eggs. This opinion is consistent with the Fifth Circuit's recent decision in *United States* v. *CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015), which examined whether the MBTA prohibits incidental take. It also marked a change from prior U.S. Fish and Wildlife Service interpretations and an earlier Solicitor's Opinion, M-37041, "Incidental Take Prohibited Under the Migratory Bird Treaty Act." The Office of the Solicitor performs the legal work for the Department of the Interior, including the U.S. Fish and Wildlife Service (hereafter "Service"). The Service is the Federal agency delegated the primary responsibility for managing migratory birds.

This proposed rule addresses the Service's responsibilities under the MBTA. Consistent with M-37050, the Service proposes to adopt a regulation defining the scope of the MBTA's prohibitions to reach only actions directed at migratory birds, their nests, or their eggs.

Provisions of the Proposed Rule

Scope of the Migratory Bird Treaty Act

As a matter of both law and policy, the Service proposes to codify M-37050 in a regulation defining the scope of the MBTA. M-37050 is available on the Internet at the Federal eRulemaking Portal: http://www.regulations.gov in Docket No. FWS–HQ–MB–2018–0090; and at https://www.doi.gov/solicitor/opinions.

As described in M-37050, the text and purpose of the MBTA indicate that 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.

The relevant portion of the MBTA reads, "it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird, [or] any part, nest, or egg of any such bird." 16 U.S.C. 703(a). Of the five referenced verbs, three—pursue, hunt, and capture—unambiguously require an action that is directed at migratory birds, nests, or eggs. To wit, according to the entry for each word in a contemporary dictionary:

- Pursue means "[t]o follow with a view to overtake; to follow eagerly, or with haste; to chase." WEBSTER'S REVISED UNABRIDGED DICTIONARY 1166 (1913);
- Hunt means "[t]o search for or follow after, as game or wild animals; to chase; to pursue for the purpose of catching or killing." *Id*. at 713; and
- Capture means "[t]o seize or take possession of by force, surprise, or stratagem; to overcome and hold; to secure by effort." *Id*. at 215.

Thus, one does not passively or accidentally pursue, hunt, or capture. Rather, each requires a deliberate action specifically directed at achieving a goal.

By contrast, the verbs "kill" and "take" could refer to active or passive conduct, depending on the context. *See id.* at 813 ("kill" may mean the more active "to put to death; to

slay" or serve as the general term for depriving of life); *id.* at 1469 ("take" has many definitions, including the more passive "[t]o receive into one's hold, possession, etc., by a voluntary act" or the more active "[t]o lay hold of, as in grasping, seizing, catching, capturing, adhering to, or the like; grasp; seize;—implying or suggesting the use of physical force").

Any ambiguity inherent in the statute's use of the terms "take" and "kill" is resolved by applying established rules of statutory construction. First and foremost, when any words "are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." ANTONIN SCALIA & BRYAN A. GARNER, READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS, 195 (2012); *see also Third Nat'l Bank* v. *Impac, Ltd.*, 432 U.S. 312, 321 (1977) ("As always, '[t]he meaning of particular phrases must be determined in context' . . . ." (quoting *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 466 (1969)); *Beecham* v. *United States*, 511 U.S. 368, 371 (1994) (the fact that "several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well"). Section 2 of the MBTA groups together five verbs—"pursue," "hunt," "take," "capture," and "kill." Accordingly, the statutory construction canon of *noscitur a sociis* ("it is known by its associates") counsels in favor of reading each verb to have a related meaning. *See* SCALIA & GARNER at 195 ("The canon especially holds that 'words grouped in a list should be given related meanings.'" (quoting *Third Nat'l Bank*, 432 U.S. at 322)).

Thus, when read together with the other active verbs in section 2 of the MBTA, the proper meaning is evident. The operative verbs ("pursue, hunt, take, capture, kill") "are all affirmative acts . . . which are directed immediately and intentionally against a particular animal—not acts or omissions that indirectly and accidentally cause injury to a population of animals." *Sweet Home*, 515 U.S. at 719–20 (Scalia, J., dissenting) (agreeing with the majority

opinion that certain terms in the definition of the term "take" in the Endangered Species Act (ESA)—identical to the other prohibited acts referenced in the MBTA—refer to deliberate actions, while disagreeing that the use of the additional definitional term "harm"—used only in the ESA—meant that "take" should be read more broadly to include actions not deliberately directed at covered species); *see also United States* v. *CITGO Petroleum Corp.*, 801 F.3d 477, 489 n.10 (5th Cir. 2015) ("Even if 'kill' does have independent meaning [from 'take'], the Supreme Court, interpreting a similar list in the [Endangered Species Act], concluded that the terms pursue, hunt, shoot, wound, kill, trap, capture, and collect, generally refer to deliberate actions"); *cf. Sweet Home*, 515 U.S. at 698 n.11 (Congress's decision to specifically define "take" in the ESA obviated the need to define its common-law meaning).

Accordingly, it is reasonable to conclude that the MBTA's prohibition on killing is similarly limited to deliberate acts that result in bird deaths. *See Newton County Wildlife Ass'n* v. *U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) ("MBTA's plain language prohibits conduct directed at migratory birds . . . . [T]he ambiguous terms 'take' and 'kill' in 16 U.S.C. 703 mean 'physical conduct of the sort engaged in by hunters and poachers ….'" (quoting *Seattle Audubon Soc'y* v. *Evans*, 952 F.2d 297, 302 (9th Cir. 1991))); *United States* v. *Brigham Oil & Gas*, 840 F. Supp. 2d 1202, 1208 (D.N.D. 2012) ("In the context of the Act, 'take' refers to conduct directed at birds, such as hunting and poaching, and not acts or omissions having merely the incidental or unintended effect of causing bird deaths"). This conclusion is also supported by the U.S. Fish and Wildlife Service's implementing regulations, which define "take" to mean "to pursue, hunt, shoot, wound, kill, trap, capture, or collect" or attempt to do the same. 50 CFR 10.12. The component actions of "take" involve direct and purposeful actions to reduce animals to human control. As such, they "reinforce[] the dictionary definition, and confirm[] that 'take'

does not refer to accidental activity or the unintended results of other conduct." *Brigham Oil & Gas*, 840 F. Supp. 2d at 1209. This interpretation does not render the words "take" and "kill" redundant since each has its own discrete definition; indeed, one can hunt or pursue an animal without either killing it or taking it under the definitions relevant at the time the MBTA was enacted.

Furthermore, the notion that "take" refers to an action directed immediately against a particular animal is supported by the use of the word "take" in the common law. As the Supreme Court has instructed, "absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States* v. *Shabani*, 513 U.S. 10, 13 (1994). As Justice Scalia noted, "the term ['take'] is as old as the law itself." *Sweet Home*, 515 U.S. at 717 (Scalia, J., dissenting). For example, the Digest of Justinian places "take" squarely in the context of acquiring dominion over wild animals, stating:

> [A]ll the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them. . . . Because that which belongs to nobody is acquired by the natural law by the person who first possesses it. We do not distinguish the acquisition of these wild beasts and birds by whether one has captured them on his own property [or] on the property of another; but he who wishes to enter into the property of another to hunt can be readily prevented if the owner knows his purpose to do so.

Geer v. Connecticut, 161 U.S. 519, 523 (1896) (quoting DIGEST, Book 41, Tit. 1, De Adquir. Rer. Dom.). Likewise, Blackstone's Commentaries provide:

> A man may lastly have a qualified property in animals *feroe naturoe, propter privilegium,* that is, he may have the privilege of hunting, taking and killing them

> in exclusion of other persons. Here he has a transient property in these animals usually called game so long as they continue within his liberty, and may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases.

Id. at 526–27 (1896) (quoting 2 BLACKSTONE COMMENTARY 410). Thus, under common law "[t]o 'take,' when applied to wild animals, means to reduce those animals, by killing or capturing, to human control." *Sweet Home*, 515 U.S. at 717 (Scalia, J., dissenting); *see also CITGO*, 801 F.3d at 489 ("Justice Scalia's discussion of 'take' as used in the Endangered Species Act is not challenged here by the government … because Congress gave 'take' a broader meaning for that statute."). As is the case with the ESA, in the MBTA, "[t]he taking prohibition is only part of the regulatory plan …, which covers all stages of the process by which protected wildlife is reduced to man's dominion and made the object of profit," and, as such, is "a term of art deeply embedded in the statutory and common law concerning wildlife" that "describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals)." *Sweet Home*, 515 U.S. at 718 (Scalia, J., dissenting). The common-law meaning of the term "take" is particularly important here because, unlike the ESA, which specifically defines the term "take," the MBTA does not define "take"—instead it includes the term in a list of similar actions. Thus, the *Sweet Home* majority's ultimate conclusion that Congress's decision to define "take" in the ESA obviated the need to divine its common-law meaning is inapplicable here. *See id.* at 697, n.10. Instead, the opposite is true.

A number of courts, as well as the prior M-Opinion, have focused on the MBTA's direction that a prohibited act can occur "at any time, by any means, in any manner" to support the conclusion that the statute prohibits any activity that results in the death of a bird, which

would necessarily include incidental take. However, the quoted statutory language does not change the nature of those prohibited acts and simply clarifies that activities directed at migratory birds, such as hunting and poaching, are prohibited whenever and wherever they occur and whatever manner is applied, be it a shotgun, a bow, or some other creative approach to deliberately taking birds. *See generally CITGO*, 801 F.3d at 490 ("The addition of adverbial phrases connoting 'means' and 'manner,' however, does not serve to transform the nature of the activities themselves. For instance, the manner and means of hunting may differ from bowhunting to rifles, shotguns, and air rifles, but hunting is still a deliberately conducted activity. Likewise, rendering all-inclusive the manner and means of 'taking' migratory birds does not change what 'take' means, it merely modifies the mode of take.").

In reaching a contrary conclusion, Opinion M-37041 assumed that because section 703 of the MBTA is a strict-liability provision, meaning that no *mens rea* or criminal intent is required for a violation to have taken place, *any* act that takes or kills a bird must be covered as long as the act results in the death of a bird. In making that assumption, M-37041 improperly ignored the meaning and context of the actual acts prohibited by the statute. Instead, the opinion presumed that the lack of a mental state requirement for a misdemeanor violation of the MBTA equated to reading the prohibited acts "kill" and "take" as broadly applying to actions not specifically directed at migratory birds, so long as the result was their death or injury. But the relevant acts prohibited by the MBTA are voluntary acts directed at reducing an animal to human control, such as when a hunter shoots a protected bird causing its death. The key remains that the actor was engaged in an activity the object of which was to render a bird subject to human control.

By contrast, liability fails to attach to actions that are not directed toward rendering an animal subject to human control. Common examples of such actions include: driving a car, allowing a pet cat to roam outdoors, or erecting a windowed building. All of these actions could foreseeably result in the deaths of protected birds, and all would be violations of the MBTA under the now-withdrawn M-Opinion if they did in fact result in deaths of protected birds, yet none of these actions have as their object rendering any animal subject to human control. Because, under the present interpretation, no "take" has occurred within the meaning of the MBTA, the strict-liability provisions of the Act would not be triggered.

The prior M-Opinion posited that amendments to the MBTA imposing mental state requirements for certain specific offenses were only necessary if no mental state is otherwise required. But the conclusion that the taking and killing of migratory birds is a strict-liability crime does not answer the separate question of what acts are criminalized under the statute. The Fifth Circuit agreed in *CITGO*, stating "we disagree that because misdemeanor MBTA violations are strict liability crimes, a 'take' includes acts (or omissions) that indirectly or accidentally kill migratory birds." The court goes on to note that "[a] person whose car accidentally collided with the bird … has committed no act 'taking' the bird for which he could be held strictly liable. Nor do the owners of electrical lines 'take' migratory birds who run into them. These distinctions are inherent in the nature of the word 'taking' and reveal the strict liability argument as a non-sequitur." 801 F.3d at 493. Similarly, in *Mahler* v. *U.S. Forest Serv.*, 927 F. Supp. 1559 (S.D. Ind. 1996), the court described the interplay between activities that are specifically directed at birds and the strict liability standard of the MBTA:

> [A comment in the legislative history] in favor of strict liability does not show any intention on the part of Congress to extend the scope of the MBTA beyond

> hunting, trapping, poaching, and trading in birds and bird parts to reach any and all human activity that might cause the death of a migratory bird. Those who engage in such activity and who accidentally kill a protected migratory bird or who violate the limits on their permits may be charged with misdemeanors without proof of intent to kill a *protected* bird or intent to violate the terms of a permit. That does not mean, however, that Congress intended for "strict liability" to apply to all forms of human activity, such as cutting a tree, mowing a hayfield, or flying a plane. The 1986 amendment and corresponding legislative history reveal only an intention to close a loophole that might prevent felony prosecutions for commercial trafficking in migratory birds and their parts.
>
> Thus, there appears to be no explicit basis in the language or the development of the MBTA for concluding that it was intended to be applied to any and all human activity that causes even unintentional deaths of migratory birds.

927 F. Supp. at 1581 (referencing S. REP. NO. 99-445, at 16 (1986), *reprinted* in 1986 U.S.C.C.A.N. 6113, 6128). Thus, limiting the range of actions prohibited by the MBTA to those that are directed at migratory birds will focus prosecutions on activities like hunting and trapping and exclude more attenuated conduct, such as lawful commercial activity, that unintentionally and indirectly results in the death of migratory birds.

The History of the MBTA

The history of the MBTA and the debate surrounding its adoption illustrate that the Act was part of Congress's efforts to regulate the hunting of migratory birds in direct response to the extreme over-hunting, largely for commercial purposes, that had occurred over the years. *See*

United States v. *Moon Lake Electric Ass'n*, 45 F. Supp. 2d 1070, 1080 (D. Colo. 1999) ("the MBTA's legislative history indicates that Congress intended to regulate recreational and commercial hunting"); *Mahler*, 927 F. Supp. at 1574 ("The MBTA was designed to forestall hunting of migratory birds and the sale of their parts"). Testimony concerning the MBTA given by the Solicitor's Office for the Department of Agriculture underscores this focus:

> We people down here hunt [migratory birds]. The Canadians reasonably want some assurances from the United States that if they let those birds rear their young up there and come down here, we will preserve a sufficient supply to permit them to go back there.

Protection of Migratory Birds: Hearing on H.R. 20080 Before the House Comm. on Foreign Affairs, 64th Cong. 22–23 (1917) (statement of R.W. Williams, Solicitor's Office, Department of Agriculture). Likewise, the Chief of the Department of Agriculture's Bureau of Biological Survey noted that he "ha[s] always had the idea that [passenger pigeons] were destroyed by overhunting, being killed for food and for sport." *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).

Statements from individual Congressmen evince a similar focus on hunting. Senator Smith, "who introduced and championed the Act . . . in the Senate," *Leaders in Recent Successful Fight for the Migratory Bird Treaty Act*, BULLETIN – THE AMERICAN GAME PROTECTIVE ASSOCIATION, July 1918, at 5, explained:

> Nobody is trying to do anything here except to keep pothunters from killing game out of season, ruining the eggs of nesting birds, and ruining the country by it.

> Enough birds will keep every insect off of every tree in America, and if you will quit shooting them they will do it.

55 CONG. REC. 4816 (statement of Sen. Smith) (1917). Likewise, during hearings of the House Foreign Affairs Committee, Congressman Miller, a "vigorous fighter, who distinguished himself in the debate" over the MBTA, *Leaders in Recent Successful Fight for the Migratory Bird Treaty Act*, BULLETIN – THE AMERICAN GAME PROTECTIVE ASSOCIATION, July 1918, at 5, put the MBTA squarely in the context of hunting:

> I want to assure you . . . that I am heartily in sympathy with this legislation. I want it to go through, because I am up there every fall, and I know what the trouble is. The trouble is in shooting the ducks in Louisiana, Arkansas, and Texas in the summer time, and also killing them when they are nesting up in Canada.

Protection of Migratory Birds: Hearing on H.R. 20080 Before the House Comm. on Foreign Affairs, 64th Cong. 7 (1917) (statement of Rep. Miller).

In seeking to take a broader view of congressional purpose, the *Moon Lake* court looked to other contemporary statements that cited the destruction of habitat, along with improvements in firearms, as a cause of the decline in migratory bird populations. The court even suggested that these statements, which "anticipated application of the MBTA to children who act 'through inadvertence' or 'through accident,'" supported a broader reading of the legislative history. *Moon Lake*, 45 F. Supp. 2d at 1080–81. Upon closer examination, these statements are instead consistent with a limited reading of the MBTA.

One such contemporary statement cited by the court is a letter from Secretary of State Robert Lansing to the President attributing the decrease in migratory bird populations to two general issues:

- Habitat destruction, described generally as "the extension of agriculture, and particularly the draining on a large scale of swamps and meadows;" and
- Hunting, described in terms of "improved firearms and a vast increase in the number of sportsmen."

These statements were referenced by Representative Baker during the House floor debate over the MBTA, implying that the MBTA was intended to address both issues. *Moon Lake*, 45 F. Supp. 2d at 1080–81 (quoting H. REP. NO. 65-243, at 2 (1918) (letter from Secretary of State Robert Lansing to the President)). However, Congress addressed hunting and habitat destruction in the context of the Migratory Bird Treaty through two separate acts:

- First, in 1918, Congress adopted the MBTA to address the direct and intentional killing of migratory birds;
- Second, in 1929, Congress adopted the Migratory Bird Conservation Act to "more effectively" implement the Migratory Bird Treaty by protecting certain migratory bird habitats.

The Migratory Bird Conservation Act provided the authority to purchase or rent land for the conservation of migratory birds, including for the establishment of inviolate "sanctuaries" wherein migratory bird habitats would be protected from persons "cut[ting], burn[ing], or destroy[ing] any timber, grass, or other natural growth." Migratory Bird Conservation Act, § 10, 45 Stat. 1222, 1224 (1929) (codified as amended at 16 U.S.C. 715–715s). If the MBTA was originally understood to protect migratory bird habitats from incidental destruction, enactment of the Migratory Bird Conservation Act eleven years later would have been largely superfluous. Instead, the MBTA and the Migratory Bird Conservation Act are complementary: "Together, the Treaty Act in regulating hunting and possession and the Conservation Act by establishing

sanctuaries and preserving natural waterfowl habitat help implement our national commitment to the protection of migratory birds." *United States* v. *North Dakota*, 650 F.2d 911, 913–14 (8th Cir. 1981), *aff'd on other grounds*, 460 U.S. 300 (1983).

Some courts have attempted to interpret a number of floor statements as supporting the notion that Congress intended the MBTA to regulate more than just hunting and poaching, but those statements reflect an intention to prohibit actions directed at birds—whether accomplished through hunting or some other means intended to directly kill birds. For example, some Members "anticipated application of the MBTA to children who act 'through inadvertence' or 'through accident.'"

> What are you going to do in a case like this: A barefoot boy, as barefoot boys sometimes do, largely through inadvertence and without meaning anything wrong, happens to throw a stone at and strikes and injures a robin's nest and breaks one of the eggs, whereupon he is hauled before a court for violation of a solemn treaty entered into between the United States of America and the Provinces of Canada.

Moon Lake, 45 F. Supp. 2d at 1081 (quoting 56 CONG. REC. 7455 (1918) (statement of Rep. Mondell)). "[I]nadvertence" in this statement refers to the boy's *mens rea*. As the rest of the sentence clarifies, the hypothetical boy acted "without *meaning* anything wrong," not that he acted unintentionally or accidentally in damaging the robin's nest. This is reinforced by the rest of the hypothetical, which posits that the boy threw "a stone *at* and strikes and injures a robin's nest." The underlying act is directed specifically at the robin's nest. In other statements various members of Congress expressed concern about "sportsmen," people "killing" birds, "shooting" of game birds or "destruction" of insectivorous birds, and whether the purpose of the MBTA was

to favor a steady supply of "game animals for the upper classes." *Moon Lake*, 45 F. Supp. 2d at 1080–81. One Member of Congress even offered a statement that explains why the statute is not redundant in its use of the various terms to explain what activities are regulated: "[T]hey cannot hunt ducks in Indiana in the fall, because they cannot kill them. I have never been able to see why you cannot hunt, whether you kill or not. There is no embargo on hunting, at least down in South Carolina . . . ." *Id*. at 1081 (quoting 56 Cong. Rec. 7446 (1918) (statement of Rep. Stevenson)). That Congress was animated regarding potential restrictions on hunting and its impact on individual hunters is evident from even the statements relied upon as support for the conclusion that the statute reaches incidental take.

Finally, in 1918, Federal regulation of the hunting of wild birds was a highly controversial and legally fraught subject. For example, on the floor of the Senate, Senator Reed proclaimed:

> I am opposed not only now in reference to this bill [the MBTA], but I am opposed as a general proposition to conferring power of that kind upon an agent of the Government. . . .
>
> . . . Section 3 proposes to turn these powers over to the Secretary of Agriculture . . . to make it a crime for a man to shoot game on his own farm or to make it perfectly legal to shoot it on his own farm . . . .
>
> When a Secretary of Agriculture does a thing of that kind I have no hesitancy in saying that he is doing a thing that is utterly indefensible, and that the Secretary of Agriculture who does it ought to be driven from office ….

55 CONG. REC. 4813 (1917) (statement of Sen. Reed).

Federal regulation of hunting was also legally tenuous at that time. Whether the Federal Government had any authority to regulate the killing or taking of any wild animal was an open question in 1918. Just over 20 years earlier, the Supreme Court in *Geer* had ruled that the States exercised the power of ownership over wild game in trust, implicitly precluding Federal regulation. *See Geer* v. *Connecticut*, 161 U.S. 519 (1896). When Congress did attempt to assert a degree of Federal jurisdiction over wild game with the 1913 Weeks-McLean Law, it was met with mixed results in the courts, leaving the question pending before the Supreme Court at the time of the MBTA's enactment. *See, e.g., United States* v. *Shaver*, 214 F. 154, 160 (E.D. Ark. 1914); *United States* v. *McCullagh*, 221 F. 288 (D. Kan. 1915). It was not until *Missouri* v. *Holland* in 1920 that the Court, relying on authority derived from the Migratory Bird Treaty (Canada Convention) under the Treaty Clause of the U.S. Constitution, definitively acknowledged the Federal Government's ability to regulate the taking of wild birds. 252 U.S. 416, 432–33 (1920).

Given the legal uncertainty and political controversy surrounding Federal regulation of intentional hunting in 1918, it is highly unlikely that Congress intended to confer authority upon the executive branch to prohibit all manner of activity that had an incidental impact on migratory birds.

The provisions of the 1916 Canada Convention provide support for this conclusion by authorizing only certain circumscribed activities specifically directed at migratory birds. The Convention authorizes hunting only during prescribed open seasons, and take at any time for other limited purposes such as scientific use, propagation, or to resolve conflicts under extraordinary conditions when birds become seriously injurious to agricultural or other interests. *See* Canada Convention, Art. II–VII, 39 Stat. 1702.

Subsequent legislative history does not undermine a limited interpretation of the MBTA, as enacted in 1918. The "fixed-meaning canon of statutory construction directs that "[w]ords must be given the meaning they had when the text was adopted." SCALIA & GARNER at 78. The meaning of written instruments "does not alter. That which it meant when adopted, it means now." *South Carolina* v. *United States*, 199 U.S. 437, 448 (1905).

The operative language in section 2 of the MBTA has changed little since its adoption in 1918. The current iteration of the relevant language—making it unlawful for persons "at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess" specific migratory birds—was adopted in 1935 as part of the Mexico Treaty Act and has remained unchanged since then. *Compare* Mexico Treaty Act, 49 Stat. 1555, § 3 *with* 16 U.S.C. 703(a). As with the 1916 Canada Convention, the Mexico Convention focused primarily on hunting and establishing protections for birds in the context of take and possession for commercial use. *See* Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, 50 Stat. 1311 (Feb. 7, 1936) (Mexico Convention). Subsequent Protocols amending both these Conventions also did not explicitly address incidental take or otherwise broaden their scope to prohibit anything other than purposeful take of migratory birds. *See* Protocol between the Government of the United States and the Government of Canada Amending the 1916 Convention between the United Kingdom and the United States of America for the protection of Migratory Birds, Sen. Treaty Doc. 104-28 (Dec. 14, 1995) (outlining conservation principles to ensure long-term conservation of migratory birds, amending closed seasons, and authorizing indigenous groups to harvest migratory birds and eggs throughout the year for subsistence purposes); Protocol between the Government of the United States of America and the Government of the United Mexican States Amending the

Convention for Protection of Migratory Birds and Game Mammals, Sen. Treaty Doc. 105-26 (May 5, 1997) (authorizing indigenous groups to harvest migratory birds and eggs throughout the year for subsistence purposes).

It was not until more than 50 years after the initial adoption of the MBTA and 25 years after the Mexico Treaty Act that Federal prosecutors began applying the MBTA to incidental actions. *See* Lilley & Firestone at 1181 ("In the early 1970s, *United States* v. *Union Texas Petroleum* [No, 73-CR-127 (D. Colo. Jul. 11, 1973)] marked the first case dealing with the issue of incidental take."). This newfound Federal authority was not accompanied by any corresponding legislative change. The only contemporaneous changes to section 2 of the MBTA were technical updates recognizing the adoption of a treaty with Japan. *See* Act of June 1, 1974, Pub. L. No. 93-300, 88 Stat. 190. Implementing legislation for the treaty with the Soviet Union also did not amend section 2. *See* Fish and Wildlife Improvement Act of 1978, Pub. L. No. 95-616, sec. 3(h), 92 Stat. 3110. Similar to the earlier Conventions, the provisions of the Japan and Russia Conventions authorized purposeful take for specific activities such as hunting, scientific, educational and propagation purposes, and protection against injury to persons and property. However, they also outlined mechanisms to protect habitat and prevent damage from pollution and other environmental degradation (domestically implemented by the Migratory Bird Conservation Act and other applicable Federal laws). *See* Convention between the Government of the United States and the Government of Japan for the Protection of Migratory birds and Birds in Danger of Extinction, and their Environment, 25 U.S.T. 3329, T.I.A.S. No. 7990 (Mar. 4, 1972) (Japan Convention); Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and their Environment, T.I.A.S. No. 9073 (Nov. 19, 1976) (Russia Convention).

No changes were made to the section of the MBTA at issue here following the later conventions except that the Act was modified to include references to these later agreements. Certainly other Federal laws may require consideration of potential impacts to birds and their habitat in a way that furthers the goals of the Conventions' broad statements. *See*, *e.g.*, *Mahler*, 927 F. Supp. at 1581 ("Many other statutes enacted in the intervening years also counsel against reading the MBTA to prohibit any and all migratory bird deaths resulting from logging activities in national forests. As is apparent from the record in this case, the Forest Service must comply with a myriad of statutory and regulatory requirements to authorize even the very modest type of salvage logging operation of a few acres of dead and dying trees at issue in this case. Those laws require the Forest Service to manage national forests so as to balance many competing goals, including timber production, biodiversity, protection of endangered and threatened species, human recreation, aesthetic concerns, and many others."). Given the overwhelming evidence that the primary purpose of section 2, as amended by the Mexico Treaty Act, was to control over-hunting, the references to the later agreements do not bear the weight of the conclusion reached by the prior Opinion (M-37041).

Thus, the only legislative enactment concerning incidental activity under the MBTA is the 2003 appropriations bill that explicitly exempted military-readiness activities from liability under the MBTA for incidental takings. *See* Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, Div. A, Title III, § 315, 116 Stat. 2509 (2002), *reprinted in* 16 U.S.C.A. 703, Historical and Statutory Notes. There is nothing in this legislation that authorizes the government to pursue incidental takings charges in other contexts. Rather, some have "argue[d] that Congress expanded the definition of 'take' by negative implication" since "[t]he exemption did not extend to the 'operation of industrial facilities,' even though the

government had previously prosecuted activities that indirectly affect birds." *CITGO*, 801 F.3d at 490-91.

This argument is contrary to the Court's admonition that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). As the Fifth Circuit explained, "[a] single carve-out from the law cannot mean that the entire coverage of the MBTA was implicitly and hugely expanded." *CITGO*, 801 F.3d at 491. Rather, it appears Congress acted in a limited fashion to preempt a specific and immediate impediment to military-readiness activities. "Whether Congress deliberately avoided more broadly changing the MBTA or simply chose to address a discrete problem, the most that can be said is that Congress did no more than the plain text of the amendment means." *Id*. It did not hide the elephant of incidental takings in the mouse hole of a narrow appropriations provision.

Constitutional Issues

The Supreme Court has recognized that "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). Accordingly, a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Fox Television*, 567 U.S. at 253 (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)). Thus, "[a] conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary

intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Id.* (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008)).

Assuming, *arguendo*, that the MBTA is ambiguous, the interpretation that limits its application to conduct that is specifically directed at birds is necessary to avoid potential constitutional concerns. As the Court has advised, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Here, an attempt to impose liability for acts that are not directed at migratory birds raises just such constitutional concerns.

The "scope of liability" under an interpretation of the MBTA that extends criminal liability to all persons who kill or take migratory birds incidental to another activity is "hard to overstate," *CITGO*, 801 F.3d at 493, and "offers unlimited potential for criminal prosecutions." *Brigham Oil*, 840 F. Supp. 2d at 1213. "The list of birds now protected as 'migratory birds' under the MBTA is a long one, including many of the most numerous and least endangered species one can imagine." *Mahler*, 927 F. Supp. at 1576. Currently, over 1,000 species of birds—including "all species native to the United States or its territories"—are protected by the MBTA. 78 FR 65,844, 65,845 (Nov. 1, 2013); s*ee also* 50 CFR 10.13 (list of protected migratory birds); Migratory Bird Permits; Programmatic Environmental Impact Statement, 80 FR 30032, 30033 (May 26, 2015) ("Of the 1,027 currently protected species, approximately 8% are either listed (in whole or in part) as threatened or endangered under the Endangered Species

Act (ESA) (16 U.S.C. 1531 *et seq*.) and 25% are designated (in whole or in part) as Birds of Conservation Concern (BCC).”). Service analysis indicates that the top threats to birds are:

- Cats, which kill an estimated 2.4 billion birds per year;
- Collisions with building glass, which kill an estimated 599 million birds per year;
- Collisions with vehicles, which kill an estimated 214.5 million birds per year;
- Chemical poisoning (e.g., pesticides and other toxins), which kill an estimated 72 million birds per year;
- Collisions with electrical lines, which kill an estimated 25.5 million birds per year;
- Collisions with communications towers, which kill an estimated 6.6 million birds per year;
- Electrocutions, which kill an estimated 5.6 million birds per year;
- Oil pits, which kill an estimated 750 thousand birds per year; and
- Collisions with wind turbines, which kill an estimated 234 thousand birds per year.

U.S. Fish and Wildlife Service, Threats to Birds: Migratory Birds Mortality—Questions and Answers, *available at* https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php (last updated September 14, 2018).

Interpreting the MBTA to apply strict criminal liability to any instance where a migratory bird is killed as a result of these threats would certainly be a clear and understandable rule. *See United States* v. *Apollo Energies, Inc.*, 611 F.3d 679, 689 (10th Cir. 2010) (concluding that under an incidental take interpretation, “[t]he actions criminalized by the MBTA may be legion, but they are not vague”). But it would also turn the majority of Americans into potential criminals. *See Mahler*, 927 F. Supp. 1577–78 (listing a litany of scenarios where normal everyday actions could potentially and incidentally lead to the death of a single bird or breaking of an egg in a

nest)). Such an interpretation could lead to absurd results, which are to be avoided. *See Griffin* v. *Oceanic Contractors*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); *see also K Mart Corp.* v. *Cartier*, 486 U.S. 281, 324 n.2 (1988) (Scalia, J. concurring in part and dissenting in part) ("it is a venerable principle that a law will not be interpreted to produce absurd results.").

These potentially absurd results are not ameliorated by limiting the definition of "incidental take" to "direct and foreseeable" harm as some courts have suggested. *See* U.S. FISH AND WILDLIFE SERVICE MANUAL, part 720, ch. 3, *Incidental Take Prohibited Under the Migratory Bird Treaty Act* (Jan. 11, 2017). The court in *Moon Lake* identified an "important and inherent limiting feature of the MBTA's misdemeanor provision: to obtain a guilty verdict . . . , the government must prove proximate causation." *Moon Lake*, 45 F. Supp. 2d at 1085. Quoting Black's Law Dictionary, the court defines proximate cause as "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be *reasonably anticipated or foreseen as a natural consequence of the wrongful act*." *Id.* (quoting BLACK'S LAW DICTIONARY 1225 (6th ed. 1990)) (emphasis in original). The Tenth Circuit in *Apollo Energies* took a similar approach, holding "the MBTA requires a defendant to proximately cause the statute's violation for the statute to pass constitutional muster" and quoting from Black's Law Dictionary to define "proximate cause." *Apollo Energies*, 611 F.3d at 690.

Contrary to the suggestion of the courts in *Moon Lake* and *Apollo Energies* that principles of proximate causation can be read into the statute to define and limit the scope of incidental

take, the death of birds as a result of activities such as driving, flying, or maintaining buildings with large windows is a "direct," "reasonably anticipated," and "probable" consequence of those actions. As discussed above, collisions with buildings and cars are the second and third most common human-caused threat to birds, killing an estimated 599 million and 214.5 million birds per year, respectively. It is eminently foreseeable and probable that cars and windows will kill birds. Thus, limiting incidental take to direct and foreseeable results does little to prevent absurd outcomes.

To avoid these absurd results, the government has historically relied on prosecutorial discretion. *See* Ogden at 29 ("Historically, the limiting mechanism on the prosecution of incidental taking under the MBTA by non-federal persons has been the exercise of prosecutorial discretion by the FWS."); *see generally FMC*, 572 F.2d at 905 (situations "such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings . . . properly can be left to the sound discretion of prosecutors and the courts"). Yet, the Supreme Court has declared "[i]t will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions." *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964); *see also Mahler*, 927 F. Supp. 1582 ("Such trust in prosecutorial discretion is not really an answer to the issue of statutory construction" in interpreting the MBTA.). For broad statutes that may be applied to seemingly minor or absurd situations, "[i]t is no answer to say that the statute would not be applied in such a case." *Keyishian* v. *Bd. of Regents*, 385 U.S. 589, 599 (1967).

Recognizing the challenge posed by relying upon prosecutorial discretion, the *FMC* court sought to avoid absurd results by limiting its holding to "extrahazardous activities." *FMC*, 572

F.2d at 907. The term "extrahazardous activities" is not found anywhere in the statute, and is not defined by either the court or the Service. *See Mahler*, 927 F. Supp. at 1583 n.9 (noting that the *FMC* court's "limiting principle … of strict liability for hazardous commercial activity … ha[s] no apparent basis in the statute itself or in the prior history of the MBTA's application since its enactment"); *cf. United States* v. *Rollins*, 706 F. Supp. 742, 744–45 (D. Idaho 1989) ("The statute itself does not state that poisoning of migratory birds by pesticide constitutes a criminal violation. Such specificity would not have been difficult to draft into the statute"). Thus, it is unclear what activities are "extrahazardous." In *FMC*, the concept was applied to the manufacture of "toxic chemicals," *i.e.*, pesticides. But the court was silent as to how far this rule extends, even in the relatively narrow context of pesticides.

This type of uncertainty could be problematic under the Supreme Court's due process jurisprudence. *See Rollins*, 706 F. Supp. at 745 (dismissing charges against a farmer who applied pesticides to his fields that killed a flock of geese, reasoning "[f]armers have a right to know what conduct of theirs is criminal, especially where that conduct consists of common farming practices carried on for many years in the community. While statutes do not have to be drafted with 'mathematical certainty,' they must be drafted with a 'reasonable degree of certainty.' The MBTA fails this test. … Under the facts of this case, the MBTA does not give 'fair notice as to what constitutes illegal conduct' so that [the farmer] could 'conform his conduct to the requirements of the law.'" (internal citations omitted)).

While the MBTA does contemplate the issuance of permits authorizing the taking of wildlife, it requires such permits to be issued by "regulation." *See* 16 U.S.C. 703(a) ("Unless and except as permitted *by regulations* made as hereinafter provided …." (emphasis added)). No regulations have been issued to create a permit scheme to authorize incidental take, so most

potential violators have no formal mechanism to ensure that their actions comply with the law. There are voluntary Service guidelines issued for different industries that recommend best practices to avoid incidental take of protected birds; however, these guidelines provide only limited protection to potential violators. Moreover, most of the Service's MBTA guidelines have not gone through the formal Administrative Procedure Act processes to be considered "regulations" and thus are not issued under the permitting authority of section 3 of the MBTA.

In the absence of a permit issued pursuant to Departmental regulation, it is not clear that the Service has any authority under the MBTA to require minimizing or mitigating actions that balance the environmental harm from the taking of migratory birds with other societal goals, such as the production of wind or solar energy. Accordingly, the guidelines do not provide enforceable legal protections for people and businesses who abide by their terms. To wit, the guidelines themselves state that "it is not possible to absolve individuals or companies" from liability under the MBTA. Rather, the guidelines are explicit that the Service may only take full compliance into consideration in exercising its discretion whether or not to refer an individual or company to the Department of Justice for prosecution. *See*, *e.g.*, U.S. FISH AND WILDLIFE SERVICE, LAND-BASED WIND ENERGY GUIDELINES 6 (Mar. 23, 2012).

Under this approach, it is literally impossible for individuals and companies to know exactly what is required of them under the law when otherwise lawful activities necessarily result in accidental bird deaths. Even if they comply with everything requested of them by the Service, they may still be prosecuted, and still found guilty of criminal conduct. *See generally United States* v. *FMC Corp.*, 572 F.2d 902, 904 (2d Cir. 1978) (the court instructed the jury not to consider the company's remediation efforts as a defense: "Therefore, under the law, good will and good intention and measures taken to prevent the killing of the birds are not a defense."). In

sum, due process "requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" *Smith* v. *Goguen*, 415 U.S. 566, 572–73 (1974).

Reading the MBTA to capture incidental takings could potentially transform average Americans into criminals. The text, history, and purpose of the MBTA demonstrate instead that it is a law limited in relevant part to actions, such as hunting and poaching, that reduce migratory birds and their nests and eggs to human control by killing or capturing. Even assuming that the text could be subject to multiple interpretations, courts and agencies are to avoid interpreting ambiguous laws in ways that raise constitutional doubts if alternative interpretations are available. Thus, interpreting the MBTA to criminalize incidental takings raises potential due process concerns. Based upon the text, history, and purpose of the MBTA, and consistent with decisions in the Courts of Appeals for the Fifth, Eighth, and Ninth circuits, there is an alternative interpretation that avoids these concerns. Therefore, as a matter of law, the scope of the MBTA does not include incidental take.

Policy Analysis of Incidental Take Under the MBTA

As detailed above, the Service agrees that the conclusion in Opinion M-37050 that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to actions directed at migratory birds, their nests, or their eggs is compelled as a matter of law. In addition, even if such a conclusion is not legally compelled, the Service proposes to adopt it as a matter of policy.

The Service's prior approach to incidental take was enacted without public input, and has resulted in regulatory uncertainty and inconsistency. Prosecutions for incidental take occurred in

the 1970s without any accompanying change in either the underlying statute or Service regulations. Accordingly, an interpretation with implications for large portions of the American economy was implicitly adopted without public debate. Subsequently, the Service has sought to limit the potential reach of MBTA liability by pursuing enforcement proceedings only against persons who fail to take what the Service considers "reasonable" precautions against foreseeable risks.

Based upon the Service's analysis of manmade threats to migratory birds and the Service's own enforcement history, common activities such as owning and operating a power line, wind farm, or drilling operation pose an inherent risk of incidental take. An expansive reading of the MBTA that includes an incidental take prohibition would subject those who engage in these common, and necessary, activities to criminal liability.

As described in M-37050, this approach effectively leaves otherwise lawful, productive, and often necessary businesses to take their chances and hope they avoid prosecution, not because their conduct is or even can be in strict compliance with the law, but because the government has chosen to forgo prosecution. Productive and otherwise lawful economic activity should not be functionally dependent upon the ad hoc exercise of enforcement discretion.

Further, as a practical matter, inconsistency and uncertainty are built into the MBTA enforcement regime by virtue of a split between Federal Courts of Appeals. Courts have adopted different views on whether section 2 of the MBTA prohibits incidental take, and, if so, to what extent. Courts of Appeals in the Second and Tenth Circuits, as well as district courts in at least the Ninth and District of Columbia Circuits, have held that the MBTA criminalizes some instances of incidental take, generally with some form of limiting construction. *See United States* v. *FMC Corporation*, 572 F.2d 902 (2d Cir. 1978); *United States* v. *Apollo Energies, Inc.*,

611 F.3d 679 (10th Cir. 2010); *United States* v. *Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal. 1978); *Ctr. for Biological Diversity* v. *Pirie*, 191 F. Supp. 2d 161 (D.D.C. 2002), *vacated on other grounds sub nom. Ctr. for Biological Diversity* v. *England*, 2003 App. LEXIS 1110 (D.C. Cir. 2003).

By contrast, Courts of Appeals in the Fifth, Eighth, and Ninth Circuits, as well as district courts in the Third and Seventh Circuits, have indicated that it does not.[1] *See United States* v. *CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015); *Newton County Wildlife Ass'n* v. *U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997); *Seattle Audubon Soc'y* v. *Evans*, 952 F.2d 297 (9th Cir. 1991); *Mahler* v. *U.S. Forest Serv.*, 927 F. Supp. 1559 (S.D. Ind. 1996); *Curry* v. *U.S. Forest Serv.*, 988 F. Supp. 541, 549 (W.D. Pa. 1997).

As a result of these cases, the Federal Government is clearly prohibited from enforcing an incidental take prohibition in the Fifth Circuit. In the Eighth Circuit, the Federal Government has previously sought to distinguish court of appeals rulings limiting the scope of the MBTA to the habitat-destruction context. *See generally Apollo Energies*, 611 F.3d at 686 (distinguishing the Eighth Circuit decision in *Newton County* on the grounds that it involved logging that modified a bird's habitat in some way). However, that argument was rejected by a subsequent district court. *See United States* v. *Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202 (D.N.D. 2012). Likewise, the Federal Government has sought to distinguish holdings in the habitat-destruction context in the Ninth Circuit. *See United States* v. *Moon Lake Electrical Ass'n*, 45 F. Supp. 2d 1070, 1075-76 (D. Colo. 1999) (suggesting that the Ninth Circuit's ruling in *Seattle Audubon* may be limited to habitat modification or destruction). In the Second and Tenth

[1] The Court of Appeals for the Ninth Circuit distinguished, without explicitly overturning, an earlier district-court decision concerning incidental take.

Circuits, the Federal Government can apply the MBTA to incidental take, albeit with differing judicial limitations.

These cases demonstrate the potential for a convoluted patchwork of legal standards, all purporting to apply the same underlying law. The MBTA is a national law. Many of the companies and projects that face potential liability under the MBTA operate across boundary lines for judicial circuits. Yet what is legal in the Fifth and Eighth Circuits may become illegal as soon as an operator crosses State lines into the bordering Tenth Circuit, or become a matter of uncertainty in the Ninth Circuit. The Service concludes that it is in its own interest, as well as that of the public, to have and apply a national standard that sets a clear, articulable rule for when an operator crosses the line into criminality. The most effective way to reduce uncertainty and have a truly national standard is for the Service to codify and apply a uniform interpretation of the MBTA that its prohibitions do not apply to incidental take, based upon the Fifth Circuit's ruling in *CITGO Petroleum Corporation*.

Therefore, as a matter of both law and policy, the Service proposes to adopt a regulation limiting the scope of the MBTA to actions that are directed at migratory birds, their nests, or their eggs, and to clarify that injury to or mortality of migratory birds that results from, but is not the purpose of, an action (i.e., incidental taking or killing) is not prohibited by the Migratory Bird Treaty Act.

Public Comments

You may submit your comments and supporting materials by one of the methods listed in **ADDRESSES**. We will not consider comments sent by email or fax, or written comments sent to an address other than the one listed in **ADDRESSES**.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, are available for public inspection at http:// www.regulations.gov. We will post your entire comment—including your personal identifying information—on http:// www.regulations.gov. You may request at the top of your document that we withhold personal information such as your street address, phone number, or email address from public review; however, we cannot guarantee that we will be able to do so.

We invite the public to provide information on the following topics: (1) the avoidance, minimization, and mitigation measures entities employed to address incidental take of migratory birds, and the degree to which these measures reduce bird mortality; (2) the extent that avoidance, minimization, and mitigation measures continue to be used, and will continue to be used if this proposed rule is finalized; (3) the direct costs associated with implementing these measures; (4) indirect costs entities have incurred related to the legal risk of prosecution for incidental take of migratory birds (e.g., legal fees, increased interest rates on financing, insurance, opportunity costs); (5) the sources and scale of incidental bird mortality; and (6) any quantitative information regarding ecosystem services provided by migratory birds. This information will be used to better inform the cost and benefit analysis of this rulemaking.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty,

and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

Codifying the Solicitor's Opinion, M-37050, into Federal regulations would provide the public, businesses, government agencies, and other entities legal clarity and certainty regarding what is and is not prohibited under the MBTA. It is anticipated that some entities that currently employ mitigation measures to reduce or eliminate incidental migratory bird take would reduce or curtail these activities given the legal certainty provided by this proposed regulation. Others may continue to employ these measures voluntarily for various reasons, including continued compliance with other Federal, State, and local laws and regulations.

The Service does not have information available to quantify these potential cost savings. Given our lack of specific data to estimate the cost savings from reduced implementation of mitigation measures and increased legal certainty, we ask for such data to inform analysis of the proposed rule's potential effects.

Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104-121)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that

describes the effects of the rule on small businesses, small organizations, and small government jurisdictions. However, in lieu of an initial or final regulatory flexibility analysis (IRFA or FRFA) the head of an agency may certify on a factual basis that the rule would not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities. Thus, for an initial/final regulatory flexibility analysis to be required, impacts must exceed a threshold for "significant impact" and a threshold for a "substantial number of small entities." *See* 5 U.S.C. 605(b). This analysis first estimates the number of businesses impacted and then estimates the economic impact of the rule.

Table 1 lists the industry sectors likely impacted by the proposed rule. These are the industries that typically incidentally take substantial numbers of birds and that the Service has worked with to reduce those effects. In some cases, these industries have been subject to enforcement actions and prosecutions under the MBTA prior to the issuance of the M-Opinion. The vast majority of entities in these sectors are small entities, based on the U.S. Small Business Administration (SBA) small business size standards.

TABLE 1 – DISTRIBUTION OF BUSINESSES WITHIN AFFECTED INDUSTRIES

NAICS Industry Description	NAICS Code	Number of Businesses	Small Business Size Standard	Number of Small Businesses
Finfish Fishing	114111	1,210	20 employees[(a)]	1,185
Crude Petroleum and Natural Gas Extraction	211111	6,878	1,250 employees	6868
Drilling Oil and Gas Wells	213111	2,097	1,000 employees	2092
Solar Electric Power Generation	221114	153	250 employees	153
Wind Electric Power Generation	221115	264	250 employees	263
Electric Bulk Power Transmission	221121	261	500 employees	214
Electric Power Distribution	221122	7,557	1,000 employees	7520
Wireless Telecommunications Carriers (except Satellite)	517312	15,845	1,500 employees	15831

Source: U.S. Census Bureau, 2012 County Business Patterns.

[a]Note: The Small Business Administration size standard for finfish fishing is $22 million. Neither Economic Census, Agriculture Census, or NMFS collect business data by revenue size for the finfish industry. Therefore, we employ other data to approximate the number of small businesses. Source: U.S. Census Bureau, 2017 Economic Annual Survey

Since the Service does not have a permitting system authorizing incidental take of migratory birds, the Service does not have specific information regarding how many businesses in each sector implement measures to reduce incidental take of birds. Not all businesses in each sector incidentally take birds. In addition, a variety of factors would influence whether, under the previous interpretation of the MBTA, businesses would implement such measures. It is also unknown how many businesses continued or reduced practices to reduce the take of birds since publication of the Solicitor's M-Opinion.

This proposed rule is deregulatory in nature and is thus likely to have a positive economic impact on all regulated entities, and many of these entities likely qualify as small businesses under the Small Business Administration's threshold standards (see Table 1). By codifying the M-Opinion, this proposal would remove legal uncertainty for any individual, government entity, or business entity that undertakes any activity that may kill or take migratory birds incidental to otherwise lawful activity. Such small entities would benefit from this proposed rule because it would remove uncertainty about the potential impacts of proposed projects. Therefore, these entities will have better information for planning projects and achieving goals.

However, the economic impact of the proposed rule on small entities is likely not significant. The costs of actions businesses typically implement to reduce effects on birds are small compared to the economic 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. Table 2 summarizes likely economic effects of the proposed rule on the business sectors identified in Table 1.

TABLE 2 – SUMMARY OF ECONOMIC EFFECTS ON SMALL BUSINESSES

NAICS Industry Description	NAICS Code	Bird mitigation measures with no action	Economic effects on small businesses	Rationale
Finfish Fishing	11411	Changes in design of longline fishing hooks, change in offal management practices, and flagging/streamers on fishing lines	Likely minimal effects	Longline fishing is regulated by the National Marine Fisheries Service under the Magnuson–Stevens Fishery Conservation and Management Act and other laws and regulations that limit bi-catch; thus, continuation of these mitigation measures is likely.
Crude Petroleum and Natural Gas Extraction	211111	Using closed waste water systems or netting of oil pits and ponds	Likely minimal effects	Several States have regulations governing the treatment of oil pits, including measures beneficial to birds. In addition, much of the industry is increasingly using closed systems, which do not pose a risk to birds. For these reasons, the proposed rule is unlikely to affect a significant number of small entities.
Drilling Oil and Gas Wells	213111	Using closed waste water systems or netting of oil pits and ponds	Likely minimal effects	Several States have regulations governing the treatment of oil pits, including measures beneficial to birds. In addition, much of the industry is increasingly using closed systems, which do not pose a risk to birds. For these reasons, the proposed rule is unlikely to affect a significant number of small entities.
Solar Electric Power Generation	221114	Monitoring bird use and mortality at facilities, limited use of deterrent systems such as streamers and reflectors	Likely minimal effects	Bird monitoring in some States would continue to be required under State policies. Where not required, monitoring costs are likely not significant compared to overall project costs.
Wind Electric Power Generation	221115	Following Wind Energy Guidelines, which involve conducting risk assessments for siting facilities	Likely minimal effects	Following 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.
Electric Bulk Power Transmission	221121	Following Avian Power Line Interaction Committee (APLIC) guidelines	Likely minimal effects	Industry would likely continue to use APLIC guidelines to reduce outages caused by birds and to reduce the take of eagles, regulated under the Bald and Golden Eagle Protection Act.
Electric Power Distribution	221122	Following Avian Power Line Interaction Committee (APLIC) guidelines	Likely minimal effects	Industry would likely continue to use APLIC guidelines to reduce outages caused by birds and to reduce the take of eagles, regulated under the Bald and Golden Eagle Protection Act.
Wireless Telecommunications Carriers (except Satellite)	517312	Installation of flashing obstruction lighting	Likely minimal effects	Industry will likely continue to install flashing obstruction lighting to save energy costs and to comply with recent Federal Aviation Administration Lighting Circular and Federal Communication Commission regulations.

To improve our analysis of this proposed rule's effects on small entities, we encourage the submission of relevant information during the public comment period as described above under *Regulatory Planning and Review*, such as additional industry sectors affected, the number of small entities affected, and the scale and nature of economic effects.

As explained above and in the rationale set forth in *Regulatory Planning and Review,* the economic effects on all regulated entities will be positive and that this proposed rule is not a major rule under SBREFA (5 U.S.C. 804(2)). Moreover, we certify that the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.

Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs

We expect that this proposed rule will be an Executive Order (E.O.) 13771 (82 FR 9339, February 3, 2017) deregulatory action.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we have determined the following:

a. This proposed rule would not "significantly or uniquely" affect small government activities. A small government agency plan is not required.

b. This proposed rule would not produce a Federal mandate on local or State government or private entities. Therefore, this action is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

Takings

In accordance with E.O. 12630, this proposed rule does not contain a provision for taking of private property, and would not have significant takings implications. A takings implication assessment is not required.

Federalism

This proposed rule would not interfere with the States' abilities to manage themselves or their funds. This rule would not have sufficient federalism effects to warrant preparation of a federalism summary impact statement under E.O. 13132.

Civil Justice Reform

In accordance with E.O. 12988, we have reviewed this proposed rule and determined that it will not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44

U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We are evaluating this proposed regulation in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), and the Department of the Interior Manual (516 DM 8). We will complete our analysis, in compliance with NEPA, before finalizing this regulation.

Compliance with Endangered Species Act Requirements

Section 7 of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531–44), requires that "The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act." 16 U.S.C. 1536(a)(1)It further states that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. 1536(a)(2)Before the Service issues a final rule regarding take of migratory birds, we will comply with provisions of the ESA as necessary to ensure that the proposed amendments are not likely to jeopardize the continued existence of any species designated as endangered or threatened or destroy or adversely modify its critical habitat.

Government-to-Government Relationship with Tribes

In accordance with Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," and the Department of the Interior's manual at 512 DM 2, we are

considering the possible effects of this proposed rule on federally recognized Indian Tribes. The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this proposed rule under the criteria in Executive Order 13175 and under the Department's tribal consultation policy and have determined that this rule may have a substantial direct effect on federally recognized Indian tribes. Accordingly, we will initiate government-to-government consultation with federally recognized Indian tribes.

Clarity of this Proposed Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Energy Supply, Distribution, or Use (E.O. 13211)

E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule is not a significant regulatory action under E.O. 13211 and would not significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action. No Statement of Energy Effects is required.

List of Subjects

50 CFR Part 10

Exports, Fish, Imports, Law enforcement, Plants, Transportation, Wildlife.

Proposed Regulation Promulgation

For the reasons described in the preamble, we propose to amend subchapter B of chapter 1, title 50 of the Code of Federal Regulations, as set forth below:

PART 10—GENERAL PROVISIONS

1. The authority citation for part 10 continues to read as follows:

AUTHORITY: 16 U.S.C. 668a–d, 703–712, 742a–j-l, 1361–1384, 1401–1407, 1531–1543, 3371–3378; 18 U.S.C. 42; 19 U.S.C. 1202.

2. In subpart B, add a new § 10.14 to read as follows:

§ 10.14 Scope of the Migratory Bird Treaty Act.

The prohibitions of the Migratory Bird Treaty Act (16 U.S.C. 703) that make it unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, or kill migratory birds, or attempt to engage in any of those actions, apply only to actions directed at migratory birds, their nests, or their eggs. Injury to or mortality of migratory birds that results from, but is

not the purpose of, an action (i.e., incidental taking or killing) is not prohibited by the Migratory Bird Treaty Act.

Dated: January 22, 2020.

Rob Wallace

Rob Wallace,

Assistant Secretary for Fish and Wildlife and Parks.