March 18, 2020

VIA FEDERAL E-RULEMAKING PORTAL

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

Re: Comment – Regulations Governing Take of Migratory Birds, FWS-HQ-MB-2018-0090

Dear Fish and Wildlife Service:

Friends of Animals\(^1\) submits these comments in response to the notice published by the U.S. Fish and Wildlife Service (FWS) on February 3, 2020, requesting comments on a proposed regulation to interpret the scope of the Migratory Bird Treaty Act (“MBTA” or “Act”). Regulations Governing Take of Migratory Birds, 85 Fed. Reg. 5915 (Feb. 3, 2020).

Friends of Animals is deeply concerned about these new regulations that would change long-standing enforcement of incidental take under the MBTA. This foundational law is intended to protect birds from all threats and clearly encompasses incidental take. The proposed regulation will seriously endanger birds and leave a major gap in the regime which protects this vital international resource. FWS has long complied with judicial interpretations of the Act, which protect constitutional rights and mitigate the impacts of commercial activity through cooperation and education.

Unfortunately, FWS has already begun weakening mitigation requirements. When the Fifth Circuit cast doubt on incidental take under the MBTA in 2015, the Department of Interior (DOI) responded with an M-Opinion (“Tomkins Opinion”) in January 2017 and began to

---

\(^1\) Friends of Animals is a nonprofit animal advocacy organization, incorporated in New York since 1957. With approximately 200,000 members worldwide, Friends of Animals advocates for the just treatment of domestic and free-living animals. We work on the ground to protect animals and their habitats and seek Endangered Species Act protection for the world’s endangered wildlife. Our work is fueled by a vision of healthy wildlife populations that are free from human exploitation. More about our work can be found at: http://www.friendsofanimals.org.
study new regulations on incidental take. However, these actions were withdrawn and suspended until the new Solicitor issued M-Opinion 37050 (“Jorjani Opinion”) in December 2017. Since then, the administration has discouraged industries from mitigating bird deaths, even reporting fatalities. For example, the Virginia Department of Transportation abandoned a planned artificial island that would minimize the destruction of the nesting grounds of 25,000 gulls, black skimmers, and other seabirds when FWS characterized the plan as “purely voluntary.” When a D.C. official alerted the agency to birds dying in netting installed on a condo building, the Region 5 Migratory Bird Program Permits Chief replied that no permit was necessary. This has exposed hundreds of birds to the precise dangers the MBTA should prevent.

For these reasons, Friends of Animals recommends that FWS retract this regulation and resume development of rules to enforce incidental take of migratory birds.

BACKGROUND

A. Treaties on Migratory Birds

The Senate ratified a treaty with Canada to protect migratory birds in 1916, leading to the MBTA, the first significant wildlife legislation of its kind. In its original form, the MBTA banned the taking of migratory birds common to the continent. Violations of the Act are criminal, and misdemeanor violations are subject to strict liability.

Several similar treaties followed over the next half-century. The Mexico Treaty sought to avoid the “extermination” of migratory birds through “adequate methods.” It mimicked the MBTA in most ways, allowing the killing of birds only when they constitute “plagues” or are

---

4 Lisa Friedman, A Trump Policy ‘Clarification’ All but Ends Punishment for Bird Deaths, NYT (Dec. 24, 2019).
5 Letter from Cindy Schulz, Field Supervisor, Virginia Ecological Services, USFWS to Angela Deem, Environmental Division Director, Virginia DOT (Jun 14, 2018) (reprinted in NYT).
6 Email from USFWS Migratory Bird Program Permits Chief, Region 5 to DOEE, Washington, D.C. (July 25, 2018) (reprinted in NYT).
injurious to agriculture. Importantly, when the Senate implemented the Mexico Treaty, it amended Section 2 to start with the phrase “by any means, at any time or in any manner.”

Decades later, the United States continued to improve upon its commitment in the protection of migratory birds in treaties with Japan and the Soviet Union. The Japan Treaty, initiated by a resolution from the International Council for Bird Preservation (now Birdlife International), refers directly to preventing extinction and devotes a large section to environmental protection. The preamble to the Treaty lists non-economic values of bird management and protection, emphasizing conservation as its critical goal. This Treaty prohibits the “taking” of birds broadly, but contains exceptions during designated hunting seasons. Additionally, both the U.S. and Japan commit to preventing damage to birds from the pollution of the seas.

The Soviet Treaty is similar to the Japan Treaty in its scope and focus. Unlike its predecessors, this agreement would require parties to notify the other of the “significant destruction” of birds due to pollution. The Soviet Treaty calls for “preserves” to aid in migratory bird management, but does so in a separate section from the requirement of environmental protection or habitat preservation.

The United States, Mexico, and Canada updated their agreement in 1997. Diplomatic exchanges make clear that the parties considered habitat conservation the primary goal of the deal. The 1995 protocol cites recent U.S. cases to emphasize the need for strict regulation.

---

11 Id. at Art. IIE.
14 Japan Treaty, supra n. 13, at Preamble.
15 Id. at Art. III.
16 Id. at Art. IV.
18 Id. at Art. IV.
19 Id. at Arts. IV, VII.
21 Id. at Preamble.
enforcement. The parties intended to “protect the interests of” conservationists (among other groups) rather than commercial interests.

B. The Migratory Bird Treaty Act

The MBTA takes a simple approach: killing or “taking” a listed migratory bird is prohibited in all circumstances. Although the MBTA does not expressly define incidental take, courts have long interpreted the MBTA to prohibit the incidental take of birds through pesticides, oil drilling equipment, wind turbines, and many other modern industrial practices.

Congress amended the MBTA several times in the last century. The Act was vastly broadened by the addition of the phrase “by any means or in any manner” in 1936. In 1960, Congress added a felony provision for commercial violations of the Act. In 1986, Congress required a knowing violation for a felony under Section 6(b). Concerned with the fairness of strict liability over baited fields, the 1998 amendment exempted this type of liability. Finally, in 2002, FWS was directed to exempt military readiness activities from incidental take.

C. Interpretations of the Solicitor

Solicitor Tomkins wrote the Tomkins Opinion in January 2017 to formalize the DOI’s view of incidental take under the MBTA. This withdrawn opinion supported FWS’s efforts to promulgate incidental take regulations. Although FWS had been enforcing incidental take for decades, a Fifth Circuit case sharpened a dispute with the Second and Ninth Circuits in United States v. CITGO Petroleum Corp. This 2015 decision drew upon historical analysis and an approach to wildlife law rejected in Endangered Species Act (ESA) jurisprudence to

---

22 See Alaska Fish & Wildlife Fed’n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933 (9th Cir. 1987) (holding hunting agreements invalid to the extent that they conflicted with treaties under the MBTA).

23 Letter of Submittal, Warren Christopher, Department of State (May 20, 1996).

24 16 U.S.C. § 703(a) (“Unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, 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, any 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, or nest, or egg thereof, included in the terms of the conventions.”).


26 49 Stat. 1555.


32 United States v. CITGO Petroleum Corp., 801 F.3d 477 (5th Cir. 2015).
conclude that the MBTA targeted only hunting and poaching.\textsuperscript{33} In its discussion, the Tomkins Opinion addresses the practical and constitutional objections of the CITGO court directly, concluding that the enforcement of incidental take is the most logical reading of the Act.

In December 2017, the Solicitor of the Department of the Interior withdrew the Tomkins Opinion and issued the Jorjani Opinion, substantially altering interpretation and enforcement of the MBTA.\textsuperscript{34} The opinion argues that the purpose of the MBTA is solely to prevent “affirmative or purposeful actions,” such as hunting and poaching, that “reduce migratory birds and their nests and eggs, by killing or capturing, to human control.”\textsuperscript{35} Moreover, the Jorjani Opinion argues, the prior construction of the MBTA created uncertainty and exposed nearly all Americans to criminal liability. This reasoning mirrors and forms the legal basis for the proposed regulation at issue here.\textsuperscript{36}

Although these regulations would have provided certainty to the targeted industries, the Jorjani Opinion suspended this plan and proceeded with a reversal, culminating in M-Opinion 37050.\textsuperscript{37} This opinion is the subject of pending litigation in the Second Circuit.\textsuperscript{38}

FWS has enforced the MBTA as a strict liability statute since 1939.\textsuperscript{39} Nearly all incidental take prosecutions in the last ten years (81\%) have been against electrical or oil and gas businesses.\textsuperscript{40} Wind energy comprises another 2.4\% of prosecutions, with chemical spills, solar development, artificial lighting, bridgework, and communication towers next in line. In this period, FWS collected over $105.8 million in criminal fines and civil penalties.\textsuperscript{41}

No uniform permitting process had existed for incidental take, but FWS emphasized voluntary industry compliance and published handbooks for the most at-risk industries.\textsuperscript{42} Indeed, following these guidelines is a crucial factor in whether FWS will pursue an enforcement action if take happens.\textsuperscript{43} These voluntary guidelines include consultation with

\textsuperscript{34} Id. at 41.
\textsuperscript{35} Id. at 41.
\textsuperscript{37} Memorandum from K. Jack Haugrud, supra n. 3.
\textsuperscript{40} Id. at 4.
\textsuperscript{41} Id. at 6 ("The Service urges voluntary adherence to the Guidelines and communication with the Service when planning and operating a facility. While it is not possible to absolve individuals or companies from MBTA or BGEPA liability, the Office of Law Enforcement focuses its resources on investigating and prosecuting those who take migratory birds without identifying and implementing reasonable and effective measures to avoid the take. The Service will regard a developer’s or operator’s adherence to these Guidelines, including communication with the Service . . . The Chief of Law Enforcement or more senior official of the Service will make any decision whether to refer for prosecution any alleged take of such species, and will take

\textsuperscript{43} See, e.g., U.S. FISH AND WILDLIFE, LAND-BASED WIND ENERGY GUIDELINES (Mar. 23, 2012).
federal and state natural resource agencies, completing baseline bird surveys and risk assessments, monitoring requirements, siting guidance, and infrastructure guidelines.\textsuperscript{44} Some of these practices mirror requirements at the state level and industry-standard practices and are, therefore, intended to be minimally burdensome.\textsuperscript{45} Special purpose permits are available to industries outside of specific permit types. Since December 2017, however, enforcement has ceased. In light of this administration’s actions (or inactions), Congress is considering legislation that would formally add incidental take to the MBTA.\textsuperscript{46}

**PROPOSED REGULATION**

A. **The MBTA is intended to protect migratory birds from all threats, not just hunting.**

The MBTA was a revolutionary law, the first to successfully establish federal control over migratory wildlife.\textsuperscript{47} Congress labored for years to fight the plunging populations of migratory birds. Upholding the Act under the treaty power, Justice Holmes remarked that protecting these birds was a national interest of “very nearly the first magnitude”:

> But for the treaty and the statute, there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.\textsuperscript{48}

Lawmakers were concerned with hunting and poaching, to be sure, but this was not their only concern.\textsuperscript{49} Both Senate and House reports make clear that their concern was the “effective protection of useful migratory birds.”\textsuperscript{50} In debate, Congress referred to habitat loss and the aesthetic and practical value of birds unrelated to hunting and poaching.\textsuperscript{51}

\textsuperscript{44} U.S. Fish & Wildlife Serv., Proposed Rulemaking to Revise Migratory Bird Permits and Regulations Governing Take of Migratory Birds: Regulatory Impact Analysis, 5-6 (January 2020).

\textsuperscript{45} 85 Fed. Reg. at 5'925.

\textsuperscript{46} H.R. 5552, 116th Congress (2020) (“To amend the Migratory Bird Treaty Act to affirm that the Migratory Bird Treaty Act’s prohibition on the unauthorized take or killing of migratory birds includes incidental take by commercial activities, and to direct the United States Fish and Wildlife Service to regulate such incidental take, and for other purposes.”).

\textsuperscript{47} See Missouri v. Holland, 252 U.S. 416 (1920) (upholding the MBTA as a valid exercise of the treaty power); see also United States v. Shauver, 214 F. 154 (E.D. Ark. 1914) (striking down the Weeks-McLean Act as an invalid exercise of the commerce power).

\textsuperscript{48} Missouri, 252 U.S. at 435.

\textsuperscript{49} See id.; H.R. Rep. No. 65-243 (referring to habitat loss and the aesthetic and practical value of birds unrelated to hunting and poaching).

\textsuperscript{50} S. Rep. No. 65-27 at 2.

\textsuperscript{51} See id. (appending letter from Secretary of State incorporating statement from Department of Agriculture); H.R. Rep. No. 65-243 at 2 (1918) (same); see Corbin Farm, 444 F. Supp. at 532.
In 1916, Congress could scarcely have foreseen the dangers posed by power lines, oil ponds, mine tailings, and industrial equipment. The purpose of the Act, however, can guide FWS in its enforcement of these new threats to birds. That the MBTA predates electric transmission, for instance, should not undermine the statute. The proposed regulations, however, would render the MBTA meaningless in the modern world.

In United States v. Moon Lake Electrical Association, a Colorado court considered deaths resulting from Moon Lake’s power lines and held that the MBTA extends beyond conduct associated with hunting and poaching. Rejecting prosecutorial discretion as a remedy against the overuse of incidental take liability, the court applied a limiting feature of proximate cause to reach a guilty verdict under Section 707(a). The Tenth Circuit mimicked this approach in United States v. Apollo Energies, where birds were killed after being trapped in “heater-treater” equipment in an oil rig. In that case, the operator was found not liable because the defendant did not and should not have known the birds would die.

FWS defends this departure from a long-standing policy by reference to the “plain language” of the statute and its legislative history. In Moon Lake, however, the court foreclosed this analysis, noting that “only if the statutory language is ambiguous should courts resort to legislative history as an interpretive aid.” FWS relies on the controversy of the legislation to overrule the significant developments in the Act and its plain language. Allowing disputes to weaken statutes retroactively would undermine nearly every significant legislative reform of the Act in the last half-century.

1. Congressional interpretation

Regardless of that original intent, Congress continually tinkered with the Act’s scope as courts interpreted its enforcement. In some cases, Congress reacted to controversial decisions by narrowing the scope of strict liability or adding a knowledge requirement to felony violations. In others, it narrowly exempted certain activities from incidental take, an opportunity it could have used to clarify any general objections to this kind of enforcement.

Although a later congressional interpretation of a statute is not always controlling, it should be given “great weight” when a new law is enacted on the basis of that interpretation. To the extent that the meaning of take is obscure, this reliance on amendments is particularly

---

52 Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) ("'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.").
53 Moon Lake, 45 F. Supp. 2d at 1088.
54 Id. at 1084-85.
55 Apollo, 611 F.3d at 690-91.
56 Jorjani Opinion, supra n. 3, at 2.
57 Moon Lake, 45 F. Supp. 2d at 1073.
If the modifications conform to long-standing agency practice, this lends additional weight. Absent indication to the contrary, “a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction.” Failure to accept incidental take would virtually nullify these amendments.

As initially written, the MBTA broadly prohibited the taking of birds, but the 1936 amendments expanded this even more. Adding “by any means or in any manner” to the prohibited acts makes clear Congress’s intent to protect birds from all direct threats. The Jorjani Opinion dismisses this interpretation, noting that it would cover a “creative approach” to hunting or killing birds. This construction defies reason, as any method of hunting would still be prohibited because it is voluntary act, not because it is an incidental taking. Instead, the modifier “any means or in any manner” clarifies that any form of taking is not permitted, giving the Act its broadest possible meaning.

Courts have long upheld the MBTA as a strict liability statute. When pesticides released in water were killing birds, the Second Circuit reasoned that failing to control the chemicals was analogous to a tort. The court opined that “[i]mposing strict liability on FMC in this case does not dictate that every death of a bird will result in imposing strict criminal liability on some party.” In another pesticide case, United States v. Corbin Farm Services, the district court also held the deaths criminal, noting that “if the defendants acted with reasonable care or if they were powerless to prevent the violation, then a very different question would be presented.”

In the 1986 felony amendment, drafters could have changed the default mental state to “knowing” for any violation, but instead limited this change to felonies. As it did so, the Senate Report stated the following: “nothing in this amendment is intended to alter the ‘strict liability’ standard for misdemeanor prosecutions.”

---

60 Mt. Sinai Hospital, Inc. v. Weinberger, 517 F.2d 329, 343 (5th Cir. 1975).
64 Jorjani Opinion, supra n. 3, at 22 (citing CITGO, 801 F.3d at 490).
65 See Virginia v. Tennessee, 148 U.S. 503, 519 (1893) (“Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.”); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 218-19, 226 (2008) (highlighting the “expansive meaning” of “any,” especially when repeated in a statutory provision).
66 FMC Corp., 572 F.2d at 907-08
67 Id. at 908.
68 Corbin Farm, 444 F. Supp. at 536.
69 Id. at 2.
Corporation, this amendment was made in full awareness of strict liability’s modern application.\footnote{Moon Lake, 45 F. Supp. 2d at 1077 (noting “that Congress reviewed and substantively amended the MBTA in 1986 without attempting to vitiate the holdings of FMC... and Corbin Farm.”).}

Congress again demonstrated its familiarity with the development of take liability in 1998 when it tackled the “unfairness” of strict liability in baiting cases.\footnote{S. Rep. No. 105-366 at 2 (1998); H. Rep. No. 105-542, at 4-6 (1998); United States v. Wulff, 758 F.2d 1121 (6th Cir. 1985).} Rather than strict liability, the MBTA would apply a negligence standard to hunters who used fields with loose grain. In making this change, the Senate Report noted that the amendment was “not intended in any way to reflect upon the general application of strict liability under the MBTA.”\footnote{S. Rep. No. 105-366, at 3 (1998).} At the same time, legislators added a felony provision for commercial violations of the Act.\footnote{S. Rep. No. 99-445 at 16.}

Congress exempted the armed forces from incidental take after a court applied the MBTA to military readiness activities.\footnote{See Ctr. for Biological Diversity v. Pirie, 201 F. Supp. 2d 113 (D.D.C. 2002) \(74\)} This 2002 amendment could have excluded incidental take entirely, but it did not.\footnote{United States v. Waste Industries, Inc., 734 F.2d 159, 166 (4th Cir. 1984) \(75\)} Legislators do not hide “elephants in mouseholes,” but the Jorjani Opinion misapplied this principle to lessen the effect of these amendments.\footnote{Whitman v. Am. Trucking Ass’ns, 531 U.S. 457,468 (2001); see also Jorjani Opinion, supra n. 3, at 31.} In fact, the inference runs the other direction – a new statute is assumed to harmonize with existing laws and interpretations.\footnote{Boynton, 63 F.3d at 343 (quoting Estate of Wood v. CIR, 909 F.2d 1155, 1160 (8th Cir. 1990) (“absent a manifestation of contrary intent, a newly-enacted or revised statutes is presumed to be harmonious with existing law and its judicial construction”).} Furthermore, this argument assumes that the amendment fundamentally changed the MBTA when it merely evinces a congressional understanding of its scope.\footnote{PL 107-314 (“not intended in any way to reflect upon the general application of strict liability under the MBTA”); see United States v. Fausto, 484 U.S. 439, 453 (1988) (“This classic judicial task of reconciling many laws enacted over time, and getting them to ’make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.”).} The enactment itself confirms that it is “not intended in any way to reflect upon the general application of strict liability under the MBTA.”\footnote{116 Stat. 2458 \(79\)}

Additionally, Congress directed FWS to create regulations to exempt military readiness rather than merely amending the MBTA.\footnote{Id. § 315(a), (c)-(d), 116 Stat. at 2509 (temporarily suspending the MBTA’s application to the non-purposeful killing of birds during military readiness activities while Interior promulgated regulations to authorize such incidental take).} These regulations, issued in 2007, imposed conservation obligations and allowed the Department of the Interior to withdraw authorization in certain circumstances.\footnote{See 50 C.F.R. § 21.15.} This statute refers explicitly to DOI’s authority
under section 3(a) of the MBTA to prescribe regulations. If incidental take is not within the agency’s authority, this statute would be a nullity. FWS has acknowledged that reference to authorized takes in the regulations confirms the negative implication: that takes must be authorized.

2. International obligations

The Senate ratified the Migratory Bird Treaty (MBT) with the United Kingdom in 1916 to cooperatively protect the shared birds of Canada and the United States. By their nature, migratory birds spend only part of the year in a given habitat. They cannot be protected in only one jurisdiction, only to be slaughtered indiscriminately in another. To that end, the MBT addresses “lack of adequate protection during nesting season” and “the preservation” of migratory birds with a “uniform system of protection.” Hunting was, indeed, a threat at this time, but the treaty calls for a more universal and comprehensive approach.

If the MBTA only targeted hunting and poaching, it would have made no sense to include non-game and songbirds on the protected list. By their nature, these birds are not a target for hunters and rely on much more comprehensive rules to protect them from extinction. Insectivorous and non-game birds are not incidental inclusions; significant diplomatic exchanges occurred with all countries, particularly Japan and the Soviet Union, on identifying each species to be listed. The Treaties protect the birds’ environment as well; the Japan Treaty is particularly clear about its scope, explicitly requiring parties to take measures to prevent damage to birds from the pollution of the seas.

Foreign laws and communications confirm that the MBTA can and must apply to non-hunting activities. Canada updated its regulations in 1995, after the latest Protocol. Section 6(a) of Canada’s Migratory Bird Regulation provides the following: “no person shall (a) disturb, destroy, or take a nest, egg, nest shelter, elder duck shelter, or duck box of a migratory bird . . . except under authority of a permit therefor.”

In 2008, Canada sent a diplomatic note to the State Department, confirming that Article III of the Treaty required controlling incidental take and applied to such industries as forestry, oil

---

82 116 Stat. 2458 at 2509, § 315(d).
85 See Migratory Bird Treaty, supra note 7.
86 Id. at proclamation.
87 Corbin Farm, 444 F. Supp. at 532 (concluding that hunting was not Congress’s sole concern, among other reasons, based on its choice to protect non-game birds).
88 See appendices of MTAs.
89 Japan Treaty, supra note 13, at Art. VI.
91 C.R.C. c. 1035; Migratory Bird Sanctuary Regulations (C.R.C. c. 1036), (Jun 6, 1994) (Can.); see also Migratory Birds Regulations (C.R.C. c. 1035) (Jun. 13, 2016) (Can.).
and gas exploration, agriculture, mining, and fishing, among others.\textsuperscript{92} The Jorjani Opinion maintains that the U.S. never replied to this note, but the U.S. did confirm that “Canada’s note and this affirmative reply establish a mutually held interpretation . . . .”\textsuperscript{93} The Tomkins Opinion cites this exchange as affirmative evidence that the treaties themselves require regulation of industrial activities.\textsuperscript{94}

As the Senate debated the MBTA, it focused on the implications of comity.\textsuperscript{95} The doctrine of international comity requires the United States to interpret its treaties consistently with its partners.\textsuperscript{96} The MBTA requires the same, directing the Secretary to determine if regulations are “compatible with the terms of the conventions.”\textsuperscript{97}

The treaties with Japan and Russia both required signatories to adopt implementing legislation to prohibit take. Japan implemented its MTA in 1972 with the Japanese Endangered Species Act, now the Act on Conservation of Endangered Species of Wild Fauna and Flora.\textsuperscript{98} This law prohibits the take of any covered species, defining take as “capture, collect, kill, or harm.”\textsuperscript{99}

The Jorjani Opinion emphasizes the listed verbs in the MBTA, interpreting them collectively to refer to voluntary actions. The Japan Convention, however, prohibits only the “taking” of birds without listing any other activities.\textsuperscript{100} The Soviet Treaty is similarly limited, preventing only the “take” of birds, the collection of eggs, and the disturbance of nesting colonies.\textsuperscript{101} FWS must adopt a substantively similar definition to remain compliant with these treaties.

The Commission on Environmental Conservation (CEC) was established in the North American Agreement on Environmental Cooperation (NAAEC), the environmental “side agreement” to NAFTA. Under NAAEC, NGOs may use a “citizen submission” procedure alleging that a Party to the agreement is “failing to effectively enforce its environmental laws.” In 1999 and 2002, the United States and Canada (respectively) were referred for

\textsuperscript{92}Jorjani Opinion, supra n. 3, at 30; Note No. 0005 from Canadian Embassy to United States Department of State at 2 (July 2, 2008).
\textsuperscript{93}Id. § 6(a).
\textsuperscript{94}Tomkins Opinion, supra n. 2, at 4.
\textsuperscript{95}S. Rep. No. 65-27
\textsuperscript{96}See, e.g., Hilton, 159 U.S. at 163-64.
\textsuperscript{97}16 U.S.C. § 704(a).
\textsuperscript{99}Japanese Endangered Species Act, Art. 9
\textsuperscript{100}Japan Treaty, supra note 13, at Art. III.
\textsuperscript{101}Soviet Treaty, supra note 17, at Art. II.
review under the NAEEC agreement. Through this procedure, the CEC evaluated compliance with the treaties themselves as well as the implementing statutes and regulations.

The lack of specific cases of non-enforcement was fatal to the case against Canada, while the case against the U.S. was too narrow. The United States had failed to enforce the MBTA on logging companies in various permits, but Wild Rockies only identified two before the CEC. Importantly, the U.S. cases were both resolved by California at the state level, suggesting that state courts are competent to enforce similar or identical provisions to the MBTA without constitutional problems. Importantly, even as they admitted that the United States had failed to enforce the MBTA against logging operations would violate this rule, Canada confirmed that its laws prohibited incidental take when defending its enforcement strategies in front of CEC.

B. The MBTA clearly prohibits the incidental taking of birds.

FWS indicates its rationale for this rule is based on the vagueness of the MBTA. However, the statute is very clearly worded. By any means and in any manner, no one may kill a listed bird. No law can be immune from ambiguity under challenging cases, but the canons of statutory construction have resolved potential issues.

The MBTA prohibits the following actions: 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 ... any part, nest, or egg of any such bird ...”. A landmark canon of statutory construction is to avoid interpreting a statute in a way that renders any word superfluous or unnecessary. The inclusion of hunt and kill means that taking must have a broader definition. However, the proposed rule would adopt the canon suggested by Justice Scalia in Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, though it has been dismissed in subsequent wildlife cases. Noscitur a sociis instructs that a word “gathers meaning from the words around it.” However, when courts have applied this canon to the

---

102 Alliance for the Wild Rockies, et al., Submission to the Commission on Environmental Cooperation pursuant to Article 14 of the North American Agreement on Environmental Cooperation 12 (17 November 1999); Canadian Nature Federation et al., Submission to the Commission on Environmental Cooperation pursuant to Article 14, North American Agreement on Environmental Cooperation (4 February 2002).
104 Id. at 217.
105 Canadian Nature Federation, supra note 131, Factual Record: Ontario Logging Submissions, 18.
phrase “in any manner,” they have not been impressed.111 Rather, the Supreme Court admonishes that the canon should not be invoked to “rob any [term] of its independent and ordinary significance.”112

Moreover, the MBTA prohibits hunting and killing, which expands the definition of taking and supports the broader context of the Act.113 A person can hunt an animal without killing it, just as she can kill an animal without hunting it. To kill is to “deprive of life” and contains little ambiguity, especially when broadened by the “any means” language of the MBTA.114 Justice Scalia did not address the inclusion of “kill” in the prohibited actions under the ESA, though the court in CITGO hastily resolved this issue with a misapplication of FMC. That case did apply kill to an incidental activity.115 It is far from obvious, as Justice Scalia claims in his dissent, that the historical meaning of “take” applied only to efforts to reduce animals to human control. Take certainly does mean this, but this context is only useful for resolving possession among hunters.116 The authority cited in CITGO fails to limit this historical definition or justify such a narrow reading.117 Therefore, FWS should not rely on this definition as the clear command of the statute, especially against such evidence to the contrary.

In any event, the common law understanding of the word does not apply when “common understandings of the word depart largely from the technical meaning it had at the old common law.”118 Take under 50 C.F.R. § 10.12 is not consistent with common law, yet these decisions do not disturb its application to incidental bird deaths. This definition includes “kill,” “pursue,” and “wound,” none of which reduce animals to human control by their nature. Even if “incidental” is not in the regulations, incidental modifies “take,” which is a prohibited act. Neither is it obvious that take requires deliberate or intentional conduct under common law. Even when a term does have a clear common law meaning, the Supreme Court has applied “generic, contemporary meaning” of the term more consistent with the statute’s purpose.119

111 Causse Mfg. Co. v. United States, 151 F. 4, 6 (2d Cir. 1906)
113 See Sweet Home, 515 U.S. at 698 n. 11 (1995) (“To the extent the Secretary’s definition of ‘harm’ may have applications that overlap with other words in the definition, that overlap reflects the broad purpose of the Act.”).
114 United States v. Stevens, 559 U.S. 460, 474-75 (2010); Ali, 552 U.S. at 226 (the “MBTA sweeps broadly as its language suggests.”).
115 See United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978).
118 Reagan, 157 U.S. at 302.
C. The proposed regulation will seriously endanger migratory birds.

1. Lack of substantive protection

Although many of the mitigation measures that FWS has suggested are effective and standard industry practice, the Jorjani Opinion admits that some operators will “scale back or eliminate” current mitigation measures because incidental take is no longer criminally prosecuted. This outcome is what FWS has been encouraging as it responds to inquiries, and it can hardly claim surprise if the voluntary practices upon which it relies are curtailed. Indeed, the administrative record of a 2018 litigation over the Jorjani Opinion shows that FWS was working closely with oil and gas executives to ease their compliance burden as this rule was being developed, even tipping them off before its release. Indeed, the purpose of the proposed rule is to relieve these operators of their regulatory burden.

The Jorjani Opinion offers the following hypothetical: a state wants to paint a bridge where Barn Swallows have their nests. If the state pressure washed the nests before painting the bridge, this would be an affirmative act that has the taking of active nests as its purpose and would require a permit. However, “if the intent was to simply paint the bridge and the nests were accidentally destroyed incidental to that process, the destruction would not violate the MBTA.” Likewise, a landowner could tear down a barn on his property, even knowing that it contained nesting owls, so long as he only intended to remove his barn and not to kill the owls. In this case, the landowner can know and reasonably foresee the owls will die, but “all that is relevant is that the landowner undertook an action that did not have the killing of barn owls as its purpose.” The hole in this scheme is large enough to house a few nests of its own.

2. The Proposed Rule will cause operators to take more risks.

Pesticides pose a grave threat to birds, though strict enforcement of the MBTA has made farmers cautious. Even in circuits skeptical of incidental take, courts have upheld

---

120 U.S. FISH & WILDLIFE SERV., supra note 43 at 6.
121 NRDC, Inc. v. United States DOI, 397 F. Supp. 3d 430 (S.D.N.Y. 2018); Letter from Megan H. Berge et al, Bakerotts LLP to Secretary Ryan Zinke (Aug. 28, 2017) (complaining of compliance costs to MBTA incidental take); Email from Timothy Williams, Principal Deputy Director of Intergovernmental & External Affairs, Department of the Interior to Samantha McDonald of IPAA (Dec. 22, 2017) (warning McDonald of the upcoming Solicitor opinion before release to the public).
124 Id.
125 Id.
convictions where pesticides were used irresponsibly.\textsuperscript{127} The proposed rule would void this understanding and confuse even prudent farmers. Without the threat of enforcement, standards are likely to relax and bird mortality will rise.

In a webinar on this proposed regulation, FWS staff confirmed that the MBTA would not punish operators who misuse pesticides in a manner that kills migratory birds.\textsuperscript{128} Stating that they encourage voluntary mitigation efforts, staff nonetheless confirmed that this practice would not be criminal unless an investigation revealed that the pesticide user intended to kill birds as the purpose of his activity. Difficulty in proving this element is the rationale for strict liability in the first place. Instead, requiring this level of intent will effectively prevent any prosecution for this direct killing of birds.

Moreover, FWS’s response to mitigation inquiries, or lack thereof, is likely to cause more confusion. As these companies explained their mitigation efforts to investors before the Jorjani Opinion, they could justify them as legal requirements. However, FWS is now telling these companies that their efforts are purely voluntary, discouraging even token cooperation. As a result, mitigation efforts will lack support.

D. The proposed regulation will leave an unacceptable regulatory loophole.

In addition to the aforementioned industrial threats to birds, the proposed rule will leave a hole in the regulatory framework meant to protect migratory birds. FWS would rely on other more comprehensive statutes to fulfill its obligations to protect birds, but these statutes do little or nothing to preserve most of the birds on the regulated list.

1. Migratory Bird Conservation Act

FWS argues that the Migratory Bird Conservation Act (MBCA) supplements the MBTA to “more effectively” implement the treaties by protecting bird habitat.\textsuperscript{129} The agency reasons that, if the migratory bird treaties protect habitat, this statute was passed eleven years later to achieve that purpose. These laws do support one another, but the authority cited does not establish that the MBCA is the sole source of habitat protection.\textsuperscript{130} Given the Senate’s leadership in developing the treaty, it is unlikely that legislators would have waited eleven years to implement a critical portion of their scheme.

In the historical context of this Act, the federal government sought retention of its federal lands and was preoccupied with establishing their authority to own properties for such novel

\textsuperscript{127} See United States v. Rollins, 706 F. Supp. 742, 743-45 (D. Idaho) (defendant had no reason to believe that his action – pesticide application exercising due care – posed a threat to birds).

\textsuperscript{128} FWS Public Webinar, March 5, 2020 at 5:00 pm EST.

\textsuperscript{129} 85 Fed. Reg. at 5918.

\textsuperscript{130} United States v. North Dakota, 650 F.2d 911, 913–14 (8th Cir. 1981), aff’d on other grounds, 460 U.S. 300 (1983) (observing that the MBTA and MBCA work together to protect birds).
purposes as wildlife management. This shift was controversial, and context suggests the MBCA was more likely meant to bolster that authority rather than to satisfy the government’s obligations fully.

Doubtless, the MBCA plays an important supportive role in habitat conservation for migratory birds. The federal government has obtained conservation easements and “inviolate sanctuaries” to protect waterfowl and other migratory birds since its passage. Without diminishing its significance, however, the MBCA is limited in scope. By purchasing wildlife refuges and managing them as federal property, the government has utilized the extent of its power under the MBCA to protect birds in their natural habitat.

The “uniform system of protection” required by the MTAs is not satisfied by piecemeal public lands. Birds are in steep decline across their range in North America. Private property is where many migratory birds die, so it is on private property that a conforming law must apply. More importantly, the U.S. cannot meet its obligations to protect against poisons and agricultural damage through its power under the MBCA. The Solicitor is, therefore, wrong to rely on this statute to meet MTA obligations.

2. Endangered Species Act

The Solicitor also cannot rely on the ESA to protect the habitats of migratory birds in lieu of the Treaties. The purpose of the ESA is to intervene against the extinction of specific plant and animal species through habitat protection, federal consultation, and broad prohibitions on take. The purpose of the MBTA is to protect all birds common to the treaty partners. Listing a species as endangered or threatened can be time-consuming and costly, and only those species which are listed by regulation are protected from taking. Currently, only 92 migratory birds are protected by the ESA. By contrast, 1,026 birds are listed in the Treaty annexes and protected under the MBTA.

Their habitats could be listed as “critical habitat” under the ESA, but their unoccupied habitat is currently on a shaky legal footing. By its nature, migratory bird habitat is unoccupied for most of the year. Even when a species is listed or severely threatened, like the jaguar, listing...
this habitat is subject to litigation and skepticism.\textsuperscript{139} Relying on the ESA alone would jeopardize the core of the migratory bird treaties.

E. Enforcing incidental take will not present constitutional issues.

1. Proximate cause

Proximate cause operates to remove the absurd from issues of causation. FWS complains that nothing stops abusive enforcement of the MBTA against, for instance, cat owners, but this doctrine would severely limit such outcomes.

\begin{quote}
Just as ‘interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available’ \textit{Griffin v. Oceanic Contractors, Inc.}, 458 U.S. 564, 575 (1982), so too interpretations of a regulation which would produce absurd results may be avoided by adopting an alternative interpretation consistent with the regulation’s purpose.\textsuperscript{140}
\end{quote}

Principles of causation require the prosecution to prove that the defendant’s act was the cause in fact as well as the proximate cause of a bird’s death.\textsuperscript{141} Proximate cause is “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.”\textsuperscript{142} \textit{Moon Lake} already found that bird deaths from driving a car, owning a building, or having a large window would not cause liability under the MBTA.\textsuperscript{143}

“Courts should not rely on prosecutorial discretion to ensure that a statute does not ensnare those beyond its proper confines.”\textsuperscript{144} Even so, this concern is overstated. Both \textit{Mahler} and \textit{FMC} ignore that prosecutors need to show proximate cause beyond a reasonable doubt.\textsuperscript{145} The absurd cases, such as driving a car, would not lead to liability because killing a bird can hardly be said to be a reasonably anticipated natural consequence of doing so, unbroken by any efficient intervening cause. Were it otherwise, windshields would be little protection as bird strikes plague the daily commute.

\begin{thebibliography}{99}
\bibitem{140} \textit{Boynton}, 63 F.3d at 344.
\bibitem{141} See \textit{Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 35}, at 267 (1972) (referring to \textit{Model Penal Code} § 2.03, which requires that the actual result be a “probable consequence” of the actor’s conduct, as the “appropriate way in which to handle legal cause in strict liability cases”).
\bibitem{142} \textit{Black’s Law Dictionary} 1225 (6th Ed. 1990)
\bibitem{143} 45 F.Supp.2d 1070 at 1085.
\bibitem{144} \textit{Id.} at 1084.
\bibitem{145} \textit{Id.}
\end{thebibliography}
2. Enforcement priorities

FWS has long had procedures that emphasize partnership with industry to protect migratory birds.\(^{146}\) Those that cooperate with agency officials can expect leniency and should not fear arbitrary prosecution. Most prosecutions are uncontested and do not yield opinions, so this routine cooperation is not as visible. Special Purpose permits are available to operators whose activities do not fall neatly into the regulated industrial categories.\(^{147}\) FWS has shown competence in issuing these types of permits as well, although they cannot be used as general purpose incidental take permits.\(^{148}\) ESA Section 10(a)(1)(B) permits also constitute MBTA incidental take permits.\(^{149}\) Each of these practices confirms that FWS has long understood incidental take to be permissible only by permit.\(^{150}\)

Furthermore, FWS has suggested that outside incentives exist to mitigate bird deaths in commercial activity. These motivations are less powerful than the MBTA and will not substitute for its framework, but layered compliance raises the notice for all operators. In addition to voluntary industry guidelines, prosecutors have a policy of working with industry to repair violations rather than bringing cases immediately.

To eliminate uncertainty, FWS should resume its regulatory efforts, which commenced in an EIS.\(^{151}\) *Moon Lake* suggests that issuing such regulations would provide constitutional notice for due process.\(^{152}\) Ironically, the proposed rule would make enforcement priorities less clear and may lead to the prosecution of good-faith operators by removing what guidance they had.

**CONCLUSION**

Thank you for the opportunity to comment on the proposed regulations on MBTA incidental take. Friends of Animals urges FWS to reconsider this rule and resume its successful partnerships and education initiatives to protect birds. Please contact me if you have any questions regarding these comments or would like more information.

Sincerely,

Courtney Renee McVean, Associate Attorney
Ashley Zurkan, Legal Extern
Friends of Animals, Wildlife Law Program

---

\(^{146}\) *U.S. Fish & Wildlife Service, Office of Law Enforcement, MBTA and Industrial Take*.

\(^{147}\) 50 C.F.R. § 21.27.

\(^{148}\) *Turtle Island Restoration Network v. Dep't of Commerce*, 878 F. 3d 725 (9th Cir. 2017) (analyzing MBTA incidental take permit, without suggesting such take is not covered by the Act).


\(^{150}\) Tomkins Opinion, *supra* note 2, at 13-14.


\(^{152}\) *Moon Lake*, 45 F. Supp. 2d at 1085.