WHAT'S GOOD FOR THE GOOSE MAY NOT BE GOOD FOR THE GANDER: A BIRD'S EYE VIEW OF THE EMERGING INCIDENTAL TAKE PERMIT PROGRAM UNDER THE MIGRATORY BIRD TREATY ACT

> *Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. . . . 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.*[1]

1. Missouri v. Holland, 252 U.S. 416, 435 (1920).

INTRODUCTION

As bitter winds rip across the Arctic tundra during the depths of winter, a small bird in the jungles of South America, no larger than a tennis ball, is preparing to make one of the most remarkable journeys on the planet.[2] Within just two short months, this Gray-cheeked Thrush (*Catharus minimus*) will travel over four thousand miles from the Amazonian jungles to the alder thickets along the Arctic Circle.[3] Along the way, it will evade predators, overcome starvation and inconceivable exhaustion—just to give birth to the next generation of these distant nomads.[4] Increasingly, however, these natural obstacles are not the greatest threat to the Thrush's survival.[5] When this Gray-cheeked Thrush crosses into Texas, it must navigate its way through a maze of the largest wind farms in the world.[6] These wind turbines are formidable opponents to a small songbird—killing between 140,000 and 328,000 migratory birds annually.[7] In doing so, these

2. ARTHUR CLEVELAND BENT, LIFE HISTORIES OF NORTH AMERICAN THRUSHES, KINGLETS, AND THEIR ALLIES 189 (Dover Publ'ns 1964) (1949) (quoting FREDERICK CHARLES LINCOLN, THE MIGRATION OF AMERICAN BIRDS (1939)); NAT'L AUDUBON SOC'Y, THE SIBLEY GUIDE TO BIRD LIFE & BEHAVIOR 463–64 (Chris Elphick et al. eds., 2001).

3. BENT, *supra* note 2, at 188–90, 197–99; Wang Yong & Frank R. Moore, *Spring Stopover of Intercontinental Migratory Thrushes Along the Northern Coast of the Gulf of Mexico*, 114 AUK 263, 264 fig.1 (1997).

4. PAUL KERLINGER, HOW BIRDS MIGRATE 91–93 (1st ed. 1995).

5. Scott R. Loss, Tom Will, & Peter P. Marra, *Estimates of Bird Collision Mortality at Wind Facilities in the Contiguous United States*, 168 BIOLOGICAL CONSERVATION 201, 202, 208 (2013).

6. *Top 10 Biggest Wind Farms*, POWER-TECHNOLOGY.COM (Sept. 29, 2013), http://www.power-technology.com/features/feature-biggest-wind-farms-in-the-world-texas/.

7. Loss et al., *supra* note 5, at 216.

industries are coming into direct conflict with one of the nation's oldest wildlife-protection statutes.[8]

The Migratory Bird Treaty Act ("MBTA") makes it "unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, [or] kill . . . any migratory bird . . . ."[9] While the Statute does not define "take," the United States Fish and Wildlife Service ("FWS" or "the Service")—the agency charged with implementing and enforcing the Act—interprets the term to mean: "pursue, hunt, shoot, wound, kill, trap, capture, or collect."[10] However, neither the Statute nor the corollary regulations clarify whether scienter is necessary to violate the MBTA's prohibitions.[11]

Presently, federal circuit courts are split on whether an incidental take is subject to the strict liability prohibitions of the MBTA.[12] Most recently, the Fifth Circuit joined the growing majority by holding that an actor's conduct must be specifically directed at a protected species for liability to attach under the MBTA.[13] The Fifth Circuit's holding effectively nullifies FWS's ability to enforce the MBTA against incidental takes within the Circuit.[14] For regulated entities, the split further fuels the growing confusion regarding the scope of liability under the MBTA.[15] Consequently, each new industrial project becomes a proverbial "canary in the coal mine" that may or may not fall prey to FWS's erratic enforcement pattern.[16] Recently, however, FWS set out to resolve the ambiguity by

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8. Andrew G. Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 WM. & MARY ENVTL. L. & POL'Y REV. 1, 8 (2013).

9. Migratory Bird Treaty Act, Pub. L. No. 65-186, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. § 703(a) (2012)).

10. 50 C.F.R. § 10.12 (2016).

11. Ogden, *supra* note 8, at 16.

12. *Compare* United States v. FMC Corp., 572 F.2d 902, 907–08 (2d Cir. 1978) (holding that unknowingly poisoning birds constituted a take under the MBTA), *and* United States v. Apollo Energies, Inc., 611 F.3d 679, 690 (10th Cir. 2010) (finding that inadvertently killing birds coupled with proximate cause constituted a take under the MBTA), *with* Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302–03 (9th Cir. 1991) (holding that logging in nesting areas constitutes an indirect and inadvertent action outside of the prohibitions of the MBTA), *and* Newton Cty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997) ("[I]t would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct . . . .").

13. United States v. Citgo Petroleum Corp., 801 F.3d 477, 494 (5th Cir. 2015). *See, e.g.*, *Seattle Audubon Soc'y*, 952 F.2d at 302–03 (holding that logging in nesting areas constitutes an indirect and inadvertent action outside of the prohibitions of the MBTA); *Newton Cty. Wildlife Ass'n*, 113 F.3d at 115 ("[I]t would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds.").

14. CROWELL & MORING, THE MIGRATORY BIRD TREATY ACT: AN OVERVIEW (2016), https://www.crowell.com/files/The-Migratory-Bird-Treaty-Act-An-Overview-Crowell-Moring.pdf.

15. Monica Carusello, *Can an Oil Pit Take a Bird?: Why the Migratory Bird Treaty Act Should Apply to Inadvertent Takings and Killings by Oil Pits*, 31 J. ENVTL. L. & LITIG. 87, 93 (2015).

16. *Id.* at 92.

issuing a "Notice of Intent" ("NOI") to promulgate a much-anticipated "Incidental Take Permit" under the MBTA.[17] Naturally, the Incidental Take Permit ("ITP") program is aimed at providing the much-needed compliance certainty to regulated entities[18]—but at what cost?

This Note examines the viability of FWS's four proposed strategies for implementing an ITP under the MBTA and recommends a strategy for the forthcoming ITP that balances avian protection against the practical limitations of regulating such a vast variety of species. Part I provides a brief overview of the MBTA's creation and operative language, as well as the treaties that form the underlying purpose of the Act.[19] Part II examines the varying judicial interpretations that arose in the absence of clear guidance from Congress or FWS.[20] Part III examines FWS's four recently proposed strategies for instituting an ITP program under the MBTA.[21] Finally, Part IV makes general recommendations on the forthcoming rule that ideally seeks to balance the MBTA's conservation purposes with the realities of modern implementation.[22]

I. THE MIGRATORY BIRD TREATY ACT OF 1918: A NATIONAL LEGACY IN AVIAN CONSERVATION

A. History of the MBTA

In the early 19th Century, the United States underwent a growth spurt.[23] Under the banner of "manifest destiny," the country's booming population expanded west and opened access to an immense wealth of untapped natural resources.[24] Commercial and recreational hunters—driven by the demands of "high society" in the east—took to the wholesale

17. Migratory Bird Permits, 80 Fed. Reg. 30,032, 30,032–36 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21).

18. *Id.* at 30,034.

19. *See infra* Part I (THE MIGRATORY BIRD TREATY ACT OF 1918: A NATIONAL LEGACY IN AVIAN CONSERVATION).

20. *See infra* Part II (STRICTLY UNRESTRICTED LIABILITY: THE VARIED JUDICIAL INTERPRETATIONS OF THE MBTA & INCIDENTAL TAKE).

21. *See infra* Part III (LIKE WATER OFF A DUCK'S BACK: FWS'S INCIDENTAL TAKE PERMIT PROPOSAL).

22. *See infra* Part IV (CHARTING A NEW FLIGHT PATH: RECOMMENDATIONS FOR THE EMERGING INCIDENTAL TAKE PERMIT).

23. *See* Guillaume Vandenbroucke, *The U.S. Westward Expansion*, 49 INT'L ECON. REV. 81, 94, 104 fig.6 (2008) (charting westward demographic shifts in the United States after the Revolutionary War).

24. *See* Meredith Blaydes Lilley & Jeremy Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, 38 ENVTL. L. 1167, 1177–78 (2008) (discussing the implications of westward expansion on the juvenile country's natural resources).

slaughter of wildlife caught in the path of the thriving frontier economy.[25] The near extinction of the American Bison (*Bison bison*) alerted some observers to the inevitable exhaustibility of the nation's natural capital.[26] Yet, despite these early warnings, the destructive path of westward expansion continued unabated.[27]

Of course, the American Bison were not the only victims of westward expansion. Some species fared even worse, such as the Passenger Pigeon (*Ectopistes migratorius*).[28] It is estimated that at the time Europeans first arrived in North America, Passenger Pigeon populations numbered between three to five billion individuals and comprised between 25 and 40 percent of the continent's total avian population.[29] The largest Passenger Pigeon rookery on record occupied roughly 850 square miles.[30] During his early excursions, John James Audubon[31] once noted that a passel of Passenger Pigeons migrating overhead blocked out the sun for three days.[32] This seemingly inexhaustible ubiquity led Americans to slaughter Passenger Pigeons for everything from food to fertilizer, bedding, and sheer boredom.[33] Nevertheless, the exhaustibility of the species became harrowingly obvious at the turn of the century.[34] Despite the astonishing abundance recorded only 40 years earlier, the Passenger Pigeon became a memory when Martha—the last of her species—gasped her final breath at the Cincinnati Zoo in 1914.[35]

At the turn of the century, Congress took notice of the nation's evaporating biodiversity. Congress's first response to the problem culminated in the Lacey Act of 1900.[36] The Lacey Act sought to curb the rampant destruction of prior decades by rehabilitating rapidly declining populations of wild birds and banning the introduction of competitive

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25. BRIAN CZECH & PAUL R. KRAUSMAN, THE ENDANGERED SPECIES ACT: HISTORY, CONSERVATION BIOLOGY, AND PUBLIC POLICY 8 (2001).

26. *Id.*

27. *Id.*

28. JOEL GREENBERG, A FEATHERED RIVER ACROSS THE SKY: THE PASSENGER PIGEON'S FLIGHT TO EXTINCTION 1 (2014).

29. *Id.*

30. *Id.*

31. As an early American naturalist, John James Audubon was one of the first persons to document the avifauna of the budding country. *John James Audubon*, NAT'L AUDUBON SOC'Y, http://www.audubon.org/content/john-james-audubon (last visited Nov. 25, 2017).

32. GREENBERG, *supra* note 28, at 1.

33. *Id.* at 69–71, 74, 109.

34. *Id.* at 159–60.

35. *Id.* at 187–88.

36. Lacey Act, Ch. 53, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 3371–78 (2012)).

exotic species.[37] However, high society's continuing demands, along with a lack of enforcement mechanisms, rendered the Lacey Act largely ineffectual in curbing the plummeting populations of domestic avian species.[38]

In response to the Lacey Act's weaknesses, Congress enacted the Weeks-McLean Act in 1913.[39] Up to this time, the individual states were the sole regulators of interstate migratory wildlife.[40] However, the Weeks-McLean Act sought to bring those migratory birds under the federal government's purview.[41] In response, dissatisfied hunters immediately challenged the Act's constitutionality.[42] The challengers argued that—absent a constitutional provision to the contrary—the Tenth Amendment[43] left the regulation of wildlife squarely within the power of the various states.[44] A federal court agreed and struck down the Weeks-McLean Act as unconstitutional.[45]

B. Treaties Animating the MBTA & Forming Its Underlying Purpose

Without the ability to regulate migratory birds under its commerce power, Congress turned to its treaty powers. The United States entered into the first treaty aimed at protecting birds with Great Britain (on behalf of Canada) in 1916.[46] Congress implemented the treaty domestically two years later under the MBTA.[47] Over the course of the next 58 years, the United States entered into three more treaties to protect migratory birds with Mexico,[48] Japan,[49] and Russia.[50] With each new treaty, Congress amended

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37. *Id.*; Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 37 (1995).

38. Alexander K. Obrecht, *Migrating Towards an Incidental Take Permit Program: Overhauling the Migratory Bird Treaty Act to Comport with Modern Industrial Operations*, 54 NAT. RESOURCES J. 107, 112 (2014); *see also* Lilley & Firestone, *supra* note 24, at 1178–79 (discussing the various shortcomings of the Lacey Act).

39. Lilley & Firestone, *supra* note 24, at 1178–79.

40. *Id.* at 1179; Act of March 4, 1913, ch. 145, 37 Stat. 828, 847 (repealed 1918).

41. Lilley & Firestone, *supra* note 24, at 1178–79.

42. United States v. McCullagh, 221 F. 288, 289–90 (D. Kan. 1915).

43. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

44. *McCullagh*, 221 F. at 292.

45. *Id.* at 295–96.

46. Convention Between the United States and Great Britain for the Protection of Migratory Birds, Gr. Brit.-U.S., Aug. 16, 1916, 39 Stat. 1702 [hereinafter Canada Treaty].

47. Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2012).

48. Convention Between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, Mex.-U.S., Feb. 7, 1936, 50 Stat. 1311 [hereinafter Mexico Treaty].

the MBTA accordingly.[51] Importantly, the treaties have a variety of protections and prohibitions directly applicable to domestic take authorization.[52] Thus, to remain within the boundaries of its statutory authority under the MBTA, FWS must comport with the principles in each of the four treaties when promulgating an ITP.[53]

1. The Canada Treaty

The United States and Great Britain entered into the MBTA's foundational treaty in 1916 to stem the "indiscriminate slaughter" of migratory birds.[54] One of the initial, basic imports of the Treaty was a flat ban on the take of any non-game species.[55] However, the parties amended the Treaty in 1995 and authorized limited takes "for scientific, educational, propagating or other *specific* purposes consistent with the [conservation] principles of this Convention . . . ."[56] While those "other specific purposes" may seem ambiguously broad, the 1995 Amendment outlined five conservation principles that serve as a check on permitted takes: (1) management of migratory birds internationally; (2) guaranteeing various sustainable uses; (3) protecting healthy bird populations for harvesting; (4) protecting necessary bird habitat; and (5) restoring diminished bird populations.[57] In essence, to remain consistent with the Canada Treaty, any domestically permitted incidental take program must have—at most—a neutral impact on avian populations, and must improve or conserve necessary habitats of migratory birds.[58]

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49. Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction, and Their Environment, Japan-U.S., Mar. 4, 1972, 25 U.S.T. 3329 [hereinafter Japan Treaty].

50. Convention Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647 [hereinafter Russia Treaty].

51. *See* 16 U.S.C. § 703(a) (2012) (listing the conventions enacted by the MBTA).

52. HOLLAND & HART, DEVELOPMENT OF A PERMIT PROGRAM FOR INCIDENTAL TAKE OF MIGRATORY BIRDS 9–13 (2010).

53. 16 U.S.C. § 704(a).

54. Canada Treaty, *supra* note 46, proclamation.

55. *Id.* art. II.

56. Protocol Amending the 1916 Convention for the Protection of Migratory Birds, Can-U.S., art. V, Dec. 5, 1995, S. TREATY DOC. NO. 104-28 (1995) (emphasis added).

57. *Id.* art. II.

58. *See* HOLLAND & HART, *supra* note 52, at 10 (discussing the various requirements imposed on potential FWS regulations by the Canada Treaty).

2. The Mexico Treaty

The United States and Mexico formed the second treaty underlying the MBTA in 1936.[59] The fundamental tenant of the Treaty holds that avian protection is "right and proper . . . in order that the species may not be exterminated . . . ."[60] This Treaty allows for the "rational utilization of migratory birds for the purposes of sport as well as for food, commerce and industry . . . ."[61] In the context of migratory bird conservation, this Treaty is generally the most relaxed.[62] Broadly, the Treaty will permit the take of migratory birds, provided that such take does not lead to the extinction of the species.[63]

3. The Japan Treaty

After the Mexico Treaty, the MBTA remained dormant for roughly 35 years until the United States and Japan entered into the third treaty supporting the Act in 1972.[64] This Treaty broadly prohibits "[t]he taking of [] migratory birds or their eggs . . . ."[65] However, exceptions to the prohibition are permitted if they serve "scientific, educational, propagative or other specific purposes not inconsistent with the objectives of this Convention . . . ."[66] While the "objectives" of the Treaty remain somewhat nebulous, a permitted incidental take program is likely consistent with the Japan Treaty if it "generally maintain[s], or enhance[s] migratory bird habitat[s] . . . ."[67]

4. The Russia Treaty

The United States and Russia entered into the final treaty animating the MBTA in 1976.[68] This Treaty generally prohibits "the taking of migratory birds, the collection of their nests and eggs and the disturbance of nesting colonies."[69] However, "[e]xception[s] to these prohibitions" are permitted by regulation "[f]or scientific, educational, propagative, or other specific

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59. Mexico Treaty, *supra* note 48.
60. *Id.* proclamation.
61. *Id.*
62. Obrecht, *supra* note 38, at 116.
63. Mexico Treaty, *supra* note 48, art. I.
64. Japan Treaty, *supra* note 49.
65. *Id.* art. III(1).
66. *Id.* art. III(1)(a).
67. HOLLAND & HART, *supra* note 52, at 28.
68. Russia Treaty, *supra* note 50.
69. *Id.* art. II(1).

purposes not inconsistent with the principles of [the] Convention."[70] Unfortunately, the Russia Treaty stops short of defining the parameters of "other specific purposes" or the "principles" with which they must comport.[71] Nevertheless, to be consistent with the Russia Treaty, an authorized incidental take program must primarily advance "the conservation of migratory birds and their environment . . . ."[72]

C. Operative Language of the MBTA

In recognition of the foregoing treaties, § 703(a) of the MBTA makes it "unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, [or] kill . . . any migratory bird . . . ."[73] Despite no clear definition for the term, an unauthorized take may result in either misdemeanor or felony criminal penalties.[74] Because the MBTA contains no scienter element, a misdemeanor violation may occur without any culpable intent, and several federal circuit courts interpret it as a strict liability statute.[75] The penalty for a misdemeanor conviction is a fine up to $15,000 or imprisonment not exceeding six months, and the U.S. Department of Justice may seek penalties for each individual bird taken.[76] For large-scale energy producers, these fines compound exponentially.[77] As a result, several circuit court interpretations break from prior precedent and limit the MBTA's applicability to actions intentionally directed at protected

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70. *Id.* art. II(1)(a).

71. *Id.*; HOLLAND & HART, *supra* note 52, at 12.

72. Russia Treaty, *supra* note 50, convention.

73. Migratory Bird Treaty Act, 16 U.S.C. § 703(a) (2012).

74. *Id.* §§ 707(a)–(b).

75. *See* United States v. Apollo Energies, Inc., 611 F.3d 679, 690 (10th Cir. 2010) (holding that an inadvertent killing of a bird proceeded by proximate cause constitutes a take under the MBTA); United States v. Morgan, 311 F.3d 611, 616 (5th Cir. 2002) ("[T]he MBTA and its attendant regulations is a strict liability offense."); United States v. Pitrone, 115 F.3d 1, 5 (1st Cir. 1997) ("For most of its existence, the MBTA contained no scienter requirement whatever; its felony provision, like its misdemeanor provision . . . imposed strict liability."); United States v. Boynton, 63 F.3d 337, 343 (4th Cir. 1995) ("Since the inception of the Migratory Bird Treaty in the early part of this century, misdemeanor violations of the MBTA . . . have been interpreted by the majority of the courts as strict liability crimes . . . ."); United States v. Engler, 806 F.2d 425, 431 (3d Cir. 1986) ("Scienter is not an element of criminal liability under the Act's misdemeanor provisions."); United States v. FMC Corp., 572 F.2d 902, 907–08 (2d Cir. 1978) (using tort law for hazardous chemicals to hold that strict liability may apply to MBTA violations).

76. 16 U.S.C. § 707(a); *see, e.g.*, Press Release, U.S. Dep't of Justice, Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Projects (Dec. 19, 2014) [hereinafter Press Release], https://www.justice.gov/opa/pr/utility-company-sentenced-wyoming-killing-protected-birds-wind-projects-0 (announcing a $2.5 million plea agreement between the United States and a wind energy company that killed 374 birds during operations).

77. Press Release, *supra* note 76; *see also* HOLLAND & HART, *supra* note 52, at 2 (outlining several different fine quantities paid by operators after being found guilty of violating the MBTA).

birds.[78] The resulting circuit split, discussed below, leaves the precise reach of the MBTA unclear.[79]

II. STRICTLY UNRESTRICTED LIABILITY: THE VARIED INTERPRETATIONS OF THE MBTA & INCIDENTAL TAKE

Difficult threshold questions face the promulgation of an Incidental Take Permit program. The foremost question is whether the scope of liability under the MBTA actually encompasses incidental take; and consequently, whether FWS has the authority to enforce an ITP program aimed at regulating those forms of take.[80] The precise contours of this debate lie outside the scope of this Note, but because any ITP program will undoubtedly face several legal challenges, a brief review and synthesis of controlling precedent is warranted.

Initially, enforcement of the MBTA focused solely on hunting and wildlife-trafficking offenses.[81] However, the MBTA contains no language that limits its applicability to those offenses alone.[82] Accordingly, amidst the increasing environmental awareness of the 1970s, FWS began to enforce the MBTA against otherwise legal behavior that inadvertently killed protected birds.[83] In the absence of clear guidance from Congress or

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78. *See* Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302–03 (9th Cir. 1991) (holding that logging in nesting areas constitutes an indirect and inadvertent action outside of the prohibitions of the MBTA); Newton Cty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997) ("[I]t would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds."); United States v. Citgo Petroleum Corp., 801 F.3d 477, 494 (5th Cir. 2015) ("If the MBTA prohibits all acts or omissions that 'directly' kill birds . . . then all owners of big windows, communication towers, wind turbines, solar energy farms, cars, cats, and even church steeples may be found guilty of violating the MBTA.").

79. Ogden, *supra* note 8, at 16*; see also* HOLLAND & HART, *supra* note 52, at 1–2 (discussing the divergent judicial interpretations of the MBTA's prohibitions).

80. *See* CROWELL & MORING, *supra* note 14 ("If the scope of MBTA 'take' and 'kill' is limited to conduct directed against wildlife, then FWS lacks the legal authority to expand the MBTA's criminal scope to include land-use or other activities that incidentally cause migratory bird deaths, and FWS lacks authority to regulate such claimed incidental takes.").

81. Larry Martin Corcoran & Elinor Colbourn, *Shocked, Crushed and Poisoned: Criminal Enforcement in Non-Hunting Cases Under the Migratory Bird Treaties*, 77 DENV. U. L. REV. 359, 385–86 (1999); *see also* Scott Finet, *Habitat Protection and the Migratory Bird Treaty Act*, 10 TUL. ENVTL. L.J. 1, 6 n.15 (1996) ("Enactment of the MBTA was a legislative response to the problem of mass destruction of avian life. At the end of the nineteenth century birds were killed in large numbers for food, sport and millinery purposes.").

82. Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2012); *see also* United States v. Moon Lake Electric Ass'n, 45 F. Supp. 2d 1070, 1082 (D. Colo. 1999) ("[T]here is no clearly expressed legislative intent that the MBTA regulates only physical conduct associated with hunting or poaching.").

83. George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 183–85 (1979).

the Supreme Court regarding the scope of liability and a precise definition of "take" under the MBTA, a circuit split matured into three relatively distinct interpretations: (1) the MBTA is an unwavering strict liability statute with broad implications; (2) the absurd outcomes derived from reading the MBTA as a strict liability statute limit its applicability to direct and unintentional behavior; and (3) while the MBTA is a resolute strict liability statute, enforcement should be narrowed by the necessities of due process.

A. Broad Strict Liability Jurisdictions

The earliest interpretation of the MBTA viewed the statute as a steadfast strict liability statute that prohibits any form of take. In the seminal case, *United States v. FMC Corporation*, the Second Circuit considered whether the operators of a toxic wastewater retention pond could unintentionally take a protected species within the definition of the MBTA.[84]

In rendering its decision, the Second Circuit interpreted the MBTA's take prohibitions broadly and held that whether a defendant knows their activity will take a protected species is irrelevant when evaluating liability under the MBTA.[85] To reach this outcome, the *FMC* court focused on the fact that "the statute does not include as an element of the offense 'wilfully, knowingly, recklessly, or negligently' . . . ."[86] Therefore, according to the Second Circuit, the MBTA prohibits *any* form of take—regardless of knowledge or intent.[87]

As the progenitor of strict liability interpretation under § 703, the *FMC* court's opinion remains the most expansive interpretation of the MBTA's scope.[88] Under the Second Circuit's analysis, a property owner might be guilty of violating the MBTA for a bird that dies while striking a window of their building.[89] Backed by the extensive list of species protected under the MBTA, the *FMC* court's opinion creates broad liability that arguably

84. United States v. FMC Corp., 572 F.2d 902, 904 (2d Cir. 1978).

85. *Id.* at 908.

86. *Id.*

87. *See id.* at 907–08 (examining the congressional intent animating the broad prohibitions of the MBTA).

88. *See* United States v. Citgo Petroleum Corp., 801 F.3d 477, 491–92 (5th Cir. 2015) (highlighting the potential breadth of the Second Circuit's holding in *FMC Corp.*).

89. *Id.* at 494. *But see* FMC Corp., 572 F.2d at 905 (leaving "[s]uch situations . . . to the sound discretion of prosecutors and the courts").

extends beyond Congress's original intent.[90] Notwithstanding that breadth, however, the opinion also implies that a successful challenge to FWS's threshold authority to regulate incidental take would be dubious in the Second Circuit.[91]

B. Direct and Intentional Jurisdictions

The intersection between incidental take and scienter remained largely dormant until the 1990s when both the Eighth and Ninth Circuits addressed the issue in a pair of cases dealing with logging.[92] In both cases, petitioners sought to enjoin the U.S. Forest Service from selling logging permits within the nesting areas of the Northern Spotted Owl (*Strix occidentalis*).[93] Petitioners argued that logging would inevitably destroy critical habitat and ultimately lead to the take of Northern Spotted Owls—a species protected by the MBTA.[94]

First, in *Seattle Audubon Society v. Evans*, the Ninth Circuit found the MBTA's primary prohibitions "describe[] physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918."[95] Consequently, and without qualification, the court found the definition of "take" did not prohibit unintentional killing through habitat modification, destruction, or any other indirect conduct.[96]

Likewise, in *Newton County Wildlife Association v. United States Forest Service*, the Eighth Circuit held that the "MBTA's plain language" and prohibitions are limited only to "conduct *directed* at migratory birds . . . ."[97] In the court's view, "it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct . . . that *indirectly* results in the death of migratory birds."[98] As a result, both courts broadly rejected the underlying notion that § 703 has the capacity to regulate incidental take.[99]

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90. *See* Citgo Petroleum Corp., 801 F.3d at 494 ("The absurd results that the government's interpretation would cause further bolsters our confidence that Congress intended to incorporate the common-law definition of 'take' in the MBTA.").

91. Obrecht, *supra* note 38, at 123.

92. Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 299–300, 302–03 (9th Cir. 1991); Newton Cty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 114 (8th Cir. 1997).

93. *Seattle Audubon Soc'y*, 952 F.2d at 298; *Newton Cty. Wildlife Ass'n*, 113 F.3d at 114.

94. *Seattle Audubon Soc'y*, 952 F.2d at 302; *Newton Cty. Wildlife Ass'n*, 113 F.3d at 115.

95. *Seattle Audubon Soc'y*, 952 F.2d at 302.

96. *Id.* at 303.

97. *Newton Cty. Wildlife Ass'n*, 113 F.3d at 115 (emphasis added).

98. *Id.*

99. Ogden, *supra* note 8, at 19.

Taken against the antithetical *United States v. FMC Corporation* opinion, the *Newton* and *Seattle Audubon* decisions appear to be a judicial overcorrection. By restricting the MBTA's take prohibition to conduct directed at birds—behavior already explicitly defined in the Act—these courts read latent redundancies into § 703.[100] The practical effect of these opinions partially abandons congressional intent by crippling the MBTA's ability to protect avian populations.[101]

Functionally, if § 703 only applies to "hunters and poachers," an ITP would be unnecessary to comply with the MBTA.[102] In essence, FWS would be powerless to enforce any program that focused on regulating indirect and unintentional takes of protected species.[103] Consequently, if the emerging ITP program is challenged in either circuit, a court is more likely to find FWS exceeded its delegated authority under the MBTA.[104]

C. Due Process & Incidental Take: Strict Liability with Proximate Cause

In light of the competing views of the MBTA's applicability to incidental take, the Tenth Circuit charted a different course in *United States v. Apollo Energies, Inc*.[105] For reasons discussed in further detail below, the *Apollo* decision provides the most practical approach to balance the competing tensions found within the MBTA's misdemeanor provision.[106]

In *Apollo*, the Tenth Circuit specifically considered whether an oil-field operator's heater-treaters[107] could take a protected species within the

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100. *See* United States v. Moon Lake Electric Ass'n, 45 F. Supp. 2d 1070, 1079 (D. Colo. 1999) ("The MBTA's language suggests that Congress intended [all terms] to serve a particular function, distinct from the functions of the other 18 types of proscribed conduct. To hold otherwise would deny [them] independent meaning and essentially read [terms] out of the MBTA and the Secretary's definition of 'take.'").

101. Ogden, *supra* note 8, at 28; *see also* Christos K. Sokos et al., *Hunting of Migratory Birds: Disturbance Intolerant or Harvest Tolerant?*, 19 WILDLIFE BIOLOGY 113, 119 (2013) (concluding that stationary, site-specific disturbances create a larger net impact on the viability of avian population structures when compared to predation as a result of hunting).

102. Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991); Ogden, *supra* note 8, at 27.

103. *See* CROWELL & MORING, *supra* note 14 (questioning FWS's fundamental authority to enforce an ITP program under the MBTA).

104. *See id.* (analyzing the potential for successful challenges to FWS's proposed ITP program).

105. United States v. Apollo Energies, Inc., 611 F.3d 679, 686–91 (10th Cir. 2010).

106. *See infra* pp. 13–15 (highlighting the beneficial aspects of applying the *Apollo* rationale to isolated and sporadic instances of take).

107. Heater-treaters are large cylinders routinely employed by oil-drill operators to separate oil from water after the mixture is pumped up from underground. *Apollo*, 611 F.3d at 682. Heater-treaters typically measure up to 20 feet tall with a diameter of three feet. *Id.* Amidst the open prairies of the Midwest, heater-treaters become an ideal location for cavity-nesting species of birds. *Id.*

meaning of § 704(a) of the MBTA.[108] In 2005, acting on an anonymous tip, a FWS enforcement agent investigated several Kansas oil fields and found 300 dead birds—ten of which were protected by the MBTA.[109] Rather than recommending prosecution, FWS embarked on an extensive "education campaign" that sought to alert oil companies about the threats posed to birds by their heater-treaters.[110] Two years later, FWS re-inspected several of those oil fields and again found protected bird carcasses in the heater-treaters of multiple operators.[111] Following their convictions, defendants appealed: (1) the applicability of the MBTA's strict liability provisions to incidental take; and (2) the Act's constitutionality on Fifth Amendment due process grounds.[112]

Addressing the MBTA's strict liability prohibition first, the Tenth Circuit focused on the fact that "[a]s a matter of statutory construction, [§ 703(a)] does not contain a scienter requirement."[113] Relying on that omission, the court's holding ultimately reestablished the MBTA's misdemeanor provision as a clear strict liability provision that may proscribe incidental take.[114]

Next, the court addressed the defendants' due process challenge in two parts: (1) whether the defendants possessed fair notice of the conduct prohibited by the statute; and (2) whether the operators knew their operations could cause the death of birds protected by the MBTA.[115] While recognizing that due process requires a statute to give fair notice of the type of conduct prohibited, the court held that "actions criminalized by the MBTA may be legion, but they are not vague."[116]

Finally, turning to the question of causation, the court found FWS's "education campaign" dispositive.[117] The record in the case showed that while the campaign reached one defendant, the other defendant remained oblivious to the potential harms posed by their heater-treaters.[118] As a result, the court sustained the conviction of the first defendant and overturned the latter.[119]

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108. *Id.* at 681–82.
109. *Id.* at 682.
110. *Id.*
111. *Id.* at 683.
112. *Id.*
113. *Id.* at 686.
114. *Id.*
115. *Id.* at 688.
116. *Id.* at 689.
117. *Id.* at 691.
118. *Id.*
119. *Id.*

Ultimately, the *Apollo* holding distills two fundamental principles relevant for future application: (1) § 703 of the MBTA is, on its face, a clear strict liability statute;[120] however, (2) prosecution must be premised upon actual notice that identifies the type of conduct that violates the MBTA.[121] For numerous reasons, *Apollo* strikes a sensible balance between the two competing views of strict liability under the MBTA. On one hand, the circuits taking a narrow view of the MBTA unduly read latent redundancies into § 703(a).[122] By limiting the MBTA's misdemeanor provision to intentionally direct actions, the MBTA becomes frozen in time, and it can no longer carryout its underlying purpose.[123] The MBTA's language and animating treaties demonstrate that its authors contemplated a broader application aimed at conserving the vitality of domestic avian *populations*[124]—rather than individuals.[125] Thus, where the Statute is read in a manner that generally excludes industrial producers engaged in persistently elevated rates of take, the MBTA's fundamental purpose is abrogated, and it no longer protects avian populations from a multitude of rapidly evolving anthropogenic threats.[126]

Comparatively, however, blindly applying strict liability to any take of a protected species has the potential to create unreasonable outcomes under the MBTA.[127] Under this approach, any individual vehicle operator who unintentionally strikes and wounds a bird instantly violates the MBTA.[128] As a result, that operator is subject to a $15,000 fine for each individual bird wounded.[129] While regrettable, these remote instances of unintentional take are unlikely to have the profound population-level effects

120. *Id.* at 686.

121. *Id.* at 689–90.

122. *See* United States v. Moon Lake Electric Ass'n, 45 F. Supp. 2d 1070, 1079 (D. Colo. 1999) ("The MBTA's language suggests that Congress intended [all terms] to serve a particular function, distinct from the functions of the other 18 types of proscribed conduct. To hold otherwise would deny [them] independent meaning and essentially read [terms] out of the MBTA and the Secretary's definition of 'take.'").

123. *See* Opinion Letter, U.S. Dep't of the Interior, Incidental Take Prohibited Under the Migratory Bird Treaty Act 24–25 (Jan. 10, 2017) [hereinafter Opinion Letter] (arguing that the Eighth and Ninth Circuit approaches are flawed in the context of the MBTA's language and underlying treaties).

124. *See* FRANK B. GILL, ORNITHOLOGY 525 (2d ed. 1995) ("Bird populations range in size from hundreds of millions of individuals to just a handful of survivors.").

125. *See* Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931, 8942 (to be codified at 50 C.F.R. § 21.3 (2013)) (highlighting the MBTA's and underlying treaties' primary focus on population-level impacts).

126. Opinion Letter, *supra* note 123, at 24–25.

127. *See* United States v. Citgo Petroleum Corp., 801 F.3d 477, 493–94 (5th Cir. 2015) (discussing the MBTA's broad coverage and the potentially absurd outcomes that flow from a strict application of § 703(a)).

128. *Id.* at 494.

129. Migratory Bird Treaty Act, 16 U.S.C. § 707(a) (2012).

contemplated by the MBTA.[130] Accordingly, it seems unlikely the drafters of the MBTA imagined these types of isolated violations would fall prey to the MBTA's prohibitions.[131]

For the general public, *Apollo*'s notice requirement places a practical limit on FWS's broad prosecutorial powers and the sweeping prohibitions of the MBTA.[132] Further, the decision imposes an attendant burden on the Service to identify individuals or operators with excessive rates of take and to work with those operators to negate or reduce that rate before properly pursuing an enforcement action.[133] Presumably, under the due process strictures of the Tenth Circuit's opinion, FWS cannot give effective notice sufficient to criminalize episodic and solitary occurrences.[134] Consequently, these sporadic or isolated takes will not violate the MBTA.[135]

Apollo's holding, therefore, has an important implication for FWS's recent NOI because it provides a practical narrowing factor. By excluding individual and isolated takes, *Apollo* could allow FWS to tailor its final permitting program toward industrial operators with excessive, population-level impacts on avian biodiversity.[136] By excluding expansive applicability from a permitting regime, FWS is positioned to promulgate an efficient program that distinctly accommodates the functional difficulties confronting large-scale, industrial operators and their rates of take.[137] Furthermore, by remaining true to the fundamental purposes of the MBTA, while simultaneously addressing due process concerns, a court will be more likely to uphold the ITP program as a permissible exercise of FWS's delegated authority under the MBTA.[138]

In the end, without a definitive decision on the scope of liability from the Supreme Court, the fractured circuit dispositions leave FWS's authority

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130. *See* GILL, *supra* note 124, at 522–23 (discussing the effects of mortality rates on avian populations).

131. *See* Benjamin Means, Note, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 MICH. L. REV. 823, 830–33 (arguing that the legislative history of the MBTA implies a limited applicability, which would exclude takes resulting from circumstances unforeseen by the drafters).

132. Ogden, *supra* note 8, at 19.

133. *Id.*

134. *Id.* at 27.

135. *Id.*

136. *See* United States v. Apollo Energies, Inc., 611 F.3d 679, 688–89 (10th Cir. 2010) (excluding most isolated instances of take from the strict liability provisions of the MBTA).

137. *See* HOLLAND & HART, *supra* note 52, at 3 (noting the potential regulatory benefits that may follow from a narrowly promulgated ITP program).

138. *See* Ogden, *supra* note 8, at 27 (summarizing the current judicial trend toward adopting the *Apollo* rationale).

to regulate incidental take subject to jurisdictionally dependent outcomes.[139] Until the Court renders that decision, however, the balanced and practical contours of the *Apollo* decision position it as the most judicious approach to setting limits on FWS's ability to enforce the MBTA against unpermitted take.[140]

III. LIKE WATER OFF A DUCK'S BACK: FWS'S INCIDENTAL TAKE PERMIT PROPOSAL

Notwithstanding the uncertainty surrounding the MBTA's precise scope, FWS recently took a definitive step toward regulating the incidental take of domestic migratory birds.[141] Due to the "rapidly accelerating [anthropogenic] impacts" causing "continental-scale population declines," FWS gave notice of its plan to promulgate a potentially enormous ITP program under the MBTA.[142] While the program began under the Obama Administration, the proposal's focus on providing "legal clarity" to regulated industries "regarding compliance with the MBTA" makes the ITP an attractive tool for the new Administration's pro-industry stance on energy production.[143] Consequently, the scoping notice provides early insight into how FWS might craft regulations that will have an enormous impact on the declining avian populations of North America.[144] Specifically, the NOI details four proposed strategies the Service is considering to deploy the new program: (1) general conditional take permits; (2) individual take permits; (3) memoranda of understanding with other federal agencies; and (4) further development of voluntary guidance for industry sectors.[145] This section considers each approach in turn and discusses the various advantages and disadvantages that each strategy poses for regulating incidental take in the modern landscape.

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139. *See* Obrecht, *supra* note 38, at 121 (highlighting the potentially wide array of interpretations that confront FWS's incidental take program).

140. Ogden, *supra* note 8, at 29.

141. Migratory Bird Permits, 80 Fed. Reg. 30,032, 30,032–36 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21).

142. *Id.* at 30,033.

143. *Id.* at 30,034; *see also* Natasha Geiling, *In a Tirade Against Renewables, Trump Claims Wind Power 'Kills All the Birds'*, THINKPROGRESS (Oct. 26, 2016, 3:23 PM), https://thinkprogress.org/donald-trump-wind-kills-all-the-eagles-bd4acf3264d (reporting on Donald Trump's aversion to the wildlife regulations applied to energy-producing industries); Juan Carlos Rodriguez, *Environmental Regulation and Legislation to Watch in 2017*, LAW360 (Jan. 2, 2017, 1:03 PM), https://www.law360.com/articles/875980/environmental-regulation-and-legislation-to-watch-in-2017 (acknowledging the new Administration's likely adoption of the ITP program).

144. Migratory Bird Permits, 80 Fed. Reg. at 30,033.

145. *Id.* at 30,034–35.

A. General Conditional Permits

The first strategy outlined in the NOI is a relatively novel approach that will allow FWS to provide "general conditional authorization[s] for incidental take" of migratory birds to those "industries and activities that involve significant avian mortality. . . ."[146] These General Conditional Permits ("GCPs") appear to be FWS's preferred approach and will be premised upon the permittee's adherence "to appropriate standards for protection and mitigation of incidental take of migratory birds."[147] Under the proposal, a GCP will seemingly be available to certain industrial operators that consistently take migratory birds where FWS has: (1) "substantial knowledge about measures these industries can take to prevent or reduce incidental bird deaths"; and (2) "a history of working with these industry sectors to address associated hazards to birds . . . ."[148] The GCP approach will authorize FWS to approve applicants without individual notice-and-comment rulemaking.[149] FWS's approval will be conditioned upon the applicant's implementation of "right from the start," passive, "bird-safe solutions"—in other words, technologies that reduce or mitigate industrial take of avian species.[150] Importantly, recent FWS presentations disclose that once the GCP issues, it *will not* be conditioned upon *any* threshold take limits, nor does the Service plan to *monitor* the actual quantity of take occurring under the permit.[151]

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146. *Id.* While the NOI does not define which industrial operators will qualify for a General Conditional Permit, the NOI lists as examples: (1) oil, gas, and wastewater disposal pits; (2) methane or other gas burner pipes; (3) communication towers; and (4) electric transmission and distribution lines. *Id.* at 30,035.

147. *Id.* at 30,035.

148. *Id.*

149. *Id.*

150. In conjunction with the NOI, the Service conducted multiple "Scoping Open Houses" around the country to explain a few of the finer details of the proposed ITP program. *See id.* at 30,033 (listing the locations of the public forums). One such open house was held online in the form of a "public webinar on July 8, 2015," which was then posted to the Service's website. *Migratory Bird Program Provides Voluntary Guidance to Help Project Proponents Reduce Incidental Take*, U.S. FISH & WILDLIFE SERV. [hereinafter *Migratory Bird Program*], https://www.fws.gov/birds/policies-and-regulations/incidental-take.php (last updated May 24, 2016). However, following the ascendancy of the Trump Administration, the video was removed from FWS's website in January 2017. For more information regarding these discussions, see Comment Letter, Defs. of Wildlife, Incidental Take of Migratory Birds 11–12 (July 27, 2015) [hereinafter Comment Letter],https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-MB-2014-00670053&attachmentNumber=1&contentType=pdf.

151. *See* Comment Letter, *supra* note 150, at 11–12 (clarifying compromises FWS is considering to institute ITP). This strategy appears to be analogous to the National Oceanic and Atmospheric Administration's ("NOAA's") general commercial trawl permits, which require the applicant to incorporate turtle-exclusion devices into trawl nets. *See* 50 C.F.R. § 223.206 (2016) (explaining the prerequisite "gear requirements" for trawlers to obtain an incidental take permit from

1. Advantages of the General Permit Approach

Facially, the GCP program contains several attractive features for both FWS and regulated entities. For FWS, a front-loaded approach that sanctions take based upon an industry-sector category will allow the Service to grant permits quickly and avoid the typical burdens of notice-and-comment rulemaking for each individual permit.[152] Comparatively, the GCP merely requires FWS to determine whether an applicant's operations fit within a pre-existing permit scheme and whether that operation is suitable for the recommended "conservation measures or technologies."[153] The approach will be a noticeable departure from the "permit-by-rule" approach employed to regulate incidental take under similar wildlife statutes.[154] As a result, the Service will be afforded the flexibility to approve a larger volume of permit applications, thereby expanding the reach of the MBTA's prohibitions on take.[155] Ideally, compared to FWS's prior apathetical enforcement of the MBTA, this new approach may provide heightened domestic protections for migratory birds.[156]

Second, for regulated entities, the GCPs are likely to have attractively reduced compliance costs.[157] Due to the broad coverage of the MBTA, the overall scheme of the streamlined GCP approach appears to be aimed at minimizing the administrative costs associated with traditional incidental take permits.[158] Where the Statute is read to criminalize incidental take, the costs associated with a violation can be astronomical for industrial operators.[159] The traditional alternative, however, may offer little reprieve because the costs associated with obtaining an individual take permit may be equally exorbitant.[160] Accordingly, under the proposed GCP approach, the reduced costs flowing from limited administrative oversight are likely to become more attractive than the potential penalties and litigation costs

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NOAA). Theoretically, these devices passively reduce the take of endangered sea turtle species. *Id.*; *Migratory Bird Program*, *supra* note 150.

152. Migratory Bird Permits, 80 Fed. Reg. 30,032, 30,034 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21).

153. *Id.* at 30,035.

154. *Id.* at 30,034; *see also* Ogden, *supra* note 8, at 55–57 (outlining the ESA's "permit-by-rule" approach).

155. Migratory Bird Permits, 80 Fed. Reg. at. 30,033.

156. *Id.* at 30,034.

157. *Id.*

158. *Id.*

159. *See* United States v. Citgo Petroleum Corp., 801 F.3d 477, 494 (5th Cir. 2015) ("[S]trict criminal liability would enable the government to prosecute at will and even capriciously (but for the minimal protection of prosecutorial discretion) for harsh penalties: up to a $15,000 fine or six months' imprisonment (or both) can be imposed for each count of bird 'taking' or 'killing.'").

160. Ogden, *supra* note 8, at 56.

stemming from prosecution under the MBTA.[161] Therefore, industrial operators are more likely to actively seek compliance with the MBTA under the GCP program.

Finally, for FWS, the GCP program potentially provides the Service with a steady stream of "conservation-based" revenue.[162] The NOI makes clear that the GCP program will allow FWS "to obtain meaningful compensatory mitigation for bird mortality that cannot be avoided or minimized through best practices or technologies."[163] With the minimized regulatory requirements imposed on FWS under the GCP, and the increased motivation for industrial compliance, the Service seemingly stands to obtain a significant premium for unpermitted surplus take.[164] Moreover, nothing in the NOI intimates the compensatory mitigation will be tied to a regional assessment of actual take quantities occurring under a given permit.[165] Therefore, FWS may be free to allocate mitigation funding to any location or project that it deems worthy of such expenditure.[166]

2. Disadvantages of the General Permit Approach

Despite the surface appeal of the GCP, this approach—as it stands—has dangerous implications for the future of domestic avian conservation. Functionally, the GCP approach appears to put FWS's desire to provide a vehicle for incidental take authorization ahead of the primary conservation purposes of the MBTA.[167]

As a threshold concern, the GCP risks running afoul of the MBTA and its recognition of the regional disparities underscoring the management of avian species. From an ornithological standpoint, avian populations may be defined and measured by narrow regional distinctions.[168] Accordingly, the focal point for understanding avian population health and behavior is through a narrow, locality-based lens.[169] In this sense, identical species and populations will behave asymmetrically based upon minor habitat

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161. *See* Migratory Bird Permits, 80 Fed. Reg. at. 30,033 ("An authorization system created through rulemaking could encourage implementation of appropriate conservation measures . . . .").

162. *Id.* at 30,033–34.

163. *Id.*

164. *Id.* at 30,034.

165. *See id.* (discussing briefly the opportunity for compensatory mitigation under a proposed ITP).

166. *Id.*

167. *See* Comment Letter, Ctr. for Biological Diversity, Incidental Take of Migratory Birds 3 (July 27, 2015) (on file with the Vermont Law Review) (comparing the forces driving the creation of the MBTA with the current NOI).

168. GILL, *supra* note 124, at 528–29.

169. *Id.* at 512–13.

distinctions.[170] Under the breadth of the MBTA, the behavioral considerations compound exponentially.[171] In recognition of this reality, § 704(a) of the MBTA authorizes the Secretary of the Interior to permit the take of protected species only under certain, regionally contingent conditions.[172] Indeed, this provision requires the Secretary (or FWS) to give "due regard to the zones of temperature and to the distribution, abundance, . . . breeding habits, and times and lines of migratory flight" of affected avian populations.[173] A permit is therefore consistent with the MBTA only after each of these interests is considered with respect to affected avian populations.[174] Given that populations are inextricably linked to narrow, regional influences,[175] § 704(a) implicitly recognizes that take authorizations must be considered in situ to scrutinize the disparate impacts on genetically and behaviorally distinct populations.[176]

Conversely, however, nothing in the NOI or recent presentations suggests FWS will consider regional distinctions when reviewing an applicant's operations.[177] Rather, the GCP's industry-level approach seemingly will only turn upon an operation's functional similarity to previously approved projects and their amenability to incorporating "bird-safe solutions."[178] While the Service believes these technologies will "sufficiently" minimize take, its plan to abstain from post-permit monitoring reveals that FWS lacks a meaningful way to analyze the efficacy of those practices.[179] Furthermore, the actual quantity of take occurring in a given location is increasingly subject to rapid change as avian populations and habitats are disrupted by a shifting climate.[180]

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170. *Id.* at 537.

171. *See Official Number of Protected Migratory Bird Species Climbs to More than 1,000*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/midwest/news/184.html (last updated Oct. 18, 2017) ("[T]he total number of species protected under the MBTA [is] 1007.").

172. Migratory Bird Treaty Act, 16 U.S.C. § 704(a) (2012).

173. *Id.*

174. *See* Fund for Animals v. Norton, 365 F. Supp. 2d 394, 419 (S.D.N.Y. 2005) ("[T]he MBTA requires federal management of the migratory bird population to weigh [§ 704(a)'s] factors when exercising authority.").

175. *See, e.g.*, Richard T. Holmes & Thomas W. Sherry, *Assessing Population Trends of New Hampshire Forest Birds: Local vs. Regional Patterns*, 105 AUK 756, 764–66 (1988) (discussing population impacts that flow from local habitat disturbances).

176. *Id.*

177. Migratory Bird Permits, 80 Fed. Reg. 30,032, 30,032–36 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21); *see also* Comment Letter, *supra* note 150, at 9–10; *Migratory Bird Program*, *supra* note 150.

178. Migratory Bird Permits, 80 Fed. Reg. at 30,033.

179. Comment Letter, *supra* note 150, at 9–10; *see also Migratory Bird Program*, *supra* note 150.

180. *See* JEFFREY V. WELLS, BIRDER'S CONSERVATION HANDBOOK: 100 NORTH AMERICAN BIRDS AT RISK 18–19 (2007) (discussing the effects of a warming climate on avian habitat and

Without site-specific monitoring and reporting requirements, ornithologists will be foreclosed from determining whether population shifts are a natural occurrence, a product of a warming climate, or the result of a failed "bird-safe solution."[181] As § 704(a) recognizes, migratory population dynamics are hardly homogeneous and uniform regulations cannot meaningfully account for a variety of regionally critical distinctions.[182] Therefore, without transparently accounting for *all* six provincial interests outlined in § 704(a), FWS's ITP program cannot comport with the MBTA's statutory mandate to examine regional impact.

Additionally, the GCP's lack of defined threshold take limits, and FWS's plan to refrain from examining the actual quantity of birds taken, further jeopardizes their legitimacy under the MBTA's foundational treaty. In connection with the regional concerns above, § 704(a) further conditions FWS's take authorization upon its consistency "with the terms of the conventions" underlying the MBTA.[183] Specifically, the Canada Treaty's prohibition on "*indiscriminate* slaughter"[184] is a guiding principle that requires, at most, a neutral impact on avian populations.[185]

While no court has explicitly interpreted this language in the MBTA's underlying treaties, FWS offered its own interpretation in a 2003 rule that authorized incidental take by the Armed Forces during military readiness activities.[186] In promulgating its final rule, FWS found that maximum take restrictions are necessary to comport with the treaties.[187] However, that "ceiling" impact would need to be ascertained through a species-by-species approach and site-specific assessments in the locations of proposed military

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distributions); *see also* Katrin Böhning-Gaese et al., *Avian Community Dynamics Are Discordant in Space and Time*, 70 OIKOS 121, 125 (1994) ("[I]ndividualistic responses of [avian] species to environmental change on different temporal and spatial scales . . . make it difficult to extrapolate across scales to predict the responses of species and communities to human-caused changes in climate and land use.").

181. *See* GILL, *supra* note 124, at 513 (discussing the differences between avian mortality resulting from anthropogenic threats in geographically distinct locations); *see also* NAT'L AUDUBON SOC'Y, *supra* note 2, at 119 ("All populations vary in size, however, even under natural conditions, and discerning a short-term decline that is part of a normal pattern of fluctuating abundance from a decline that indicates a conservation concern can be difficult . . . .").

182. Migratory Bird Treaty Act, 16 U.S.C. § 704(a) (2012).

183. *Id.*; *see also* Humane Soc'y v. Glickman, 217 F.3d 882, 885 (D.C. Cir. 2000) ("[T]he Secretary of the Interior may issue permits for killing Canada geese and other migratory birds if this is shown to be 'compatible with the terms of the [Migratory Bird] conventions.'" (quoting 16 U.S.C. § 704(a) (2012)).

184. Canada Treaty, *supra* note 46, proclamation (emphasis added).

185. *See supra* Part I.B.1 (discussing the requirements of the Canada Treaty).

186. *See* Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931, 8942 (to be codified at 50 C.F.R. § 21.3 (2013)) (distilling the various requirements of compliance with the MBTA's underlying treaties).

187. *Id.* at 8946.

exercises.[188] To prevent violating the undefined maximum take quantities, FWS further determined that a comprehensive monitoring scheme would be a sufficient "safeguard that provides for compliance" with the animating treaties.[189]

While the military's ITP appears more akin to the Individual Permits, discussed below, the guiding principle remains the same.[190] Here again, the absence of even basic monitoring provisions or established take thresholds in the GCP will violate FWS's own interpretation of the underlying treaties.[191] To rectify the GCP proposal with its interpretation of the underlying treaties, FWS must elucidate some form of continuing, site-specific monitoring program that will accompany each GCP approval and explicitly define a ceiling impact that may be contingent upon the permit applicant's specific location.[192] Without any monitoring component or any outline of "maximum take," the GCP's current consistency with the language of the Canada Treaty is seemingly suspect. Accordingly, in a post-promulgation challenge to the ITP, a court may be hard pressed to find that the Secretary complied "with the terms of the conventions" underlying the MBTA.[193]

B. Individual Permits

The second approach proposed in the NOI would establish FWS's legal authority to issue individualized incidental take permits to industrial operators.[194] The proposal defines the permit's availability by exclusion and makes the permit available to projects that: (1) "present complexities or siting considerations"; or (2) "for which there is limited information regarding adverse effects."[195] While FWS offers very little information about these individual take permits, the NOI paints this approach as an appurtenant catchall to the GCPs.[196]

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188. *Id.*

189. *Id.*

190. *See infra* Part III.B.1 (analyzing FWS's interpretation of the MBTA's treaties and individualized permits).

191. *See* Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. at 8946 (identifying monitoring as a key provision of compliance with the MBTA treaties).

192. *See id.* at 8942 (distilling the various requirements of compliance with the MBTA treaties).

193. Migratory Bird Treaty Act, 16 U.S.C. § 704(a) (2012).

194. Migratory Bird Permits, 80 Fed. Reg. 30,032, 30,035 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21).

195. *Id.*

196. *Id.*

1. Advantages of the Individual Permit Approach

The initial advantage of the individual permit approach is its potential consistency with the conservation purposes of both the MBTA and underlying treaties. In an individual permit scheme, akin to incidental take authorization under § 10 of the Endangered Species Act ("ESA"), FWS will make applicant-specific assessments of an operation's impact on migratory birds.[197] This approach has the capacity to account for regionally distinct populations of avian species, as well as set targeted threshold limits to monitor the quantity of actual take occurring under each permit.[198] As discussed above, both qualities potentially satisfy FWS's obligations under § 704(a) of the MBTA by giving "due regard to the zones of temperature and to the distribution, abundance, . . . breeding habits, and times and lines of migratory flight" present at each individual location.[199]

Second, the individual permit program may also satisfy FWS's obligation under § 704 to comply with the treaties animating the MBTA.[200] The emerging individual permit program appears analogous to the military permit, which "exempt[s] the Armed Forces for the incidental taking of migratory birds during military readiness activities . . . ."[201] In its final rule, FWS admitted that "what level of effect on [] migratory bird population[s]" constitutes a violation of the MBTA's treaties is uncertain; however, the Service highlighted the Secretary's ability to withdraw approval if "information needed to assure compliance" with population-level effects could not be obtained from the Armed Forces.[202] In essence, FWS felt that individual assessments of populations—bolstered by informed take quantities—creates a "safeguard that provides for compliance with the requirements of the treaties."[203] In the NOI, it appears that individual permits will incorporate an individualized review requirement that determines a permittee's consistency with the requirements of the underlying treaties.[204] Accordingly, an individual permit program that

197. *Id.*; *see also* Ogden, *supra* note 8, at 55–57 (outlining the general requirements of ESA § 10 incidental take permits).

198. *See* Ogden, *supra* note 8, at 57 (acknowledging that an individualized permit program would be able to account for population-level take more readily than a general permit scheme).

199. Migratory Bird Treaty Act, 16 U.S.C. § 704(a) (2012).

200. *Id.*

201. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. 107-314, § 315, 116 Stat. 2458, 2509-10 (2002).

202. Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931, 8946 (to be codified at 50 C.F.R. § 21.3 (2013)).

203. *Id.*

204. Migratory Bird Permits, 80 Fed. Reg. 30,032, 30,035 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21).

monitors the local abundance and fecundity of regional populations, while maintaining locally static viability, would comply with FWS's interpretation of the MBTA treaties.

2. Disadvantages of the Individual Permit Approach

The disadvantages posed by the individual permit approach are best characterized by the regulatory burdens imposed on both FWS and potential applicants. Compared to the ESA, the theoretical reach of an individual permitting program under the MBTA could be astounding.[205] If the individual permit program were the only mechanism to obtain MBTA compliance, the broad prohibitions in the language of § 703 and the extensive list of protected species would undoubtedly create a new regulatory juggernaut.[206] Accordingly, the individual permit approach could potentially reach every private property owner in the country.[207] Given the staunch opposition from the "property rights" movement to the ESA's comparatively limited reach, a full-scale individual permit program would undoubtedly draw a shocking volume of legal challenges.[208] In light of the recent presidential election, FWS's ability to finance and defend such an extensive program also seems dubious.[209] Nevertheless, the NOI's vague portrayal of the program suggests the individual permit is merely meant to serve as a fail-safe derivative of the GCP program and will not be used to impose burdens on non-industrial property owners in any meaningful sense.[210]

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205. Ogden, *supra* note 8, at 55–56 (comparing the take permit provisions of the ESA and the MBTA).

206. *See* United States v. Citgo Petroleum Corp., 801 F.3d 477, 494 (5th Cir. 2015) ("Equally consequential and even more far-reaching would be the societal impact if the government began exercising its muscle to prevent 'takings' and 'killings' by regulating every activity that proximately causes bird deaths.").

207. *See id.* ("If the MBTA prohibits all acts or omissions that 'directly' kill birds, where bird deaths are 'foreseeable,' then all owners of big windows, communication towers, wind turbines, solar energy farms, cars, cats, and even church steeples may be found guilty of violating the MBTA.").

208. *See* CZECH & KRAUSMAN, *supra* note 25, at 139–42 (discussing the strategies employed by the "property rights" movement to oppose wildlife regulations on private land).

209. *See* Darryl Fears, *Interior Department Budget Could Be Slashed By 12 Percent*, WASH. POST (Mar. 16, 2017), https://www.washingtonpost.com/national/health-science/interior-department-budget-could-be-slashed-by-12-percent/2017/03/15/f0d7b2f8-0999-11e7-b77c-0047d15a24e0_story.html (discussing the potential ramifications flowing from President Trump's dramatic proposal to reduce the Department of Interior's budget for the 2017 fiscal year).

210. Migratory Bird Permits, 80 Fed. Reg. 30,032, 30,035 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21).

C. Memoranda of Understanding

The third approach outlined in the NOI will allow FWS to negotiate and expand Memoranda of Understanding ("MOUs") with other federal land-management agencies.[211] The NOI provides only a cursory outline of this proposal due to the individualized nature of inter-agency MOUs.[212] However, the NOI explains that under this proposal, FWS would have the authority to permit incidental takes by other federal agencies and in turn, "third parties regulated by those agencies," if: (1) that agency implements an individualized MOU with FWS; and (2) that MOU provides standards for the secondary agency to "mitigate [authorized] take appropriately."[213]

1. Advantages of the MOU Approach

For FWS and regulated entities, the first advantage of the MOU-based proposal is the potential "efficiency" it may provide to both parties through a comprehensive permitting process. By setting forth another agency's MBTA responsibilities in a governing MOU, FWS may assume a passive enforcement role with respect to that agency's incidental take.[214] If MOUs additionally authorize a secondary agency to grant incidental take permits, FWS may further alleviate its oversight burden by delegating preliminary compliance enforcement and monitoring to the supporting agency.[215] For regulated entities, if FWS allows take authorization to be folded into other federal land-use permits, the MOU-based approach has the capacity to create "one-stop permit shops" that potentially streamline a project's regulatory compliance obligations.[216] As a result, the MOU-based approach has the potential to reduce costs by avoiding duplicative permitting reviews and would likely be a preferential approach for regulated entities.[217]

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211. *Id.*

212. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1161–62 (2012) (discussing the broad flexibility agencies retain to utilize MOUs).

213. Migratory Bird Permits, 80 Fed. Reg. at 30,035.

214. *See* Freeman & Rossi, *supra* note 212, at 1161–62 ("MOUs may specify goals, assign responsibilities, establish metrics, commit personnel and funding, and establish responsibility for oversight.").

215. *See id.* (noting that inter-agency MOUs may assign oversight responsibility for regulating third-party behavior).

216. *See* HOLLAND & HART, *supra* note 52, at 35, 40.

217. *Id.* at 39; *see also* Christopher Brooks, *Will a New Approach Fly? The FWS Considers Implementing an Incidental Take Program Under the Migratory Bird Treaty Act*, 47 TRENDS (ABA Section of Environment, Energy, and Resources), Oct.–Nov. 2015, at 12, 15 (noting the efficiency benefits provided to third parties under the proposed MOU-based approach).

The second advantage offered by the MOU-based approach is the expanded wingspan it may provide to the MBTA's take prohibitions. If incidental take authorization is combined with secondary agency permits governing private land use, the prohibitions on incidental take would have a far wider applicability than the GCPs and individual permits alone.[218] Most notably, the MOU-based approach has the potential to regulate incidental take that follows from habitat modification or destruction.[219] Where previous attempts to enjoin habitat modification under the MBTA failed, the MOU-based approach might have the capacity to succeed.[220] For instance, if a MOU is reached between FWS, the Environmental Protection Agency ("EPA"), and the U.S. Army Corps of Engineers ("Corps"), any project that requires a § 404 "dredge-and-fill" permit under the Clean Water Act may also be subject to a more robust MBTA-focused review.[221] Accordingly, a project that significantly alters vital avian habitat and effectuates an incidental take of protected species, might be required to provide more definitive "compensatory mitigation," or undergo restructuring to reduce "significant avian mortality."[222]

While these foregoing projects are already theoretically required to comply with the Act, under FWS's prior enforcement patterns—and ambiguous jurisdiction—MBTA compliance simply has not been a central concern in previous land-use permitting decisions.[223] However, under a MOU-based approach, this might change and FWS's incidental take-reduction strategies may serve to protect avian species in a broader range of permitting decisions.[224]

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218. *See* Brooks, *supra* note 217, at 16 (questioning the potential for the MOU approach to reach private property owners).

219. *Id.*; *see also* Collette L. Adkins Giese, *Spreading Its Wings: Using the Migratory Bird Treaty Act to Protect Habitat*, 36 WM. MITCHELL L. REV. 1157, 1177 (2010) (calling for collaborative avian habitat protections through MBTA regulations).

220. *Compare supra* Part II.B (explaining the Eighth and Ninth Circuit's rejection of attempts to enjoin the U.S. Forest Service from providing permits to loggers that would destroy Northern Spotted Owl nesting habitat), *with* Migratory Bird Permits, 80 Fed. Reg. 30,032, 30,035 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21) (suggesting an approach that has the capacity to place incidental take restrictions on logging permit decisions).

221. *See* HOLLAND & HART, *supra* note 52, at 38–39 (proposing MBTA incidental take authorization by incorporation into § 404 permitting review)*; see also id.* at 45 (suggesting the combination of incidental take permitting with the Federal Energy Regulatory Commission certificate review process).

222. *See* Migratory Bird Permits, 80 Fed. Reg. 30,032, 30,034–35 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21) (outlining the proposed strategies for reducing unavoidable incidental take).

223. Brooks, *supra* note 217, at 16.

224. *See id.* (referencing the potential for FWS to regulate habitat modification under the MOU-based approach).

2. Disadvantages of the MOU Approach

Despite the foregoing benefits of this approach, the darker side of the MOU-based proposal paints a troubling future for the public's ability to ensure that "the protectors of our forests" will be managed effectively.[225] As a threshold issue, it should be noted that "incidental take caused by [a] Federal agency program[] [or] activit[y]" should already be addressed in inter-agency MOUs.[226] Executive Order 13,186 required federal agencies that impose "a measurable negative effect on migratory bird populations" to implement MOUs with FWS that outline mitigation strategies, and "promote the conservation of migratory bird populations."[227]

If nothing else, FWS's recent NOI certainly demonstrates that incidental take rates associated with regulated entities are causing enough "measurable negative effect[s]" to warrant the promulgation of a national ITP program.[228] Nevertheless, 16 years after Executive Order 13,186, several agencies with clear and measurable impacts on migratory birds have yet to finalize MOUs with FWS.[229] The various agencies' reluctance to implement, or even negotiate, those MOUs provides an illustrative glimpse into the potential future—or lack thereof—for an incidental take program under the MOU-based approach.

A crucial disadvantage posed by the MOU-based approach is the potential immunity it might provide to FWS. Notably, the MBTA lacks a citizen-suit provision, and the public is therefore precluded from enforcing the Statute against FWS directly.[230] To date, the public's only avenue for enforcing the MBTA lies with the Administrative Procedure Act ("APA").[231] However, the fluidity provided by inter-agency MOUs generally precludes judicial review of their terms under the APA.[232] Specifically, where FWS defines the terms of another agency's take authorization through a MOU, it may not be enforceable against either

225. Missouri v. Holland, 252 U.S. 416, 435 (1920).

226. Migratory Bird Permits, 80 Fed. Reg. at 30,035.

227. Exec. Order No. 13,186 § 3(a), 66 Fed. Reg. 3853, 3854 (Jan. 10, 2001).

228. *Id.*; *see also* Migratory Bird Permits, 80 Fed. Reg. at 30,033 (recognizing that "anthropogenic sources" are causing significant "population declines").

229. *See* Comment Letter, *supra* note 150, at 7–8.

230. *See* Defs. of Wildlife v. Admin'r, EPA, 882 F.2d 1294, 1301 (8th Cir. 1989) ("Unlike the ESA, neither the Bald and Golden Eagle Protection Act . . . nor the Migratory Bird Treaty Act . . . contain provisions for private rights of action." (internal citations omitted)).

231. Opinion Letter, *supra* note 123, at 17.

232. *See* Freeman & Rossi, *supra* note 212, at 1195–96 ("The relative informality that makes MOUs so appealing and easy to deploy also makes them generally unenforceable and, in most cases, entirely insulated from judicial review.").

agency.[233] As a result, citizens will be powerless to challenge FWS's findings with respect to another agency's take limits.[234] Without standing to enforce the MBTA under the Statute itself or the APA, this approach may place the future of avian biodiversity entirely in the hands of administrative agencies.[235]

Also troubling is FWS's assertion in the NOI that other federal agencies "are not [currently] subject to the prohibitions of the MBTA when acting in their regulatory capacities."[236] FWS's contention is directly contrary to the D.C. Circuit's holding in *Humane Society v. Glickman*, which explicitly held that "the broad language of § 703 applies to actions of the federal government"—even where those actions are derivative of their regulatory capacity.[237] FWS's perplexing interpretation of the MBTA's inter-governmental applicability, taken with a MOU's relative insulation from judicial review under the APA, paints a frustrating future for domestic avian conservation.[238] Ultimately, if the final rule employs the MOU-based approach to regulate incidental take, FWS will undoubtedly face several legal challenges from wildlife conservation organizations.[239]

D. Voluntary Guidance

The final proposal outlined in the NOI suggests FWS will also consider further development of their "voluntary guidance that identifies best management practices or technologies that can be applied to avoid or minimize avian mortality resulting from specific hazards in [potential industry] sectors."[240] Essentially, this "no action" alternative will result in a continuation of FWS's status quo.[241] The central tenet of the voluntary

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233. *Id.*

234. *See* Michael C. Blumm & Andrea Lang, *Shared Sovereignty: The Role of Expert Agencies in Environmental Law*, 42 ECOLOGY L.Q. 609, 631–32 (2015) (discussing separate attempts by FWS to delegate ESA § 7 authority to EPA and the Department of Agriculture).

235. Comment Letter, *supra* note 150, at 7–8.

236. Migratory Bird Permits, 80 Fed. Reg. 30,032, 30,035 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21).

237. Humane Soc'y v. Glickman, 217 F.3d 882, 887 (D.C. Cir. 2000); *see also* Defs. of Wildlife v. Admin'r, EPA, 882 F.2d 1294, 1301 (8th Cir. 1989) (holding that EPA's *registration* of a harmful pesticide—rather than a third party's use of that pesticide—constituted a take of a protected species).

238. Comment Letter, *supra* note 150, at 8.

239. *Id.*; *see also* Comment Letter, Ctr. for Biological Diversity, *supra* note 167, at 6 (urging FWS to reconsider the MOU-based approach while threatening suit in response to the adoption of that strategy).

240. Migratory Bird Permits, 80 Fed. Reg. at 30,035.

241. Brooks, *supra* note 217, at 15.

guidance approach is the prosecutorial discretion exercised by FWS, which determines MBTA liability on a case-by-case basis.[242]

1. Advantages of the Voluntary Guidance Approach

For FWS, the advantages of the "no action" approach flow from the agency's broad discretion under the MBTA.[243] As mentioned above, without a citizen-suit provision in the Act, FWS is relatively immune from challenges under the MBTA and thereby retains broad discretion under the Act.[244] In jurisdictions that recognize FWS's authority to regulate incidental take, the Service remains the sole arbiter of the MBTA's scope.[245] Under the voluntary guidance approach, FWS has the flexibility to collect data on industrial-take quantities and further develop technologies for new operational categories by incentivizing compliance—under threat of prosecution.[246]

Finally, from an administrative standpoint, the "no action" alternative is unlikely to require any major shifts in the agency's enforcement structure and, therefore, no major budgetary or personnel alterations.[247] Sadly, in the current political environment, the voluntary guidance approach is also the least likely to ruffle feathers in Washington, D.C.[248] As a result, utilizing this approach to reduce the prosecution of large-scale energy producers will ultimately provide the highest degree of political cover to the Service.[249]

2. Disadvantages of the Voluntary Guidance Approach

As the primary incidental take regulation method for the past 40 years, the shortcomings of the voluntary guidance approach are inherently familiar. Traditionally, courts have relied on FWS's prosecutorial discretion

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242. Migratory Bird Permits, 80 Fed. Reg. at 30,035.

243. Ogden, *supra* note 8, at 29–33 ("The FWS has considerable discretion in deciding whom and when to prosecute for a violation of the MBTA.").

244. *Id.* at 47–48 (arguing for the addition of a citizen-suit provision to the MBTA).

245. *Id.*; *see also supra* note 75 (listing jurisdictions that interpret the MBTA as a strict liability statute).

246. *See* Ogden, *supra* note 8, at 33 (noting the advantages retained by FWS in exercising prosecutorial discretion).

247. Brooks, *supra* note 217, at 15.

248. *See* Thomas Perry & Andrew Bell, *Trumping Obama's Interior Department*, LAW360 (Dec. 12, 2016, 12:09 PM), https://www.law360.com/articles/871294/trumping-obama-s-interior-department/ (discussing the fate of the proposed incidental take program under the Trump administration).

249. *See id.* ("The interior secretary under the Trump administration could rely on the Fifth, Eighth and Ninth Circuit court precedents to issue a regulation, or at a minimum, an internal policy memorandum, that prohibits enforcement of the MBTA against nonpurposeful forms of take.").

to exclude any MBTA enforcement that "offend[s] reason and common sense."[250] However, FWS's inconsistent and lackluster enforcement of the MBTA is precisely the reason that an ITP program is necessary in the first place.[251]

For regulated entities, the economic uncertainty surrounding statutory compliance is not only jurisdictionally dependent, but politically and administratively dependent, as well.[252] While compliance with the recommended management practices may provide some assurances that FWS will not seek prosecution, there is simply no guarantee of immunity.[253] As a result, potential investors may be more reluctant to invest in projects that are premised on a tentative promise.[254]

From an ecological standpoint, the adoption of the "no action" approach may have further destructive impacts on avian biodiversity. With increasing climate disruption, it is difficult to draw a direct line between FWS's enforcement strategies and the overall health of domestic migratory birds. However, recent assessments of domestic avian mortality in the United States place the estimated anthropogenic predation rate at 600 million birds annually—or 3% to 6% of annual breeding populations.[255] With updated estimates showing only steady increases amongst industrial operators, it is hard to imagine how FWS's exercise of prosecutorial discretion is benefitting domestic birds.[256]

From a legal standpoint, FWS's pattern of prosecutorial "discretion" debatably constitutes an abdication of its responsibility under the MBTA's statutory mandate. Where FWS consistently decides to withhold prosecution for clear violations of the MBTA, the agency is arguably

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250. United States v. FMC Corp., 572 F.2d 902, 905 (2d Cir. 1978).

251. *See* HOLLAND & HART, *supra* note 52, at 2–3 (proposing an industry-based take permit approach to resolve the jurisdictional ambiguity under the MBTA); Obrecht, *supra* note 38, at 139–41 (noting FWS's possible resolution of MBTA ambiguity through an incidental take permit); Ogden, *supra* note 8, at 53 (calling for a resolution to FWS's misuse of prosecutorial discretion through an incidental take permit); *see also* Krisztina Nadasdy, Note, *Killing Two Birds With One Stone: How an Incidental Take Permit Program Under the MBTA Can Help Companies and Migratory Birds*, 41 B.C. ENVTL. AFF. L. REV. 167, 196 (2014) (arguing for a general incidental take permit to replace FWS's erratic enforcement scheme).

252. *See* Means, *supra* note 131, at 834–36 (discussing the shortcoming of the prosecutorial-discretion standard from a political standpoint).

253. Migratory Bird Permits, 80 Fed. Reg. 30,032, 30,035 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21).

254. *See* Ogden, *supra* note 8, at 36–37 (noting the investment losses suffered by the wind-energy sector due to regulatory uncertainty flowing from the MBTA).

255. *Id.* at 10.

256. *See* Alan Neuhauser, *Pecking Order: Energy's Toll on Birds* (Aug. 22, 2014, 4:20 PM), http://www.usnews.com/news/blogs/data-mine/2014/08/22/pecking-order-energys-toll-on-birds (reporting on new take-level data recorded at energy-production facilities).

"engag[ing] in a pattern of nonenforcement of clear statutory language . . . ."[257] In the past, the Supreme Court indicated that such a pattern may be considered an "abdication of [an agency's] statutory responsibilities" under the APA.[258] Therefore, whether one examines FWS's voluntary guidance (i.e., status quo) approach from an economic, ecological, or legal standpoint, one conclusion becomes clear: "no action" is not a permissible alternative.

IV. CHARTING A NEW FLIGHT PATH: RECOMMENDATIONS FOR THE EMERGING INCIDENTAL TAKE PERMIT

While the four proposed strategies outlined in the May 2015 NOI are a step in the right direction, taken in isolation, the individual advantages and disadvantages of each strategy cannot effectively balance the MBTA's competing complexities. Rather, a combination of these proposals should be employed to balance the conservation heritage of the MBTA against industrial and non-industrial take.

A. The MBTA & Avian Population Dynamics Demand Regionally Contingent, Rigorously Monitored Incidental Take Permits

The attraction of utilizing GCPs to regulate incidental take by industrial operators cannot be overstated.[259] Fundamentally, the GCP approach's latitude and accessibility present the most attractive framework for counterbalancing the realities of industrial operations, the expansive reach of the MBTA, and the conservation purposes found in the animating treaties.[260] However, if FWS is afforded the regulatory leeway it seeks in the NOI, the concerns outlined in Part III must be addressed to bring the program into line with the governing legal authorities and conservation purposes of the MBTA.[261]

First, an applicant's operational consistency with previously approved permits must also account for the applicant's geographical location.[262] FWS

257. Heckler v. Chaney, 470 U.S. 821, 839 (1985) (Brennan, J., concurring).

258. *Id.* at 853 (Marshall, J., concurring).

259. *See supra* Part III.A.1 (furnishing several advantages of the GCP-based approach).

260. *Id.*

261. *See supra* Part III.A–B (outlining the potential pitfalls of the GCP and individual permit approaches).

262. Migratory Bird Permits, 80 Fed. Reg. 30,032, 30,035 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21); *see also* Miguel Ferrer et al., *Weak Relationship Between Risk Assessment Studies and Recorded Mortality in Wind Farms*, 49 J. APPLIED ECOLOGY 38, 45 (2012) ("If relevant factors affecting the frequency of [avian] collisions with turbine rotor blades are operating at the individual

is already aware that protected species are susceptible to varying degrees of disruption based upon their individual ecosystems.[263] Overall, however, the NOI seems to demonstrate that the agency is more concerned with providing a vehicle for authorized take than it is with honoring the conservation mandate of the MBTA.[264] While the effectiveness of "mitigation technologies" as applied to a given *type* of industry is certainly informative, the operator's *specific region* should be an equally primary concern.

To accomplish regional review, FWS should adopt a more focused approach that accounts for population-level impacts within the ecosystems actually affected.[265] Whether a GCP applicant's operations are suitable for implementing take-reduction technologies should depend upon the operator's specific location with respect to differences in local avian population genetics and behaviors.[266] By utilizing this targeted, locality-based approach, FWS can align the GCP program with its previous ITP promulgated pursuant to the "military readiness" requirement.[267] Consequently, a population-centric approach may satisfy the regional requirements of both § 704(a) and the underlying treaties.[268]

Second, to further ensure compliance with the MBTA and its treaties, the GCP program must incorporate a comprehensive monitoring system. Backed by regional assessments of population fecundity, continued monitoring will provide FWS with the requisite data to determine a project's actual impact on local avian populations.[269] Where monitoring facilitates ceiling-impact assessments, the GCPs will not risk running afoul of the MBTA's underlying treaties.[270] Consequently, FWS may immunize the ITP program from challenges alleging the agency acted in excess of its delegated authority under the MBTA.[271] Furthermore, these limits may also provide the permittee with effective notice when take levels stand to violate

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turbine scale, and not at the entire wind farm scale, [impact assessments] must be conducted at the level of individual proposed turbines.").

263. *See* Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931, 8942 (to be codified at 50 C.F.R. § 21.3 (2013)) (acknowledging population determinations and dynamics as a governing factor to determine allowable take).

264. Comment Letter, *supra* note 150, at 7–8.

265. *Id.* at 9.

266. *See supra* Part III.A.2 (pointing to FWS's internal interpretation of the MBTA's underlying treaties).

267. Obrecht, *supra* note 38, at 137–38.

268. *See supra* note 172 and accompanying text (disclosing the requirements necessary to comply with the MBTA and animating treaties).

269. *Id.*

270. *Id.*

271. *See* Obrecht, *supra* note 38, at 141 (pointing out weaknesses in FWS's potential promulgation of an incidental take permit program).

the terms of their permit.[272] In turn, comprehensive monitoring at permitted locations will allow FWS to work with operators in reducing the take level and avoiding costly enforcement proceedings.

Third, FWS's final rule should condition the expenditure of compensatory mitigation funds upon regional habitat considerations. The Canada Treaty specifically requires an authorized take program to conserve "habitats essential to migratory bird populations."[273] Likewise, the Russia Treaty calls for necessary take to conserve "migratory birds and *their* environment . . . ."[274] Accordingly, under a GCP program that monitors population-based take, compensatory mitigation funds should be allocated to habitat conservation within the immediate area that take is actually occurring.[275] Likewise, in recognition of the MBTA's population-level approach, the type of habitat conserved should directly correlate with the type of avian populations adversely affected under the permit.[276] In doing so, FWS will likely satisfy the habitat-conservation requirements under each of the MBTA's foundational treaties.[277] As a result, FWS will further insulate the budding program against likely challenges to the agency's delegated authority under the MBTA.[278]

Finally, FWS should retain the individual permit approach for certain, limited industrial operators. Individual permits should remain the *only* acceptable permit for industrial operators where FWS: (1) has limited information regarding an operation's adverse effects; (2) has no history of working with the operator to mitigate incidental take; or (3) where unique regional circumstances constrain the efficacy of FWS's best available take-reduction strategies.[279]

As discussed above, the individual approach is the most consistent with conservation requirements of the MBTA and the underlying treaties.[280]

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272. *See supra* Part II.C (highlighting the necessity for FWS to give actual notice to sustain an enforcement action).

273. Protocol Amending the 1916 Convention for the Protection of Migratory Birds, Can.-U.S., *supra* note 56, art. VIII.

274. Russia Treaty, *supra* note 50, convention (emphasis added).

275. *See* HOLLAND & HART, *supra* note 52, at 44 (proposing a regional and migration-corridor-based approach for habitat conservation under a theoretical MBTA take permit).

276. *See id.* at 42 (discussing FWS's siting recommendations for natural gas pipelines, which involve population-effect assessments).

277. *See id.* at 28–29 (detailing the MBTA treaties' habitat-based compliance requirements).

278. *See id.* at 27 (arguing that for an ITP to be a valid exercise of statutory authority, FWS must comply with all treaties animating the MBTA); *see also* CROWELL & MORING, *supra* note 14 (questioning FWS's fundamental authority to regulate incidental take under the MBTA's language and history).

279. Migratory Bird Permits, 80 Fed. Reg. 30,032, 30,035 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21).

280. *See supra* Part III.B.1 (discussing the advantages of the individual permit approach).

Nevertheless, FWS's history of inconsistent enforcement, the uncertainty of future enforcement, the MBTA's lack of a citizen-suit provision, and the availability of a comparatively exonerating GCP, raises concerns about how the agency will make threshold permit designations.[281] To alleviate those concerns, FWS should be transparent about which operations qualify for a GCP and explain why they do not warrant the heightened regulatory scrutiny associated with an individualized permit. In other words, when granting a GCP, FWS should issue a clarifying opinion that outlines the reasons that each industrial project is not disqualified under each of the three requirements for an individual permit.

B. The Incidental Take Regulation Should Belong to FWS Alone

As discussed above, the potential breadth offered by the MOU-based approach is appealing.[282] However, the latent pitfalls negate its superficial charm. First, the possibility that federal agencies will be immunized from MBTA responsibility is alarming.[283] Prior history with MBTA-based MOUs and the potential for gross violations of the MBTA—without public accountability—outweighs the theoretical potential for expanded protection.[284]

Second, the NOI's intimation that auxiliary agencies could be authorized to administer ITPs under a MOU-based approach is equally troubling. As the primary agency with proficiency in wildlife regulation, FWS must retain the sole responsibility for administering any ITP program under the MBTA.[285] Ultimately, the conservation purposes of the MBTA must outweigh FWS's desire to defray responsibility for complying with the Act.

Finally, as noted above, federal agencies that authorize significant impacts on migratory birds are already directed to implement MOUs with FWS under Executive Order 13,186.[286] A duplicitous MOU-based approach would therefore be, at best, redundant and, at worst—ignored.[287] If anything, these foregoing concerns demonstrate that a cursory

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281. *See supra* Part III.D.2 (recounting FWS's inconsistent enforcement of the MBTA).

282. *See supra* Part III.C.1 (describing the advantages of the MOU-based approach).

283. *See supra* Part III.C.2 (highlighting the MOU-based approach's potential to separate FWS from accountability to the general public under the MBTA).

284. *See supra* Part III.C (outlining the troubling lack of accountability FWS will retain under an MOU-based approach).

285. Comment Letter, *supra* note 150, at 8.

286. Exec. Order No. 13,186 § 3(a), 66 Fed. Reg. 3853, 3854 (Jan. 10, 2001).

287. *See supra* Part III.C (discussing federal agencies' unfulfilled mandates to implement MBTA-based MOUs with the Service).

experimentation with a MOU-based approach is likely to be a dangerous abdication of statutory authority under the MBTA, which should not be incorporated into the final program.

C. Sustaining Voluntary Guidance As a Backdrop to Comprehensive Industrial Take Regulation

Finally, despite the current approach's various economic, legal, and ecological shortcomings, voluntary "best management practice[]" guidance should remain available to certain private property owners whose conduct does not result in population-level impacts.[288] As discussed above, excluding these owners and small-scale operators from the permitting regime will allow FWS to tailor its program to regulated entities with elevated rates of take.[289] Presumably, FWS will then be able to promulgate a targeted program that drastically reduces incidental take, without exposing the agency to a flock of legal challenges from "property rights" advocates.[290] In the alternative, these "unpermitted" actors should remain subject to *Apollo*'s practical notice requirements, thereby avoiding the potentially absurd outcomes under an expansive view of the MBTA.[291]

Furthermore, while these non-industrial operations may not necessitate an ITP in the traditional sense, conscious industry practitioners and interested landowners may still seek guidance on best practices in reducing incidental avian mortality. Currently, however, the potential for prosecution may restrict owners and operators that do not wish to draw the undue attention of the Service.[292] Of course, merely seeking guidance will not provide immunity under the MBTA's strict liability provisions.[293] However, if FWS adopts the *Apollo* court's reasoning as a subset of its nationally promulgated ITP program, conscious regulated entities may be more likely to seek guidance on implementing take-reduction strategies.[294] As a result,

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288. Migratory Bird Permits, 80 Fed. Reg. 30,032, 30,035 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21).

289. *See supra* Part II.C (highlighting the advantages of adopting the *Apollo* rationale for non-industrial, incidental take).

290. *Id.*; *infra* Part III.B.2.

291. *See id*. (discussing the reciprocally implied duties imposed on FWS by the *Apollo* decision).

292. *See Bird Conservation Partnerships and Initiatives*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/management/bird-conservation-partnership-and-initiatives.php (last updated Aug. 24, 2017) (highlighting the various programs that FWS offers to conscious industry practitioners).

293. *See supra* Part III.D (discussing the advantages and disadvantages offered by the voluntary guidance approach).

294. *See supra* Part II.C (arguing for the exclusion of isolated take instances from FWS's enforcement regime).

FWS can further the conservation principles of the MBTA—without the acrimony of prosecution.

CONCLUSION

When the first wisps of winter air seep back into the alder thicket of the Arctic Circle, the Gray-cheeked Thrush is already retracing the steps of her epic journey back to the jungles of the Amazon.[295] This time, however, she is not traveling alone. Now, she must pass on the secrets of transcontinental navigation to a new generation of Gray-cheeked Thrushes. In doing so, she has fulfilled the fundamental promise protected by the MBTA.

Born from the rubble of this nation's destructive past, the MBTA is infused with a legacy of avian conservation. For nearly a century, the MBTA has been sustained by its inherent resiliency. Now, in the face of modern anthropogenic threats, the MBTA must evolve again. Yet, the MBTA's road to modernization is not entirely clear. In the wake of congressional ambiguity, courts now view the MBTA's scope from polar extremes, and the precise reach of the MBTA's prohibitions remain subject to jurisdictionally dependent conclusions.

Amidst the morass, FWS now seeks to provide some semblance of clarity. While FWS's effort to reinvigorate the MBTA is laudable, modernizing the Statute as a mechanism for blind destruction would do violence to its legacy. Of course, the broad reach of the MBTA creates a heavy burden for the Service. However, there can be a balance between the practicalities of the modern era and the ultimate conservation mandates that illuminate the MBTA.

To achieve equilibrium, FWS should employ a comprehensive permutation of its recent proposals. For industrial operators, the scrutiny of the individual permit requirements must be an unconditional threshold. Where an applicant proves it is not disqualified by the individual permit conditions, general take permits may provide an appropriate framework for counterbalancing the conservation purposes of the MBTA against regulatory efficiency. Likewise, to honor the MBTA and its treaties, FWS must consider the feasibility of general permit applications at a regional level and rigorously monitor their tangible impacts on avian biodiversity. Finally, to fully satisfy the treaties' terms, FWS must also allocate mitigation funds toward in situ habitat-restoration and acquisition plans. Without these concessions, FWS's plan will continue to contravene the

295. NAT'L AUDUBON SOC'Y, *supra* note 2, at 463; BENT, *supra* note 2, at 196.

MBTA's time-honored legacy, and "there soon might be no birds for any powers to deal with."[296]

—Matthew R. Arnold[*†]

296. Missouri v. Holland, 252 U.S. 416, 435 (1920).

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