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A Farfetch'd Extension of Bird Law: Limiting Migratory Bird Treaty Act Challenges to Federal Land Use Permits

Michael C. Ledet

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INTRODUCTION

A. Plight of the Louisiana Waterthrush

The Industrial Revolution and its consequences have been a disaster for birds.[1] The Louisiana waterthrush, *Parkesia motacilla*, is a wood warbler that feeds on aquatic insects.[2] Waterthrush populations and nest survival rates decline when their swamp water habitats lie downstream from shale gas development sites.[3] The gray partridge, *Perdix perdix*, faces similar risks when its cereal seed diet is contaminated with agricultural pesticides.[4] The American kestrel, *Falco sparverious*, avoids water contamination by dwelling in trees while feeding on grasshoppers and beetles.[5] When searching for a perch, kestrels seek high positions over open land.[6] Kestrels often land on electrical wires, leading to

1. *See* THEODORE KASCZYNSKI, INDUSTRIAL SOCIETY AND ITS FUTURE 1 (1995).

2. *Guide to North American Birds: Louisiana Waterthrush*, Audubon, https://www.audubon.org/field-guide/bird/louisiana-waterthrush [https://perma.cc/54JH-CUF3] (last visited Feb. 11, 2023).

3. Mack W. Frantz et al., *Demographic Response of Louisiana Waterthrush, a Stream Obligate Songbird of Conservation Concern, to Shale Gas Development*, 120 THE CONDOR 265 (2018).

4. Ana Lopez-Antia et al., *Risk Assessment of Pesticide Seed Treatment For Farmland Birds Using Refined Field Data*, 53 J. APPL. ECOL. 1373 (2016).

5. *Guide to North American Birds: American Kestrel*, AUDUBON, https://www.audubon.org/field-guide/bird/american-kestrel [https://perma.cc/4BVS-ET6S] (last visited Feb. 11, 2023).

6. *Id.*

electrocutions, power outages, and removal work for wildlife agency employees.[7]

In contrast, migratory waterfowl, like the Canvasback diving duck, *Aythya valisineria*, maintain stable populations, despite being popular targets of recreational duck hunters.[8] The Migratory Bird Hunting and Conservation Stamp Program, which requires hunters to purchase annual permits, helps fund preservation efforts for waterfowl populations.[9] Since 1934, the program has raised $5.8 million to protect 5.7 million acres of migratory bird habitats.[10]

Electrocution, contamination, and execution illustrate the fatal risks that migratory birds face in the United States.[11] However, incidental effects of energy infrastructure threaten migratory bird populations more than hunting.[12] The explanation for this apparent anomaly is an effective permitting scheme—the Stamp Program—that allows the purposeful killing, or "taking," of frequently hunted birds that would be criminally punishable by the Migratory Bird Treaty Act (MBTA).[13] Wildlife authorities refer to non-hunting bird deaths caused by collisions with wind turbine blades, landing in solar energy towers, and other industrial hazards as "incidental takes."[14] In contrast to the efficient Stamp Program, no permitting regulations govern incidental takes by industries acting without the purpose of harming migratory birds.[15] Because it is unclear if these incidental takes are prohibited by the MBTA, there is no federal permitting scheme directing agencies to formally monitor incidental takes. Therefore, energy projects, whose activity incidentally harms birds, have little

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7. *Id.*

8. *Bird Classifications*, BIRDS.COM, https://www.birds.com/species/classifications/ [https://perma.cc/Z3P9-BK8Y] (last visited Feb. 11, 2023); *Guide to North American Birds: Louisiana Waterthrush*, *supra* note 2.

9. *See* Migratory Bird Hunting and Conservation Stamp Act, 16 U.S.C. § 718(a); *see also* 16 U.S.C. § 704(c)(1)(A) (regulating waterfowl hunting seasons).

10. *Federal Duck Stamp*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/program/federal-duck-stamp/about-us [https://perma.cc/W4LM-EZQS] (last visited Feb. 11, 2023).

11. *Threats to Birds*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php [https://perma.cc/67XX-QCGV] (last visited Feb. 11, 2023).

12. *Id.*

13. The U.S. Fish and Wildlife Service defines "take" in 50 C.F.R. § 10.12 as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect."

14. Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds, 86 Fed. Reg. 54667 (Oct. 4, 2021) (to be codified at 50 C.F.R. pt. 21).

15. 16 U.S.C. § 703(a); *see* Migratory Bird Hunting and Conservation Stamp Act, 16 U.S.C. § 718(a).

guidance on whether they are in full compliance with the MBTA. Wind farms and solar energy projects, which kill birds due to their location on migration routes, risk MBTA liability because they cannot apply for an incidental take permit.[16] Conversely, energy projects may be able to operate while harming birds without acquiring the proper permits or taking efforts to mitigate their harm to birds, thus violating wildlife laws.[17]

Federal courts addressed incidental takes early in the MBTA's history when the Second Circuit held a pesticide manufacturing plant liable for bird deaths caused by the contamination of a wastewater pond.[18] In *United States v. FMC Corp.*, the Second Circuit found MBTA liability because the defendant engaged in the manufacture of a highly toxic chemical and failed to prevent the chemical from entering the pond and killing protected birds, even though the defendant did not intend to harm the birds and may not have been aware of the harm.[19] However, since then, the MBTA's application to incidental takes has been chaotic.[20]

B. Early Phases of Wind Energy Projects in the Gulf of Mexico

Renewable energy like wind and solar power poses incidental risks to birds.[21] Birds suffer fatal collisions with wind turbine blades and can be, for lack of a better term, "fried" by solar panels.[22] With renewable energy mandates in place at both the federal and state level, it is crucial to have an efficient and consistent administrative permitting process for renewable energy projects spanning over federal land.[23] With energy output

16. *Bird Mortality at Renewable Energy Facilities Have Population-Level Effects*, U.S. GEOLOGICAL SURVEY (May 19, 2022), https://www.usgs.gov/news/science-snippet/bird-mortality-renewable-energy-facilities-have-population-level-effects [https://perma.cc/AD29-MK6R].

17. *Id.*; s*ee generally* 16 U.S.C. § 703; *see generally* 16 U.S.C. § 1531.

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

19. *Id.* at 908.

20. Darryl Fears & Dino Grandoni, *The Trump Administration Has Officially Clipped the Wings of the Migratory Bird Treaty Act*, THE WASH. POST (Apr. 13, 2018, 5:33PM), https://www.washingtonpost.com/news/energy-environment/wp/2018/04/13/the-trump-administration-officially-clipped-the-wings-of-the-migratory-bird-treaty-act/ [https://perma.cc/7RUY-PGB9].

21. *Threats to Birds*, *supra* note 11.

22. *Id.*

23. MASS. GEN. LAWS ch. 25A, § 11F (2022); *see also* Valerie Volcovici & Nichola Groom, *White House Backs 2030 Milestone on Path to Net Zero Grid*, REUTERS (Apr. 26, 2021, 5:18 PM), https://www.reuters.com/business/sustainable-business/exclusive-white-house-pushing-80-clean-us-power-grid-by-2030-2021-04-26/ [https://perma.cc/R77D-C8UP].

dependent on the acreage of the wind or solar project, presence of such projects on federal land is inevitable.[24] When a wind project is built offshore, the probability of the project spanning federal land is even higher.[25]

For example, LM Wind Power—operating out of Michoud Assembly Facility in New Orleans East—plans to build wind energy projects in the Gulf of Mexico within the next 10 years.[26] The Bureau of Ocean Energy Management (BOEM), which oversees offshore wind and gas permitting, will open the gulf to wind lease sales by 2025.[27] In October 2020, Louisiana Governor John Bel Edwards asked BOEM Acting Director Walter Cruikshank to establish an intergovernmental task force to build renewable energy infrastructure in the Gulf.[28] Some offshore oil platforms could also be repurposed as wind energy support stations.[29] Birds pose the second biggest challenge to these projects, behind hurricanes, since over two billion birds cross the Gulf as part of their migratory pattern, and some would inevitably be killed by turbine blades.[30]

Louisiana and other gulf states are somewhat dependent on the federal government, with respect to quickly constructing wind farms and meeting renewable energy mandates. If federal agencies cannot efficiently grant permits to energy projects on federal land, these projects could be delayed

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24. Eric Wesoff, *Solar Star, Largest PV Power Plant in the World, Now Operational*, GREENTECH MEDIA (June 26, 2015), https://www.greentechmedia.com/articles/read/solar-star-largest-pv-power-plant-in-the-world-now-operational [https://perma.cc/CLW9-59XP] (solar energy project spanning 3,200 acres).

25. *See* Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (exclusive federal government control over all submerged lands).

26. Tristan Baurick, *The Gulf of Mexico Is Poised for a Wind Energy Boom. 'The Only Question Is When.'*, NOLA.com (Nov. 24, 2021, 2:00 PM), https://www.nola.com/news/environment/the-gulf-of-mexico-is-poised-for-a-wind-energy-boom-the-only-question-is/article_c73d806c-4233-11ec-8fad-a76859704a1b.html [https://perma.cc/LX6D-K6E8]. The Michoud Assembly Facility is the only wind farm technology engineering center in the United States.

27. *Id.*

28. Letter from John Bel Edwards, Governor, State of La., to Dr. Walter Cruickshank, Acting Dir., Bureau of Ocean Energy Mgmt., Dep't of the Interior (Oct. 21, 2020), https://www.boem.gov/sites/default/files/documents/renewable-energy/John%20Bel%20Edwards%20-%20BOEM%20Intergovernmental%20%20Taskforce%20-%20Offshore%20Renewable%20Energy%20-%20for%20Louisiana.pdf [https://perma.cc/N9GY-9LRW].

29. Baurick, *supra* note 26.

30. *Id.*

for decades.[31] Challenges made by environmental groups under the Administrative Procedure Act (APA) often hinder these projects' timelines significantly.[32] These challenges are necessary to ensure compliance with wildlife and other environmental statutes but should be limited to settled violations of applicable statutes. Shortening the list of regulatory challenges to energy project permits helps administrative efficiency and will bring clean energy to the Gulf sooner, thus allowing states to see returns on the heavy investment required to construct renewable energy projects.

C. The Bird Law of This Country is Governed by the Executive Branch, Not by Reason

Preventable bird deaths devastate wildlife enthusiasts because birds carry a priceless cultural value with their visual and auditory appeal. Birds also help human agriculture by eating insects and spreading seeds.[33] Preservation of birds is the overarching goal, but enforcement of the statute through executive agencies creates administrative issues that complicate a deceptively simple goal.[34] This article focuses on the interaction of the MBTA and the APA with the role of federal agencies in land permitting for the wind and solar energy industries.[35] This Part describes the recent controversy in MBTA interpretation and enforcement precipitated by changes in presidential power.

1. The Executive Branch's Role in MBTA Enforcement

The U.S. Fish & Wildlife Service (FWS) is a division of the Department of the Interior tasked with enforcing the MBTA by prosecuting violations or granting permits.[36] The FWS issues regulations specifying how the MBTA is enforced.[37] The Bureau of Land

31. Pub. Emps. for Env't Resp. v. Hopper, 827 F.3d 1077, 1084 (D.C. Cir. 2016).

32. *Id.* at 1081 ("The project has slogged through state and federal courts and agencies for more than a decade.").

33. *Conservation Column: Done Right, Farming Can Benefit Both Humans and Birds*, LANE CNTY. AUDUBON SOC'Y (July 1, 2019), https://laneaudubon.org/conservation-column-done-right-farming-can-benefit-both-humans-and-birds [https://perma.cc/B6TL-S6RD].

34. *See* LINDA TSANG & ERIN H. WARD, CONG. RSCH. SERV., R44694, THE MIGRATORY BIRD TREATY ACT: SELECTED LEGAL ISSUES (2002).

35. *See* 16 U.S.C. §§ 703–12; 5 U.S.C. §§ 551–913.

36. 16 U.S.C. § 704; 16 U.S.C. § 707.

37. *See generally* 50 C.F.R. pt. 21.

Management (BLM) and BOEM, other divisions of the Department of the Interior, grant permits for energy projects that span mainland or offshore federal lands.[38]

As divisions of the Department of the Interior, these three agencies interact in regulating wildlife endangerment and other crucial aspects of environmental policy.[39] In addition to the obligation to mitigate the effect of their own action on migratory birds under an executive order signed by President Clinton,[40] BLM and BOEM must closely review the environmental effects of "major actions" taken under the National Environmental Policy Act (NEPA).[41] Permits issued by BLM and BOEM must consider the MBTA to comply with executive policy because the authorization of private actions by an agency triggers NEPA's hard look requirement, and migratory bird deaths are an environmental impact of most energy projects.[42] A broad range of agency actions, including decisions on permit applications, can trigger an agency's responsibility to prepare an environmental impact statement under NEPA, and dangers to wildlife, including birds, is the main environmental impact of granting permits for renewable energy projects.[43]

The APA further defines the information that the BLM and BOEM must consider in granting or denying land use permits.[44] The general purpose of the APA is to ensure that the agency decision-making process

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38. *Leases and Permits*, U.S. DEP'T OF THE INTERIOR: BUREAU OF LAND MGMT., https://www.blm.gov/programs/lands-and-realty/leases-and-permits [https://perma.cc/GGZ2-BCFG] (last visited Feb. 11, 2023); *Lease and Grant Information*, U.S. DEP'T OF THE INTERIOR: BUREAU OF OCEAN AND ENERGY MGMT., https://www.boem.gov/renewable-energy/lease-and-grant-information [https://perma.cc/AXC5-4CMB] (last visited Feb. 11, 2023).

39. *See* Jessica Scott & Andrea Folds, *From Friend to Foe: The Complex and Evolving Relationship of the Federal Government and the Migratory Birds It is Bound to Protect*, 49 ENVTL. L. 187, 219 (2019).

40. Exec. Order No. 13186, 3 C.F.R. § 13186 (2002).

41. 42 U.S.C. § 4332(C)(2) (requiring the preparation of an Environmental Impact Statement for major federal actions affecting the environment); 42 U.S.C. § 4332 (requiring cooperation of agencies in environmental policymaking).

42. Pub. Emps. For Env't. Resp. v. Hopper, 827 F.3d 1077, 1082 (D.C. Cir. 2016) (citing Sierra Club v. U.S. Army Corps of Eng'rs, 803 F.3d 31, 36–37 (D.C. Cir. 2015)).

43. *NEPA Documents for Migratory Birds*, U.S. FISH & WILDLIFE SERVICE, https://www.fws.gov/library/collections/nepa-documents-migratory-birds [https://perma.cc/8R8T-HDVN] (last visited Jan. 24, 2023).

44. The BOEM and BLM grant land use permits, leases, rights of way, and easements on federal land. For the purposes of this article, all have the same effect in that they authorize wind or solar energy projects to build on federal land.

is based on sound evidence, and not in violation of the acts of Congress or binding administrative regulations.[45] The procedural requirements of the APA attempt to insulate agency decision-making from political pressure but, as outlined below, have not succeeded with regard to the FWS's interpretation of the MBTA.[46]

The following discussion shows that invalidating BLM & BOEM permits on the grounds that the permitted project incidentally takes birds is an impractical interpretation of section 703.

2. Regulation after 1978 and Problems with Shifting Interpretations of "Take"

From 1978, following the decision in *United States v. FMC Corp.*, until 2017, when President Trump took office, the FWS interpreted the MBTA to apply to all activity that kills birds, whether or not bird killing was that activity's purpose.[47] The FWS enforced this understanding through prosecuting violators or working with potential violators to mitigate their harm to migratory birds.[48]

On December 22, 2017, the Department of the Interior reversed course with a solicitor's letter, known as the Jorjani Memorandum, which criticized the regulatory burden placed on energy industries by the former interpretation: "[i]nterpreting the MBTA to apply to incidental or accidental actions hangs the sword of Damocles over a host of otherwise lawful and productive actions."[49] The FWS proposed a regulation to

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45. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (delineating the arbitrary and capricious standard for review of federal agency actions).

46. Michael A. Livermore, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1, 33 (2019); s*ee* Christine A. Fazio & Ethan I. Strell, *Abrupt Policy Change on Century-Old Migratory Bird Treaty Act*, CARTER LEDYARD & MILLBURN, LLP (Feb. 22, 2018), https://www.clm.com/abrupt-policy-change-on-century-old-migratory-bird-treaty-act/ [https://perma.cc/XUC3-PM2M].

47. Fazio & Strell, *supra* note 46; Nat. Res. Def. Council., Inc. v. U.S. Dep't of Interior, 397 F.Supp. 3d 430, 442 (S.D.N.Y. 2019) ("There is no dispute that before the Jorjani Opinion, the official position of DOI and FWS was that incidental takes of migratory birds were illegal and subject to criminal prosecution pursuant to the MBTA.").

48. Andrew G. Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 WM. & MARY ENVTL. L. & POL'Y REV. 1, 7–9 (2013).

49. Memorandum from Daniel H. Jorjani, Principal Deputy Solic., U.S. Dep't of Interior, to the Sec'y, U.S. Dep't of Interior 1 (Dec. 22, 2017), http://

implement the opinion set forth in the Jorjani Memorandum during the Trump administration.[50] Further, Congresswoman Elizabeth Cheney introduced an amendment that would, according to Audubon Society President and CEO David Yarnold, "giv[e] oil and gas companies and other industries a free pass to kill birds with impunity."[51] The Jorjani Memorandum acknowledged its derogation from the FWS's prior practice of holding industries liable for their incidental takes.[52]

If the MBTA prohibits incidental takes, a solar or wind energy project seeking a federal land permit or lease must account for its incidental takes with an FWS-issued permit and develop a comprehensive strategy to mitigate the project's harm to migratory birds.[53] In turn, BLM and BOEM carry more responsibility along with the potential to issue faulty permits. When a project in the planning and leasing stage seeks a permit, migratory bird deaths factor into the decision of whether to grant the land use permit.[54] The responsibility to account for incidental takes opens federal land use permits to APA challenges on grounds that the permit does not comply with the MBTA. The challenges allege that BLM and BOEM should have conditioned the permit on an application to the FWS for a take permit.[55] Challenges to permits based on MBTA compliance are problematic because states have renewable energy mandates in place, and more regulatory burden would lead to an extension of time before wind farms are approved for construction. Challenges to permits are not problematic in themselves but are unnecessarily burdensome when based

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www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf [https://perma.cc/7LK9-6QZ5]. The Solicitor is the Department of the Interior's chief lawyer, charged with issuing the DOI's interpretation of federal statutes. The Sword of Damocles is a reference to a Greek myth in which a sword hangs over a king's head, which was said to represent impending peril and the unexpected dangers of power.

50. Regulations Governing Take of Migratory Birds, 85 Fed. Reg. 5903, 5923 (Feb. 3, 2020) (to be codified at 50 C.F.R. pt. 10).

51. *Congresswoman Liz Cheney Introduces Bird-Killer Amendment*, AUDUBON (Nov. 8, 2017), http://www.audubon.org/news/congresswoman-liz-cheney-introduces-bird-killer-amendment [https://perma.cc/5AL8-5QTM]; H.R. Rep. No. 115-1000 (2017).

52. Memorandum from Daniel H. Jorjani, *supra* note 49, at 1, fn. 4 ("This memorandum recognizes that this interpretation is contrary to the prior practice of this Department.").

53. In the wind energy context, mitigation efforts include limiting the number of lights on turbines, limiting the size of turbines, and shutting down turbines during peak migration seasons. *See* Baurick, *supra* note 26.

54. *NEPA Documents for Migratory Birds*, *supra* note 43.

55. Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571, 578 (9th Cir. 2016).

upon an unsettled interpretation of a statute conferring regulatory responsibility on federal agencies.

If the MBTA does not prohibit incidental takes, birds and state interests would be harmed. If large energy projects can legally kill large swathes of birds by asserting the simple defense that the project's harm to birds is unintentional, bird populations may decline to the same low levels that led to the enactment of the MBTA. Oil companies account for over 90% of incidental takes prosecuted by the FWS.[56] Furthermore, many states claim ownership of the wildlife within their borders. Thus, allowing incidental takes to go unprosecuted could lead to tension between the states and the federal government, particularly in states that use their authority under section 708 to enact laws more protective of birds than the MBTA.[57]

3. Industrial, Administrative, and State Response to the Jorjani Memorandum

Shortly after its publication, the Jorjani Memorandum met stiff resistance. Conservation groups, like the National Resources Defense Council and the Audubon Society, challenged it along with eight states.[58] The U.S. District Court for the Southern District of New York consolidated the claims under Federal Rule of Civil Procedure 42, since every claim involved the common question of whether the stance on incidental takes in the Jorjani Memorandum constituted an arbitrary interpretation of the MBTA.[59] The plaintiffs argued the Jorjani Memorandum substantially reduced the cost of industrial activities that incidentally kill birds, thereby increasing the likelihood of those activities occurring and killing birds.[60] The environmental groups worried about bird deaths in general, while each state expressed their concern over the unprosecuted killing of "migratory birds owned by one of the Plaintiff States."[61]

After determining the Plaintiffs had standing to challenge the Jorjani Memorandum, the Southern District of New York decided the case by

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56. Fears & Grandoni, *supra* note 20.

57. 16 U.S.C. § 708 (authorizing states to enact statutes more protective of birds than the MBTA).

58. Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior, 397 F.Supp. 3d 430 (S.D.N.Y. 2019).

59. *Id.* at 437; FED. R. CIV. P. 42. (2022).

60. *Nat. Res. Def. Council*, 397 F.Supp. 3d at 440.

61. *Id.*

granting the Plaintiffs' motion for summary judgment.[62] The Jorjani Memorandum was permanently withdrawn on March 8, 2021, returning to "the interpretation of the MBTA implemented for the previous several decades by the Service, the Department of the Interior, and the Department of Justice."[63] The Trump administration reacted with regulations to codify their industry-friendly interpretation of "take," which took effect just before the Biden administration took office.[64] Unsurprisingly, the Biden administration swiftly issued regulations to revoke them.[65]

4. Biden Administration's Proposed Incidental Take Permits

Along with the revocations, the Biden administration issued an advance notice of proposed rulemaking on October 4, 2021, to alert interested parties that the FWS is "developing regulations that authorize incidental take under prescribed conditions."[66] If the regulation allowing industries to apply for incidental take permits is enacted, these permits will be the first to allow non-purposeful takes under the MBTA.[67] However, the FWS already issues incidental take permits under the Endangered Species Act and the Bald and Golden Eagle Protection Act.[68] The proposed migratory bird incidental take permit program could solve the biggest problem with the current "cooperation lest prosecution" method in place for MBTA violations—that it is "ineffective, possibly a violation of federal environmental laws, and fails to promote the conservation of

62. *Id.* at 469, 471.

63. U.S. Dep't of the Interior Fish and Wildlife Serv., Director's Order No.: 225, Incidental Take of Migratory Birds, 16 U.S.C §§ 703–12 (Oct. 4, 2021), https://www.regulations.gov/document/FWS-HQ-MB-2018-0090-19194 [https://perma.cc/XV8Q-Z9ED].

64. Regulations Governing Take of Migratory Birds, 85 Fed. Reg. 5903, 5923 (Feb. 3, 2020) (to be codified at 50 C.F.R. pt. 10) (enacted by the Trump administration).

65. Regulations Governing Take of Migratory Birds; Revocation of Provisions, 86 Fed. Reg. 54642 (Oct. 4, 2021) (to be codified at 50 C.F.R. pt. 10) (enacted by the Biden administration).

66. Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds, 86 Fed. Reg. 54667 (Oct. 4, 2021) (to be codified at 50 C.F.R. pt. 10).

67. Ogden, *supra* note 48, at 28 ("Although the Secretary has created a number of exceptions that permit incidental taking . . . she has not exercised her regulatory authority to create a broadly applicable permit for incidental taking.").

68. Permits for Incidental Taking of Species, 50 C.F.R. § 222.307 (2022) (pursuant to 16 U.S.C. § 1531); Eagle Permits, 50 C.F.R. § 22.26 (2022) (pursuant to 16 U.S.C. § 668).

MBTA-protected species."[69] The creative ways courts and the FWS avoid applying the MBTA to activities such as owning a cat or a high rise window suggest that a Congressional amendment would better solve the problem of non-uniform MBTA enforcement.[70] In the absence of amended legislation, administrative regulations, such as the proposed incidental take permit program, present the best available recourse.[71] An incidental take permit program tracks the prevailing direction of MBTA enforcement. Thus, regulations limiting the challenges to BLM and BOEM permits for future MBTA violations by projects, like wind farms in the Gulf of Mexico, would best accommodate industries and agencies in the future.

5. Regulations Eliminating MBTA Challenges to Land Use Permits Should Accompany the Proposed Incidental Take Permit Program

An incidental take permit program is consistent with pre-Trump MBTA interpretations and the statute's purpose to protect birds from all types of harm.[72] Incidental take permits clear up uncertainties renewable energy companies operating on federal land face, but also complicate existing challenges to BLM and BOEM permits for MBTA violations by the industries BLM and BOEM regulate. Given the ability of conservation groups to challenge land use permits under the APA, incidental take permits could increase MBTA challenges to energy projects on federal land if these challenges are not curtailed by the regulations. However, administrative efficiency increases if the regulations specify that liability for *not* obtaining a required incidental take permit lies with the companies building wind energy projects instead of with the permitting agencies, or if the projects must apply for an incidental take permit to receive a land use permit.

The Biden administration must promulgate the incidental take program carefully to avoid an influx of challenges to federal land use permits. Specifically, the incidental take permit program needs to account

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69. Ogden, *supra* note 48, at 32.

70. A detailed analysis of whether specific activities should or should not constitute violations is outside the scope of this article, which addresses specific agency regulation of activities that have often been challenged under the MBTA, such as wind farming and oil drilling.

71. Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds, 86 Fed. Reg. 54667 (Oct. 4, 2021) (to be codified at 50 C.F.R. pt. 10).

72. *See infra* Part II.B for full discussion of the arguments for each respective interpretation of "take" in Section 703, and Part III.A for an analysis of why incidental takes should be prohibited by the MBTA going forward.

for pre-existing land use permit requirements to ensure projects can navigate the permit scheme efficiently. To do so, the incidental take permit regulations should either specify that federal land use permits cannot be challenged for noncompliance with the MBTA, or make incidental take permits a prerequisite to applying to the BLM or BOEM for a land use permit. Congress established the Federal Permitting Improvement Council in 2015, seeking to promote "the most efficient applicable processes, including the alignment of Federal reviews of projects and reduction of permitting and project delivery time."[73] Cooperation by the FWS with the BLM and BOEM in granting land use permits promotes efficiency by ensuring that energy companies have permits for potential bird deaths before seeking permits for the use of federal land.

The issue is narrow, but eliminating MBTA claims from the long list of procedural challenges to early stages of wind projects, like LM Wind Power's, streamlines administrative approval of renewable energy projects. More efficient approval allows the country to meet its federal and state renewable energy mandates by preventing the broadly protective MBTA from acting as an undue barrier to renewable energy infrastructure.[74]

C. Roadmap

This article makes recommendations for how the proposed incidental take permit program should accommodate federal land use permits to promote the efficient approval of industrial projects on federal land. It first explains the purpose of the MBTA, the disagreement over its "take" language, and the function of take permits within the larger permitting scheme for industrial projects on federal land.

Part I provides relevant background, beginning with Congress's enactment of the MBTA, then tracks the MBTA's historical application to incidental takes, followed by a discussion of how the proposed incidental take permit program affects the BLM and BOEM. Part II analyzes the administrative landscape, along with other problems likely to arise within it, and recommends solutions to these problems. Part III concludes with a discussion of how a Congressional amendment to the MBTA may complicate the recommendations made in Part II.

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73. 42 U.S.C. § 4370m-1(ii)(I).

74. Mass. Gen. Laws ch. 25A, § 11F (2022); *see also* Volcovici & Groom, *supra* note 23.

I. THE VOLATILE MBTA ENFORCEMENT LANDSCAPE IMPACTS FEDERAL LAND USE PERMITS

A. Origin and Functionality of the Migratory Bird Treaty Act

1. The Rise of Hunting Prior to Federal Regulation

Early settlers of the United States hunted birds for survival when crop yields were low.[75] Ducks, geese, and turkey were abundant in the 17th and 18th centuries, as settlers successfully used smoothbore rifles, or "fowlers," to hunt their food supply.[76] George Washington, an avid hunter in the runup to the American Revolution, wrote about killing "2 mallards and 5 bald faces" in a February 24, 1768 diary entry.[77] Commercial hunting began in the 19th century, as the east coast and cities along the Mississippi River became popular waterfowl trading hubs.[78]

By the 20th century, bird hunting was an entrenched American hobby and commercial endeavor.[79] The Browning Auto-5 semi-automatic shotgun, which allowed commercial hunters to massively increase their yield, started production in 1903.[80] The Christmas "Side Hunt" was a longstanding competitive bird hunting tradition, and the market for plume and bycocket hats spiked demand for feathers.[81] The explosion of bird hunting for recreation, fashion, and commerce led to a threatening decline

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75. Bill Nichol, *Waterfowling in a New World*, DUCKS UNLIMITED, https://www.ducks.org/hunting/duck-hunting-stories/waterfowling-in-a-new-world [https://perma.cc/GY6N-GB8N] (last visited Feb. 11, 2023).

76. *Id.*

77. Philip G. Smucker, *A Fowler and a Fisher*, GEORGE WASHINGTON'S MOUNT VERNON, https://www.mountvernon.org/george-washington/athleticism/hunting-fishing/ [https://perma.cc/2K8G-56CK] (last visited Nov. 7, 2022).

78. Larry L. Reid, *The Last Market Hunter: The End of One Waterfowling Era and the Beginning of Another*, WILDFOWL (Nov. 3, 2010), https://www.wildfowlmag.com/editorial/destinations_wf_1107_03/281039 [https://perma.cc/QM8V-E3MX].

79. *Important Dates in the Conservation of Migratory Birds*, U.S. FISH & WILDLIFE SERV., https://digitalmedia.fws.gov/digital/api/collection/document/id/1476/download [https://perma.cc/2ETP-8JCL] (last visited Feb. 11, 2023).

80. Anthony Vanderlinden, *Browning Auto-5: The First Successful Semi-Auto Shotgun*, NRA: AM. RIFLEMAN (Dec. 18, 2020), https://www.americanrifleman.org/content/browning-auto-5-the-first-successful-semi-auto-shotgun/ [https://perma.cc/7XYK-NK6B].

81. *Important Dates in the Conservation of Migratory Birds*, *supra* note 78.

in bird populations.[82] In response to the increase in commercial bird hunting, the 20th century brought protective rules and court decisions to maintain bird populations.

2. Protecting Birds—An Interest of the Very Nearly First Magnitude

Also in the 20th century, private citizens and government entities began asserting interest in the alarmingly low bird populations.[83] In response to the overhunting of birds, Audubon conservation societies advocated for protective legislation to save bird species from possible extinction.[84] State governments and the Supreme Court recognized the ecological value of birds, with Justice Holmes noting a sovereign's interest in conservation efforts because birds help states maintain a stable food supply by "destroying insects injurious to vegetation."[85] In *Missouri v. Holland*, Missouri argued it had a pecuniary interest in birds within state borders. The Court held that a state can regulate wildlife within its borders, but that federal treaties otherwise govern transitory wildlife.[86] The MBTA reflects this federal control over migratory birds, authorizing the FWS to enforce the MBTA, which acts as a floor for bird protection and allows states to extend further protection.[87]

Congress began its federal wildlife regulation with the Lacey Act, a statute passed pursuant to the Commerce Clause that criminalized the interstate transport of migratory birds protected under state laws.[88] In 1913, Congress enacted the Weeks-McLean Act to extend federal jurisdiction to all migratory game.[89] The Weeks-McLean Act failed constitutional challenges under the Commerce Clause, but illustrated the

82. Malory Henderson, *Unlikely Headfellows: Reflecting on Millinery History and Migratory Bird Conservation*, N. C. WILDLIFE RES. COMM'N (May 18, 2018), https://www.ncwildlife.org/News/Blog/unlikely-headfellows-reflecting-on-millinery-history-and-migratory-bird-conservation [https://perma.cc/6KB4-BRGC].

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

84. KURKPATRICK DORSEY, THE DAWN OF CONSERVATION DIPLOMACY 165, 176–77 (1998).

85. *Missouri*, 252 U.S. at 431 ("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."); *see also* Geer v. Connecticut, 161 U.S. 519, 533 (1896).

86. *Missouri*, 252 U.S. at 430, 434.

87. 16 U.S.C. § 708.

88. Dorsey, *supra* note 84, at 180–81.

89. Weeks-McLean Act of Mar. 4, 1913, ch. 145, 37 Stat. 828 (superseded by Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703–12 (2022)).

need for legislation to protect bird populations—and even drew the attention of Canadian conservationist groups.[90]

The need for national legislation protecting birds spurred negotiations between the United States and Canada, resulting in the Migratory Bird Treaty.[91] Congress ratified the Migratory Bird Treaty in 1916, despite opposition from Missouri hunting groups.[92] Congress implemented the international treaty into domestic law by passing the Migratory Bird Treaty Act of 1918.[93] Since then, the United States ratified bird treaties with Mexico, Japan, and Russia, amending the MBTA accordingly to cover the newly protected migratory bird species.[94]

The MBTA incorporates by reference the bird species listed in the Migratory Bird Treaty.[95] A bird technically does not have to migrate at all to be protected by the MBTA.[96] The MBTA protects all bird species present in the United States through natural ecological or biological processes.[97] As of 2022, the MBTA protects 1,093 bird species.[98]

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90. United States v. McCullagh, 221 F. 288, 294–95 (D. Kan. 1915).

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

92. Dorsey, *supra* note 84, at 206–09 (detailing compromises in the hunting seasons allowed by the treaty to appease Missouri groups).

93. *Important Dates in the Conservation of Migratory Birds*, *supra* note 78; 16 U.S.C. §§ 703–12.

94. Convention for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311; Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, U.S.-Japan, Mar. 4, 1972, 25 U.S.T. 3329; Convention Concerning the Conservation of Migratory Birds and Their Environment, U.S-Russia, Nov. 19, 1976, T.I.A.S. 9073.

95. 16 U.S.C. § 703(a).

96. Charles Seabrook, *Wild Georgia*: *Why Some Birds Migrate and Others Don't*, THE ATLANTA J. CONST. (Nov. 6, 2020), https://www.ajc.com/life/wild-georgia-why-some-birds-migrate-and-others-dont/BZJ3GA2WJJD2THT2Y6X5WJK6ME/ [https://perma.cc/A6KP-QB8Y] (cardinals and mockingbirds do not migrate).

97. *See* 16 U.S.C. § 703(b)(2) (A–B).

98. General Provisions, Revised List of Migratory Birds, 50 C.F.R. § 10.13 (2022).

3. Strict Criminal Liability for . . . What Exactly?

What *actus reus* triggers MBTA liability? The MBTA prohibits the "taking" of protected migratory bird species without prior authorization by the FWS.[99] Under the MBTA,

> it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird.[100]

The prohibitory language in the MBTA is broad, protecting birds from a wide range of activities without expressly limiting MBTA criminal liability to any particular actor.[101]

The word "take" complicates the determination of what action or inaction constitutes an MBTA violation. Under one fair interpretation of the statute, the word "take" merely summarizes other prohibited acts, such as the "capture" or "transport" of migratory birds. Another interpretation prohibits other bird-killing activities not listed in the statute, including hunting and capturing. "Kill" is arguably even broader than "take"—some dictionary and judicial definitions of "take" involve intentional acts, while "kill" encompasses "any means or any matter" in which human behavior causes bird deaths, whether the behavior intended harm to birds or not.[102] The FWS regulation embodies this overlap between "taking" and "killing," defining "take" as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap,

99. *Migratory Bird Treaty Act*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php [https://perma.cc/8KHY-YT5U] (last visited Feb. 11, 2023).

100. 16 U.S.C. § 703(a).

101. Humane Soc'y of the U.S. v. Glickman, 217 F.3d 882, 883 (D.C. Cir. 2000) ("what matters is whether someone has killed or is attempting to kill or capture or take a protected bird, without a permit and outside of any designated hunting season. Nothing in § 703 turns on the identity of the perpetrator"); *see also* 16 U.S.C. § 707(a) ("any person, association, partnership, or corporation who shall violate any provisions . . .").

102. 16 U.S.C. § 703(a).

capture, or collect" a migratory bird.[103] This definition provides little guidance to industries and federal agencies issuing land use permits.[104]

Consequently, MBTA violations occur every day by an array of individuals and entities. The only enforcement measure provided in the MBTA is criminal prosecution.[105] The MBTA does not provide for individual enforcement by private citizens interested in enforcing the statute against suspected violators,[106] which differs from the Endangered Species Act.[107] The only way for private citizens or conservation groups to enforce the MBTA against suspected violators is through the APA.[108]

Section 703 does not impose a *mens rea* requirement for misdemeanor violations.[109] A 1960 MBTA amendment differentiated misdemeanor takes, which were made strict liability crimes, from felony takes in which the actor knowingly captures protected species with the intent to sell.[110] Under section 703's strict liability standard, conduct alone—without specific intent or guilty knowledge—is sufficient to violate the MBTA.[111] One court justified this standard in the MBTA context by noting that strict liability is appropriate for regulatory violations with small penalties that do not harm the offender's reputation.[112]

Applying the strict liability standard to common MBTA violations proves difficult. Defining the *actus reus* required to trigger strict liability is complex because the consequence of criminal penalties suggests Congress did not contemplate prosecution for petty violations of the

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103. 28 U.S.C. § 703; *see* 50 C.F.R. § 17.3.

104. 50 C.F.R. § 10.12 (2022).

105. JOHN C. MARTIN ET. AL., THE MIGRATORY BIRD TREATY ACT: AN OVERVIEW, CROWELL MORING (2016), https://www.eagles.org/wp-content/uploads/2016/01/The-Migratory-Bird-Treaty-Act-An-Overview-Crowell-Moring.pdf [https://per ma.cc/SZD7-DN5U].

106. *See* Flint Hills Tallgrass Prairie Heritage Found., Inc. v. Scottish Power, PLC, 147 Fed. Appx. 785, 787 (10th Cir. 2005).

107. *See* 16 U.S.C. § 1540(a).

108. *See infra* Part II.D.3.

109. 16 U.S.C. § 707(a); United States v. Schultze, 28 F. Supp. 234, 236 (1939) ("The statute fails to use the word 'willfully' or 'knowingly' or any similar phrase.")

110. Act of Sept. 8, 1960, Pub. L. No. 86–732, 74 Stat. 866; 16 U.S.C. 707(b)(1–2) (2022) (setting a maximum sentence of two years for felony MBTA violations).

111. United States v. Corrow, 119 F.3d 796 (10th Cir. 1997) (holding that possession of a Native American headdress decorated with migratory bird feathers violated the MBTA).

112. United States v. Engler, 806 F.2d 425, 432 (3d Cir. 1986) (*quoting* Morrissette v. United States, 342 U.S. 246, 256 (1952)).

MBTA's broad prohibition of takes. Killing, capturing, or exporting migratory birds without proper permits are misdemeanor violations consisting of intentional acts targeted at migratory birds.[113] However, courts in two federal circuits held defendants liable for misdemeanor MBTA violations without purposeful hunting, pursuit, or possession of any bird—partially by relying on the "in any manner," "take," and "kill" language in section 703.[114]

The MBTA successfully curbed rates of illegal hunting, thus, incidental takes account for most bird deaths and litigation today.[115] The FWS lists collision with man-made structures, electrocution, poisoning, landing in oil pits, and cats as the leading causes of bird deaths.[116]

4. The "Cooperation Lest Prosecution" Model

The FWS lacks the resources to prosecute every human-caused migratory bird death.[117] As current FWS Deputy Martha Williams explained, "[t[he Service recognizes that a wide range of activities may result in incidental take of migratory birds. Pursuing enforcement for all these activities would not be an effective or judicious use of our law enforcement resources."[118] Further, it is unreasonable to prosecute some purely accidental takes such as bird collisions with airplanes and glass

113. Regulations Governing Take of Migratory Birds, 86 Fed. Reg. 1134, 1135 (Jan. 7, 2021) (to be codified at 50 C.F.R. pt. 21) ("Thus, one does not passively or accidentally pursue, hunt, or capture. Rather, each requires a deliberate action specifically directed at achieving a goal.").

114. *See* United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010) (birds killed by oil drilling equipment); United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978) (birds poisoned by noxious waters).

115. Ogden, *supra* note 48, at 6–7 ("[A]ll species of birds are far more likely to be killed by anthropogenic threats than the estimated fifteen million birds taken annually by hunters.").

116. *Threats to Birds*, *supra* note 11. Collision with man-made structures accounts for more deaths than any other listed causes, with the FWS sub-dividing collision death rates into collisions with wind turbines, electrical towers, vehicles, solar panels, and communication towers.

117. U.S. Dep't of the Interior Fish and Wildlife Serv., Director's Order No.: 225, Incidental Take of Migratory Birds, 16 U.S.C §§ 703-12 (2021), https://www.regulations.gov/document/FWS-HQ-MB-2018-0090-19194 [https://perma.cc/XV8Q-Z9ED].

118. *Id.* at pt. 2.

windows. Under the current MBTA framework, prosecutorial discretion prevents limitless MBTA liability.[119]

Prosecutorial discretion allows industries concerned with potential MBTA liability to work with the FWS on mitigating harm to migratory birds to avoid prosecution.[120] The FWS's Division of Law Enforcement fosters relationships with industries proactively mitigating their impact on migratory birds, attempting to resolve the issue before investigation, enforcement, and conviction.[121] In this way, the FWS tailors its enforcement of the MBTA to avoid the problem of limitless liability that applies if section 703 is read to prohibit incidental takes. The FWS uses this model to interpret the MBTA with Congress's lack of guidance regarding how to apply the MBTA to non-hunting activities.[122]

But courts disfavor prosecutorial discretion as a method of reigning in limitless MBTA liability.[123] Prosecutorial discretion can lead to arbitrary enforcement and convictions by the FWS for activities Congress did not intend to prohibit.[124] It may also fail to promote the protection of bird species, as the mitigation efforts helping an industry escape prosecution may not be effective in the long term, and the FWS lacks the resources to monitor the effectiveness.[125] If a wind turbine's location or construction excessively impacts migratory birds, no mitigation efforts could solve the problem. Additionally, mitigating harm after construction is not the most effective way to implement this statute.[126] Lastly, incidental take permits would allow industries receiving them to avoid violating the MBTA, rather than a vague promise that the FWS will not prosecute their violations if the industry takes mitigation efforts.[127]

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119. United States v. FMC Corp, 572 F.2d 902, 905 (1978) ("Such situations properly can be left to the sound discretion of prosecutors and the courts.").

120. Robert S. Anderson & Jill Birchell, *Prosecuting Industrial Takings of Protected Avian Wildlife*, 59 U.S. ATTY'S BULL.: ENV'T CRIMES 65, 75 (2011), http://www.justice.gov/ej/docs/USA_Bulletin_072011.pdf [https://perma.cc/N9DC-HANR].

121. *Id.*

122. *Id.*

123. Mahler v. U.S. Forest Serv., 927 F. Supp. 1559, 1582–83 (S.D. Ind. 1996).

124. *Id.* ("trust in prosecutorial discretion is not really an answer to the issue of statutory construction.").

125. Ogden, *supra* note 48, at 33.

126. *Id.* at 36.

127. *Id.* at 37.

B. The Circuit Split Incubates with United States v. FMC Corp. and Eludes Resolution

1. Ultrahazardous Acts Trigger Strict MBTA Liability in the Second and Tenth Circuits

The issue of MBTA applicability to non-hunting activities created a circuit split, subjecting multistate industries to inconsistent enforcement of the MBTA.[128] In the Second (which decided *FMC Corp.*) and Tenth Circuits, any activity that proximately causes bird deaths is subject to the MBTA's permitting requirements and penalties.[129] In *FMC Corp.*, a pesticide and chemical company stored wastewater in a waterfowl-inhabited pond.[130] After an appeal for a 36-count conviction for the wastewater harming birds, the Second Circuit rejected FMC's argument that a conviction required intent to harm birds.[131] Instead, it held FMC strictly liable on a textual basis, because "the statute does not include as an element of the offense 'willfully, knowingly, recklessly, or negligently,'" and FMC took no effort to mitigate the wastewater's toxic effects.[132]

To limit prosecutions of unwitting violators such as cat owners, the Second Circuit requires an "ultrahazardous activity" to meet the *actus reus* requirement for section 703 violations.[133] This requirement limits which acts trigger strict liability and provides a cushion to industrial actors attempting to mitigate their harms to migratory birds.[134] The *FMC Corp.* court found that storing toxic wastewater without mitigating efforts

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128. *Rig Locator*, CACTUS DRILLING CO., http://www.cactusdrlg.com/rig-locator [https://perma.c c/477R-MTRS] (last visited Feb. 11, 2023). The Cactus Drilling Company has two facilities located only 100 miles apart, but each facility is subjected to a different interpretation of the MBTA because the facilities are in different states.

129. United States v. FMC Corp., 572 F.2d 902, 907 (2d Cir. 1978); United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010).

130. *FMC Corp.*, 572 F.2d at 904–05.

131. *Id.* at 907.

132. *Id.* at 908.

133. *Id.* at 903–906; *see* Christopher Chesne, *Un-Pheasant Consequences: The Migratory Bird Treaty Act Circuit Split, the Trump Administration, and a Sensible Interpretation of 16 U.S.C. § 703*, 7 LSU J. OF ENERGY L. & RESOURCES 497, 511, 513 (2019). The ultrahazardous activity requirement weakens the pure strict liability aspect of the statute, leading to an analysis that Chesne compares to strict tort liability or criminal negligence.

134. *Id.*

constituted an ultrahazardous activity and imposed strict liability.[135] However, driving a car that collides with a bird or owning a high-rise building does not constitute MBTA violations under the Second Circuit's ultrahazardous activity requirement.

In a similar attempt to limit the expansive scope of incidental take liability, the Tenth Circuit's proximate cause analysis checks whether a defendant knew its equipment posed a threat to migratory birds.[136] In *United States v. Apollo Energies, Inc.*, migratory birds died by flying into oil drilling equipment.[137] When the oil drillers argued that the incidental take liability was absurdly broad, the Tenth Circuit relied on notions of proximate cause and foreseeability to resolve these concerns.[138] The Tenth Circuit was clear that its interpretation required no intent to harm birds, but considered the defendant's ability to foresee the harm to migratory birds and whether the defendant took mitigation steps.[139]

The Second and Tenth Circuits rooted their decisions in the broadly written plain text of section 703, a justified approach since the "in any means or in any manner" language suggests that Congress wanted the FWS to prosecute some non-hunting activities.[140] Another policy supporting the Second and Tenth Circuit's extension of the MBTA's "take" to non-hunting activities includes the FWS regulations addressing incidental takes in the military readiness context, which would not be necessary if those military-caused bird deaths were not considered MBTA takes.[141]

In sum, the Second and Tenth Circuits each apply strict liability to MBTA violators based on a certain *actus reus* threshold to prevent MBTA liability for every single human-caused bird death.[142] Because other circuits interpret the MBTA as requiring a *mens rea*, or a certain criminal

135. *FMC Corp.*, 572 F.2d at 903–906.

136. United States v. Apollo Energies, Inc., 611 F.3d 679, 691 (10th Cir. 2010).

137. *Id.* at 682.

138. *Id.* at 689–690.

139. *Id.* at 691.

140. 16 U.S.C. § 703(a).

141. Authorization of Take Incidental to Military Readiness Activities, 50 C.F.R. § 21.42 (2022).

142. *Apollo Energies, Inc.*, 611 F.3d at 679; United States v. FMC Corp., 572 F.2d 902, 903–906 (2d Cir. 1978).

intent, in addition to the *actus reus* of performing a dangerous act that kills birds, the circuits are split.[143]

2. The Fifth, Eighth, and Ninth Circuits Require Intentional Killing—i.e., Hunting

In the Fifth, Eighth, and Ninth Circuits, incidental takes do not violate the MBTA, regardless of the hazards posed by the industrial activity in question; strict liability only applies to poaching activities because poachers act with the specific intent to kill or capture birds.[144] In 1991, the Ninth Circuit became the first court since the 1978 *FMC. Corp*. decision to address the question of whether incidental takes violated the MBTA.[145] In *Seattle Audubon Society v. Evans*, the Ninth Circuit held that timber operations incidentally destroying spotted owl habitats were not MBTA takes.[146] The Fifth, Eighth, and Ninth circuits define "take" as used in section 703 as "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 1914."[147]

Of the circuits that only impose MBTA liability for hunting, the Ninth Circuit first addressed incidental take liability in *Evans*, when timber sales allegedly violated the MBTA because they harmed the spotted owl population.[148] In *Evans*, along with an Eighth Circuit case that also involved timber sales, both the Ninth and Eighth Circuits held that intent to harm birds—specifically, the intent clearly present in hunting, where the activity directly targets birds—is a necessary element of an MBTA violation.[149] These decisions relied on the fact that timber harvesters engaged in a legal, commercial activity to cut down trees, not kill birds.[150]

Most recently in *United States v. CITGO Petroleum Corp.*, the Fifth Circuit addressed incidental takes in the context of oil projects, specifically

143. *See* United States v. CITGO Petrol. Corp., 801 F.3d 477 (5th Cir. 2015); Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110 (8th Cir. 1997); Seattle Audubon Soc'y v. Evans, 952 F.2d 297 (9th Cir. 1991).

144. *See CITGO Petrol. Corp.*, 801 F.3d at 477; *Newton Cnty. Wildlife Ass'n*, 113 F.3d at 110.

145. *Seattle Audubon Soc'y*, 952 F.2d at 297.

146. *Id.* at 303 (Habitat destruction causes "harm" to the owls under the ESA but does not 'take' them within the meaning of the MBTA.").

147. *Newton Cnty. Wildlife Ass'n*, 113 F.3d 110 at 115.

148. *Seattle Audubon Soc'y*, 952 F.2d at 297.

149. *Newton Cnty Wildlife Ass'n*, 113 F.3d at 110.

150. *Seattle Audubon Soc'y*, 952 F.2d at 303; *Newton Cnty Wildlife Ass'n*, 113 F.3d at 115.

addressing the Second and Tenth Circuits' view.[151] On the merits, the Fifth Circuit found defendant CITGO innocent of MBTA violations because the Court defined "take" in the MBTA context to mean "reduce[ing] those animals, by killing or capturing, to human control."[152] Addressing the circuit split, the CITGO court explained that the Second and Tenth Circuit mangled the strict liability analysis by conflating *mens rea* with *actus reus*.[153]Under the Fifth Circuit's view, the MBTA cannot raise the *actus reus* above any act that kills birds without effectively imposing a *mens rea* requirement that contradicts the strict liability nature of the statute.[154]

The circuits' struggle with interpreting "take" is understandable given the tension between competing interests. Since the *Evans* decision, the circuits remain split, with neither Congress nor the U.S. Supreme Court providing clarity.[155] Recent changes in the executive branch's enforcement of the MBTA also complicate this analysis. Federal agencies are responsible for implementing either interpretation of the MBTA, but such varying implementation fails to provide courts with clear guidance on construing section 703.[156]

C. Recent Executive Branch Developments in MBTA Enforcement

1. Interpretation of "Take" From FMC Corp. Until the End of the Obama Administration

After *FMC Corp.*, federal prosecutors pursued oil and gas, timber, mining, chemical, and electricity companies for their incidental takes.[157] This enforcement continued into the 21st century, as 2013 saw the first case applying the MBTA to incidental takes by wind turbines.[158] The

151. United States v. CITGO Petrol. Corp., 801 F.3d 477 (5th Cir. 2015).

152. *Id.* at 489.

153. *Id.* at 492.

154. *Id.* at 491–92 ("Strict liability crimes dispense with the first requirement; the government need not prove the defendant had any criminal intent. But a defendant must still commit the act to be liable.").

155. Chesne, *supra* note 133 at 508–511 (suggesting amendment of the MBTA).

156. Martha G. Vásquez, *Clipping the Wings of Industry: Uncertainty in Interpretation and Enforcement of the Migratory Bird Treaty Act*, 74 WASH. & LEE. L. REV. ONLINE 281 (2018).

157. Jesse Greenspan, *The History and Evolution of the Migratory Bird Treaty Act*, AUDUBON (May 22, 2015), http://www.audubon.org/news/the-history-and-evolution-migratory-bird-treaty-act [https://perma.cc/X6GA-NLCE].

158. *Id.*; United States v. Duke Energy Renewables, Inc., No. 2:13-cr-00268, 2013 BL (D. Wyo., Nov. 22, 2013) (Wyoming is in the Tenth Circuit, which

budding circuit split over the interpretation of "take" indicated that this century-old practice could change.[159]

The Obama Administration responded to the circuit split with a Solicitor's Opinion, stating that the Fifth, Eighth, and Ninth Circuits "erroneously construed the prohibition of 'take' in the MBTA as limited to hunting and other forms of intentional taking."[160] Known as the Tompkins Memorandum, the opinion stressed that its interpretation was consistent with former FWS interpretations of "take," pointing to Congress's inaction in amending the MBTA as proof of its agreement with the prosecution of incidental takes.[161]

Enforcing the MBTA against industries incidentally killing birds was a consistent practice before the Trump administration, but nonetheless came under fire from Senators in states hosting energy projects.[162] Former Louisiana Senator David Vitter criticized the FWS for what he viewed as hand-picking incidental take prosecutions to disproportionately pursue the oil and gas industry.[163]

2. The Trump Administration's Derogation from MBTA Enforcement Policy

The unrest surrounding the MBTA drove the Trump administration to take drastic action to protect the business-related political interests at stake.[164] If incidental takes violate the MBTA, then energy companies face potential MBTA liability and more stringent permitting requirements.

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upheld the MBTA's application to incidental takings from industrial activities under the MBTA in United States v. Apollo Energies, Inc., 611 F.3d 679, 688–89 (10th Cir. 2010)).

159. Jennifer Bautista, *Flying Too Close to the Sun: The Abrogation of the Migratory Bird Treaty Act by the Trump Administration*, 45 NOVA L. REV. 205, 208 (2021); *see CITGO Petrol. Corp.*, 801 F.3d at 477.

160. Memorandum from Hilary C. Tompkins, Solicitor, U.S. Dep't of Interior, to Dir., U.S. Fish & Wildlife Serv. (Jan. 10, 2017). The Solicitor is the Department of the Interior's chief lawyer, charged with issuing the DOI's interpretation of federal statutes.

161. *Id.*

162. *See Vitter, Alexander Demand a Clear Migratory Bird Policy from Justice Department*, U.S. SENATE COMM. ON ENV'T & PUB. WORKS (Jan. 30, 2013), https://www.epw.senate.gov/public/index.cfm/2013/1/post-8c84134d-a36c-2155-a554-dc81eaded88a [https://perma.cc/E6NB-ZPKJ] (requesting clarification of the Department of Justice's policy for choosing which incidental takes are actually prosecuted).

163. *Id.*

164. Fears & Grandoni, *supra* note 20.

The Trump Administration's rationale for abruptly changing the FWS's interpretation of "take" with the Jorjani Memorandum was set out in a 2020 Environmental Impact Statement that considered three possible courses of action.[165] Attempting to "provide legal certainty to the public regarding what actions are prohibited under the MBTA," the Trump Administration settled on a No Action Alternative that recommended enforcement consistent with the Jorjani Memorandum—interpreting the MBTA to exclude incidental takes.[166] The No Action Alternative described the decision as one that permanently established the FWS's stance on incidental takes compared to other alternatives, potentially reducing the regulatory burden on the public and simplifying the obligations of law enforcement officers.[167] The reasoning set forth in the Impact Statement led to the January 7, 2021 FWS regulation allowing incidental takes, which the Biden administration later repealed.[168]

3. The Biden Administration's Proposed Incidental Take Permits

Along with repealing the Trump Administration's actions regarding interpretation of the MBTA, the Biden Administration set forth regulations of its own. To codify its stance that the MBTA applies to incidental takes, the FWS issued an advance notice of proposed rulemaking, calling for input on developing a rule to permit incidental takes under certain circumstances.[169] The FWS is considering authorizing incidental takes through "three primary mechanisms: (1) [e]xceptions to the MBTA's prohibition on incidental take; (2) general permits for certain activity types; and (3) specific or individual permits."[170] The Biden Administration is also preparing an Environmental Impact Statement for this proposal pursuant to NEPA.[171] Director's Order No. 225, which became effective

165. U.S. DEP'T OF INTERIOR: FISH AND WILDLIFE SERV., FINAL ENVIRONMENTAL IMPACT STATEMENT: REGULATIONS GOVERNING TAKE OF MIGRATORY BIRDS (2020), https://www.law.nyu.edu/sites/default/files/MBTA_%20FINAL%20EIS_V5_11_25.2020.pdf [https://perma.cc/3QTD-5PNN].

166. *Id.*

167. *Id.*

168. Regulations Governing Take of Migratory Birds, 86 Fed. Reg. 1134, 1135 (Jan. 7, 2021) (to be codified at 50 C.F.R. 10); Regulations Governing Take of Migratory Birds; Revocation of Provisions, 86 Fed. Reg. 54642 (Oct. 4, 2021) (to be codified at 50 C.F.R. 10).

169. Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds, 86 Fed. Reg. 54667 (Oct. 4, 2021) (to be codified at 50 C.F.R. pt. 10).

170. *Id.*

171. *Id.*

on December 3, 2021, provides guidance for prosecuting incidental takes until the potential permits become available:

b. The Service prioritizes the following types of conduct for enforcement:

(1) Incidental take that is the result of an otherwise illegal activity; or
(2) Incidental take that:
(i) results from activities by a public- or private-sector entity that are otherwise legal;
(ii) is foreseeable; and
(iii) occurs where known general or activity-specific beneficial practices were not implemented.[172]

This guidance attempts to limit incidental take prosecutions to egregious violators, and will be in place until the FWS completes the APA's informal rulemaking process (which involves comments from interested parties).[173]

D. The MBTA's Role in Federal Land Permitting and the Administrative Procedure Act

1. U.S. Fish and Wildlife Service Depredation Permits and Control Orders

Migratory Bird Treaty Article VII contemplated take permits in "extraordinary conditions" when birds "become seriously injurious to the agricultural or other interests in any particular community."[174] Section 704 of the MBTA implements the "extraordinary condition" standard, details the government's duties, and describes baiting methods that violate the MBTA despite valid hunting permits.[175]

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172. U.S. Dep't of the Interior Fish and Wildlife Serv., Director's Order No.: 225, Incidental Take of Migratory Birds, 16 U.S.C Code §§ 703-12 (2021), https://www.regulations.gov/document/FWS-HQ-MB-2018-0090-19194 [https://perma.cc/XV8Q-Z9ED].

173. *Id.*; 5 U.S.C. § 553.

174. Humane Soc'y of the U.S. v. Glickman, 217 F.3d 882, 885 (D.C. Cir. 2000) (quoting Convention for the Protection of Migratory Birds, art. VII, U.S.-U.K., Aug. 16, 1916, 39 Stat. 1702).

175. 16 U.S.C. § 707(a–b).

Section 704 of the MBTA allocates permit authority to the Secretary of the Interior, who, in turn, delegates permit authority to the FWS.[176] The MBTA allows the Secretary of the Interior to permit taking compatible with the original Migratory Bird Treaty.[177]

FWS regulations detail the permitting framework.[178] Specific regulations for MBTA permits supplement general federal wildlife permitting requirements.[179] The regulations provide for depredation control permits, rehabilitation permits, banding permits, scientific collecting permits, and Waterfowl sale and disposal permits, among others.[180] The regulations provide general exceptions to permitting requirements that allow government employees, veterinarians, and the general public to handle migratory birds pursuant to their job or to rescue birds trapped in buildings.[181] Title 50 also provides a permitting exception for incidental takes by the Department of Defense during military readiness activities.[182]

2. Hunting Permits and Special Purpose Permits

The FWS issues take permits for waterfowl hunting that impose limits on hunting seasons.[183] Title 50 of the Code of Federal Regulations identifies three other types of take permits relevant to incidental takes by industrial actors and federal agencies: depredation permits, control orders, and special purpose permits.[184] Depredation permits require an application describing the agricultural interests affected, a description of the area where the injuries occurred, and the species of birds involved.[185] Depredation permits are one year in length and impose limits on the

176. 16 U.S.C. § 704; 5 U.S.C. §§ 301–02 (authorizing agency heads to delegate authority to subordinate departments); 50 C.F.R. § 2.1 (2022) (organization of FWS). The FWS is a bureau within the Department of the Interior.

177. 16 U.S.C. § 704(a); Fund For Animals v. Norton, 281 F. Supp. 2d 209, 235 (D.C. Cir. 2003) (upholding depredation permits).

178. 16 U.S.C. § 704; 50 C.F.R. §§ 21.1–21.61 (2022).

179. 50 C.F.R. §§ 13.1–13.50 (2022).

180. *Id.* §§ 21.21–21.41 (2022).

181. *Id.* § 21.12 (2022).

182. *Id.* § 21.15 (2022).

183. *See* 16 U.S.C. 704(c)(1)(A) (regulating duck hunting season).

184. 50 C.F.R. §§ 21.21–21.41 (2022).

185. *Id.* § 21.14 (2022). Depredation is the act of consuming agricultural resources.

grantee's ability to lethally take birds.[186] Control orders, issued for an overabundant species in dire circumstances, allow anyone to destroy bird and bird nests without a permit.[187]

The FWS also provides special purpose permits for activities "which are otherwise outside the scope of the standard form permits of this part."[188] Application for a special purpose take permit requires a "detailed statement describing the project or activity which requires issuance of a permit, purpose of such project or activity, and a delineation of the area in which it will be conducted," and any grantees must keep records of their project's effects on migratory birds.[189]

The FWS regulations do not address general incidental take permits for industrial actors whose lawful activity threatens migratory birds.[190]

3. Federal Land Use Permits and Leases Issued by BLM & BOEM

Title 43, Chapter II, Section 2920 of the Code of Federal Regulations establishes provisions for leases, permits, and easements for non-federal use of public lands.[191] The proposed use of federal land must comply with BLM or BOEM plans and resource management programs, as well as applicable federal law.[192]

The Federal Land Policy and Management Act authorizes BLM to grant land use permits on the mainland and the Outer Continental Shelf Lands Act authorizes BOEM to grant land use permits offshore.[193] BLM regulations govern "Leases, Permits, and Easements," all of which allow private use of federal land.[194] Leases authorize possession of federal land;

186. *Id.* The depredation permit must specifically authorize the killing, and any birds killed under the permit must be retrieved and turned over to an agency official.

187. *Id.* §§ 21.53–21.54 (2016) (control orders for Muscovy ducks and purple swamphens).

188. *Id.* § 21.95 (2022).

189. *Id.* § 21.95(b)(1) (2022).

190. Ogden, *supra* note 48, at 28 ("Although the Secretary has created a number of exceptions that permit incidental taking in specific limited circumstances or as directed by Congress, she has not exercised her regulatory authority to create a broadly applicable permit for incidental taking."). Ogden's article proposes a broad incidental take permit.

191. 43 C.F.R. § 2920.0-1 (2022) (issued under the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1732–33, 1740 (2022)).

192. *Id.* § 2920.1-1 (2022).

193. 43 U.S.C. § 1701; 43 U.S.C. § 1331.

194. 43 C.F.R. § 2920.0-3 (2022). BOEM's regulations are practically identical to BLM's. *See* 30 C.F.R. §550.101 (2022).

permits for land use authorize use of the land for specified purposes, like building a wind farm.[195] The Code of Federal Regulations provides the details of renewable energy leases, easements, and rights of way on offshore federal lands.[196] Generally, the regulations require BOEM to ensure renewable energy projects are safe and comply with applicable federal laws.[197] BOEM can issue cessation orders if it finds a permitted energy project failed to comply with federal law in a way that poses an imminent threat of irreparable damage to natural resources.[198]

BLM and BOEM actions in granting land use permits are subject to challenges brought by private citizens under the APA, which provides the procedural requirements for agencies operating under the authority of a congressional statute.[199] These challenges occur when citizens allege that BLM or BOEM did not base their permitting decision on sufficient evidence or did not comply with applicable laws establishing the procedure for granting permits.[200]

The issuance of any permit by an agency is subject to the procedural requirements of the APA because permitting is an adjudicatory agency action.[201] The APA allows judicial review of a final agency action when an aggrieved party satisfies the APA's justiciability requirements.[202] To establish a cause of action, the plaintiff must show that an agency action violates a substantive statute that applies to the agency.[203] A suit under the APA involves a federal question, which supports federal jurisdiction even if the underlying statute fails to provide for a private right of action.[204] If the agency action is held to violate an underlying substantive statute, courts can set aside the agency action for its derogation from applicable law.[205] Setting aside an agency action in the MBTA context means

195. 43 C.F.R. § 2920.0-5 (2022). Easements are non-possessory rights in land that are similar to usufructs in civilian property law.

196. 30 C.F.R. § 585 (2022).

197. *Id.* § 585.102 (2022).

198. *Id.* §§ 585.400–01 (2022).

199. 5 U.S.C. § 500.

200. *See, e.g.*, Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571 (9th Cir. 2016).

201. 5 U.S.C. § 551(6–9).

202. *Id.* §§ 702–04.

203. *Id.* § 702 (2022) (granting right of review to parties "adversely affected or aggrieved by agency action within the meaning of a relevant statute"); Preferred Risk Mut. Ins. Co. v. United States, 86 F.3d 789, 792 (8th Cir.1996).

204. 28 U.S.C. § 1331; *Preferred Risk Mut. Ins. Co.*, at 792, note 2. The basis for federal question jurisdiction is especially strong when assessing a statute's application to the federal government.

205. 5 U.S.C. § 706(2)(a).

invalidating permits granted to energy projects or preventing an agency from pursuing a proposed course of action.[206] Generally, the APA requires BLM and BOEM to base permitting decisions on applicable law and the details of the relevant energy project.[207] The decision to grant a permit is subject to the "arbitrary, capricious, or not in accordance with law" standard, which ensures the agency's decisions stem from good fact finding and adhere to applicable law.[208]

Courts struggle when a plaintiff seeks APA review of non-FWS agency action using the MBTA as the underlying substantive statute because the text of the MBTA does not allow citizen suits to enforce its broad prohibition of takes.[209] Courts agree that the MBTA's criminal enforcement provision cannot be used to prosecute federal agencies.[210]

Although the FWS will not prosecute other agencies, the APA gives private parties a mechanism to enforce the MBTA against federal agencies.[211] Holding that a civil injunctive suit is available to enforce MBTA section 703, the Eighth, Ninth, and D.C. Circuits decided cases brought by conservation groups challenging BLM or BOEM land permits.[212]

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206. Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571 (9th Cir. 2016) (suit challenging land use permits); Sierra Club v. Martin, 110 F.3d 1551 (11th Cir. Ga. 1997) (suit to enjoin Forest Service from timber cutting operation).

207. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 56 (1983).

208. *Id.*

209. 16 U.S.C. §§ 703, 707(a); Humane Soc'y of the U.S. v. Glickman, 217 F.3d 882, 888 (D.C. Cir. 2000) ("Both opinions rest on the mistaken idea that in 1918, § 703 could be enforced only through the criminal penalty provision in § 707(a).").

210. *Humane Soc'y of the U.S.*, 217 F.3d at 886 ("[W]e are willing to assume that the criminal enforcement provision could not be used against federal agencies."); United States v. Cooper Corp., 312 U.S. 600, 604 (1941) (acknowledging canon of construction that "person" does not include the sovereign).

211. *Humane Soc'y of the U.S.*, 217 F.3d at 886; *Protect Our Cmtys. Found.*, 825 F.3d at 576.

212. City of Sausalito v. O'Neill, 386 F.3d 1186, 1203 (9th Cir. 2004).

E. Jurisprudence on Federal Agency Liability Under the MBTA

There is no dispute that federal agencies whose function requires directly taking birds should need an MBTA permit.[213] The clearest example of this is when an agency that directly regulates wildlife acts to prevent harm caused by bird overpopulation.[214] This direct MBTA liability does not implicate the APA or the issues applying the statute to incidental takes.

1. Direct Takes by Non-Military Agencies

Direct agency action that kills birds provides the most direct path to agency MBTA liability. In *Humane Society of the U.S. v. Glickman*, the D.C. Circuit addressed "whether the Migratory Bird Treaty Act prohibits federal agencies from killing or taking migratory birds without a permit from the Interior Department."[215] The Glickman court concluded that the Wildlife Services Division of the Department of Agriculture needed a depredation permit to conduct a Canadian Goose management program in Virginia.[216] The plan involved the capturing and killing of an overabundant goose population harming crop yields and local water quality.[217] The *Glickman* court relied on guidance from past FWS enforcement and Supreme Court dicta for its holding that the MBTA applied to federal agencies.[218]

2. Incidental Takes Resulting from Direct Actions of the Department of Defense

In 2002, birdwatching plaintiffs sued the Department of Defense under the MBTA and the APA for live-fire training exercises that occasionally killed migratory birds in *Center for Biological Diversity v. Pirie*.[219] The

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213. *Humane Soc'y of the U.S.*, 217 F.3d at 886 (requiring the Wildlife Services Division of the Department of Agriculture to apply for a depredation permit).

214. Sierra Club v. Martin, 110 F.3d 1551, 1552 **(**11th Cir. 1997) (National Forest Service cutting down timber housing migratory bird nests).

215. *Humane Soc'y of the U.S.*, 217 F.3d at 883.

216. *Id.*

217. *Id.*

218. *Id.* at 883–84; Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 438 (1992) (discussing U.S. Forest Service's MBTA obligations).

219. Ctr. for Biological Diversity v. Pirie, 191 F.Supp. 2d 161, 163 (D.D.C. 2002).

Pirie court found the Department of Defense in violation of the MBTA, even though the Department of Defense applied for a take permit from the FWS—which the FWS denied.[220] Significantly, the Department of Defense applied for a depredation permit, but the "injurious bird" rationale did not apply to live-fire exercises.[221] The U.S. District Court for the District of Columbia (D.C. District Court) noted the MBTA challenge to the agency's action as appropriate under the APA, acknowledging that "the law of this Circuit is clear: a plaintiff may sue a federal agency under the APA for violations of the MBTA."[222]

FWS regulations authorizing takes incidental to military readiness activities superseded Pirie in 2007,[223] but Pirie provides a good example of a citizen suing through the APA to enjoin direct agency action, as opposed to citizen suits against an agency for permitting industries that commit incidental takes.[224]

3. Challenges to Land Use Permits for Non-Compliance with the MBTA

Two cases illustrate MBTA-based procedural challenges to BLM and BOEM land use permits for wind farms on federal land.[225]

In *Public Employees for Environmental Responsibility v. Hopper*, Cape Wind, LLC worked with BOEM and the Coast Guard to build 130 wind turbine generators in Nantucket Sound.[226] BOEM has regulatory

220. *Id.* at 166–67, 178.

221. *Id.* at 167.

222. *Id.* at 175.

223. Authorization of Take Incidental to Military Readiness Activities, 50 C.F.R. § 21.15 (2007).

224. *Pirie* and *Glickman* deal with direct agency liability–requiring an agency to get an FWS permit for its own actions—and not the permitting liability that is the focus of this Comment. However, these cases provide context for the general treatment of federal agencies in the MBTA sphere and enhance the discussion of whether incidental takes are or should be regulated by the MBTA and FWS regulations.

225. Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571 (9th Cir. 2016) (Tule Wind Project in California); Pub. Emps. For Env't Resp.v. Hopper, 827 F.3d 1077 (D.C. Cir. 2016) (Cape Wind Project offshore, in Nantucket Sound off of the coast of Massachusetts). The D.C. Circuit's decisions on administrative issues are particularly important because most administrative statutes mandate jurisdiction in the D.C. Circuit.

226. *Pub. Emps. For Env't Resp.*, 827 F.3d at 1080. The project's purpose was to help the region meet Massachusetts's renewable energy requirement. Mass. Gen. Laws ch. 25A, § 11F (2022).

authority over offshore renewable energy projects under the Energy Policy Act of 2005.[227] BOEM regulations require BOEM to consult with the Coast Guard and the FWS to collect information about the project's environmental condition before granting a land use permit.[228] Conservation groups challenged Cape Wind's progress through the regulatory framework under six federal statutes: NEPA, the Outer Continental Shelf Lands Act, the National Historic Preservation Act, the Coast Guard and Maritime Transportation Act, the Endangered Species Act, and the MBTA.[229] BOEM conceded that the language of their lease with Cape Wind required BOEM to ensure the acquisition of MBTA take permits prior to construction—BOEM took the "official position" that the wind project had a legal obligation to acquire an MBTA permit.[230] The Public Employees court used the arbitrary and capricious standard to determine that BOEM failed to comply with the APA because of the project's inadequate environmental impact and incidental take statements.[231] The Public Employees court vacated both statements, delaying approval of the project because it deemed BOEM's granting of the permit violated the APA.[232]

In *Protect Our Communities Foundation v. Jewell*, Tule Wind, LLC applied for a right-of-way on federal lands in San Diego to build 128 wind turbines and supporting infrastructure.[233] Again, conservation groups challenged the right-of-way grant under a slew of federal statutes, alleging that BLM violated the Bald and Golden Eagle Protection Act, NEPA, and the MBTA.[234] The plaintiffs alleged that APA section 706(2)(a) invalidated the land use permit as "contrary to law" because BLM did not condition the land use permit on the project's acquisition of an MBTA

227. Energy Policy Act of 2005, Pub. L. No. 109-58, § 388(a), 119 Stat. 594, 744 (amending Outer Continental Shelf Lands Act, 43 U.S.C. § 1337(p) (2012)).

228. *See generally* 30 C.F.R. § 585.100 (2022).

229. *Pub. Emps. For Env't Resp.*, 827 F.3d at 1081.

230. *Id.* at 1090, note 11; Notice of Intent, Migratory Bird Permits, 80 Fed. Reg. 30032, 30034 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21). At the time of the decision, the FWS viewed incidental takes as violations of the MBTA and was considering general incidental take permits for certain industrial hazards to birds.

231. *Pub. Emps. For Env't Resp.*, 827 F.3d at 1081.

232. *Id.* at 1090.

233. Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571, 576 (9th Cir. 2016); *see* 43 U.S.C. §§ 1732(a), 1702(c) (outlining the Bureau of Land Management's responsibility in managing federally owned land).

234. *Protect Our Cmtys. Found.*, 825 F.3d at 576–77.

depredation permit.[235] In granting the right-of-way, BLM took steps to mitigate the harm to birds, reducing the number of wind turbines to 33 and repositioning several wind turbines to locations that posed less of a threat to migratory birds.[236] BLM published an Environmental Impact Statement under NEPA outlining these changes.[237] The Ninth Circuit held that BLM satisfied its procedural obligations and upheld summary judgment dismissal.[238] Importantly, BLM conditioned the permit on compliance with an Avian and Bat Protection Plan it created in conjunction with the FWS—a plan the FWS acknowledged could serve as a future permit application.[239] The upshot of Public Employees and Protect Our Communities is that BLM and BOEM can satisfy their MBTA obligations without requiring permit grantees to apply for an incidental take permit. However, there is no clear standard for exactly what an agency must do to avoid MBTA challenges to its land use permits for future violations by grantees.

Thus, the issue of whether MBTA liability extends to agencies in a licensing capacity remains unanswered. Although a concession in *Public Employees* changed the analysis, it is likely that BOEM conceded the necessity of an MBTA take permit due to the risk that the permit would be set aside.[240] Since the issue affects both BLM and BOEM's decisions in budgeting for the creation of mitigation efforts and protection plans, clearer guidance on their MBTA obligations would benefit both agencies.

One scholarly article proposes limiting MBTA challenges to BLM and BOEM permits using a foreseeability requirement, which would start limiting MBTA challenges to federal land use permits.[241] However, foreseeability requirements would not be dispositive of the issue, since every wind or solar energy project foreseeably kills at least one bird. Clarifications in take permit regulations will help avoid the factual question of foreseeability while ensuring industries assess their effect on migratory birds before successfully acquiring a land use permit.

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235. *See id. at* 585; 5 U.S.C. § 706 (establishing scope of review for courts reviewing a final agency action).

236. *Protect Our Cmtys. Found.*, 825 F.3d at 577.

237. *Id.*

238. *Id.* at 588.

239. *Id.* at 578.

240. George A. Croton, *It's Always Windy in McCain Valley: Vicarious Liability Under the Migratory Bird Treaty Act*, 69 HASTINGS L.J. 647, 661 (2018).

241. *Id.* at 651 ("[O]nly in limited situations where the violation is completely foreseeable and inevitable, and where the agency's permit or license is a proximate and but-for cause of the violation.").

II. CHANGES TO FWS, BLM, AND BOEM REGULATIONS TO REDUCE MBTA CHALLENGES TO LAND USE PERMITS

A. The Biden Administration's Proposed Incidental Take Permit Program is Consistent With the MBTA

Despite the circuit split, the prevailing interpretation of the MBTA applies section 703 to incidental takes by commercial actors.[242] This interpretation is also more consistent with the MBTA's text, as opposed to the interpretation that the MBTA's broad "take" language only applies to hunting.[243] Some form of incidental take prohibition will likely remain if the Biden administration passes incidental take permit regulations. The permits will largely align with past MBTA enforcement, but bring more MBTA challenges to land use permits like those seen in *Public Employees* and *Protect Our Communities*.

1. The Cooperation Lest Prosecution Model Works Better with Incidental Take Permits

Incidental take permits streamline the FWS's informal system of working with industrial actors on mitigation strategies to guide prosecutorial discretion.[244] Currently, the FWS limits prosecution of incidental taking by using criminal penalties as an incentive for industries to cooperate with the FWS.[245] This system avoids absurd prosecutions, such as convicting individuals for fatally striking a bird with their car.[246] However, the prosecutorial discretion model opens incidental take prosecution to criticisms of selective enforcement, like the argument presented by former Senator David Vitter in 2013.[247] Senator Vitter's argument may have merit, but even the appearance of selective enforcement is problematic because it provides a rationale for future executive branches to scale back MBTA regulations to only prohibit

242. Chesne, *supra* note 133, at 518.

243. *Id.* at 511–513 ("The Fifth Circuit's analysis in CITGO is flawed because it focused its analysis of the MBTA's scope solely on the word 'take' while ignoring the fact that two words later, 'kill' appears.").

244. Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds, 86 Fed. Reg. 54667 (Oct. 4, 2021) (to be codified at 50 C.F.R. pt. 21).

245. Ogden, *supra* note 48, at 29.

246. *Id.* at 32.

247. *See Vitter, Alexander Demand a Clear Migratory Bird Policy from Justice Department*, *supra* note 162 (requesting clarification of the Department of Justice's policy for choosing which incidental takes to prosecute).

hunting activities.[248] Limiting the MBTA's application to hunting presents issues since incidental takes harm substantially more birds than hunting. Broader application of section 703 better serves the MBTA's purpose of protecting birds from extinction.[249] Preventative regulation, like the MBTA, is more effective if "enforced before the harm occurs," but prosecution occurs after industries illegally take birds, thereby presenting another issue with this model.[250] Relatedly, mitigation efforts by industries to avoid prosecution sometimes occur after existing projects have already harmed birds.

These problems aside, even a well-run cooperation lest prosecution model benefits from dividing incidental takers into those who apply for an incidental take permit and those who do not.[251] The criticism for hand-picked prosecutions will persist as long as prosecutorial discretion constitutes the only limiting factor on incidental take liability, which provides a more persuasive argument in an unclear MBTA permitting and enforcement landscape.[252] A clear record of which industrial actors acknowledge their effect on migratory birds by applying for an incidental take permit resolves part of Senator Vitter's aforementioned criticism. Incidental take permit applications also allow the FWS to screen projects for especially harmful features, which provides developers with the opportunity to change a project's features or location early in the process.

If incidental take permits become available, industries and critics will not be able to argue that incidental take prosecutions stem from selective prosecution—since all prosecutions would only be based on lack of a proper permit. Currently, with only depredation and special purpose permits available, industries are unaware of the proper channels to authorize their incidental takes because of the confusion over whether the FWS, BLM, or BOEM can authorize incidental takes. In a case like *Protect Our Communities*, the court is unclear whether an avian protection plan sufficiently avoids MBTA liability, or if the project needs an FWS permit.[253] Also, the ability to acquire an actual permit, as opposed to a mere

248. *See id.*

249. Dorsey, *supra* note 84, at 206–209.

250. Ogden, *supra* note 48, at 36.

251. *See* THE EDISON ELECTRIC INSTITUTE'S AVIAN POWER LINE INTERACTION COMMITTEE, U.S. FISH AND WILDLIFE SERV., AVIAN PROTECTION PLAN GUIDELINES 15 (Apr. 2005) (providing that a violator's disregard for the legality of their actions factors into decisions on which incidental takes to prosecute).

252. *See Vitter, Alexander Demand a Clear Migratory Bird Policy from Justice Department*, *supra* note 162.

253. Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571 (9th Cir. 2016).

promise to refrain from prosecution for cooperating with the FWS, is a more favorable option for renewable energy industries.[254] Incidental take permits impose obligations that a few circuits have already applied towards energy projects; thus, including these obligations in the Code of Federal Regulations is the nextlogical next step.[255]

2. Incidental Take Permits are Consistent with the MBTA and Existing FWS Regulations

Congress's intent and historical treatment of the MBTA aligns with the proposed incidental take permits. The broad "in any manner" language in section 703 signals the MBTA's purpose of protecting birds from all fatal harms, not just intentional harms like hunting.[256] Until there is jurisprudential or legislative consensus on a uniform interpretation of the MBTA, the FWS must protect birds as much as possible to adhere to the text of section 703.

Further, Congress's inaction on the incidental take issue after the *FMC Corp.* decision in 1978 suggests the *FMC Corp.* approach to incidental takes constitutes a fair way to construe the text Congress enacted. The last major substantive amendment (which occurred in 2003) only specified *which* birds the statute protects.[257] Alternatively, one may infer Congressional inaction signals as a delegation to the FWS to define the exact scope of the word "take."

If Congress intended the latter, the FWS already acted to allow incidental takes in narrow military circumstances. [258] Thus, it would make sense to continue down the path of authorizing incidental takes under other circumstances necessary for national interests.[259] Military readiness activities are lawful and necessary in the same way that renewable energy projects are, despite the vastly different aims of these activities. Especially with renewable energy mandates, incidental takes by renewable energy

254. Ogden, *supra* note 48, at 37 (industries would "prefer something more substantial than a vague promise that a prosecution will not follow an incidental taking if the voluntary guidelines are followed.").

255. United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978); United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010).

256. 16 U.S.C. § 703(a).

257. H.R. Res. 4114, 108th Cong. (2003) (enacted).

258. Authorization of Take Incidental to Military Readiness Activities, 50 C.F.R. § 21.42 (2022).

259. 50 C.F.R. § 21.15 (2022).

projects remain an inevitable consequence of legally conducted activity.[260] Confusion on which take permit is proper for incidental take activities caused the Department of Defense to apply for a depredation permit for military operations—an incidental take permit program avoids this problem without the need to undertake the process of creating an FWS regulation that exempts military operations.[261] This confusion also plagues industries, as national corporations or wide-spanning wind projects encounter different permitting requirements under the present framework, which requires operating without a formal incidental take permit.[262]

3. Incidental Take Permits Will Help Energy Projects in the Second and Tenth Circuits

The Second and Tenth Circuit courts upheld incidental take prosecutions under the MBTA by applying the "ultrahazardous activity" or proximate cause test.[263] Wind and solar energy projects likely constitute ultrahazardous activities because of the number of birds each kills per year. Alternatively, the ultrahazardous activity standard as applied to energy projects may require a case-by-case analysis, with only poorly located or poorly constructed projects constituting an ultrahazardous activity to trigger strict liability. Energy projects in these regions are in a strange position if required to have FWS permits to avoid strict liability because the FWS regulations do not offer incidental take permits.[264] The jurisprudence on BLM and BOEM permitting liability requires a permit or a strong mitigation plan to maintain a successful federal land use permit; however, no permit is available and no clear standard for what constitutes a sufficient mitigation plan exists.[265]

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260. *See, e.g.*, Mass. Gen. Laws ch. 25A, § 11F (2022); *see also* Volcovici & Groom, *supra* note 23.

261. Ctr. for Biological Diversity v. Pirie, 191 F.Supp. 2d 161, 167 (D.D.C. 2002); 5 U.S.C. §§ 553, 556–57 (outlining administrative rulemaking procedures). Informal rulemaking requires a notice and comment process.

262. Vásquez, *supra* note 156.

263. United States v. FMC Corp., 572 F.2d 902, 903–906 (2d Cir. 1978); United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010).

264. The Second Circuit's jurisdiction includes Connecticut, New York, and Vermont. The Tenth Circuit's jurisdiction includes Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah.

265. Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571 (9th Cir. 2016) (Tule Wind Project on the mainland); Pub. Emps. For Env't Resp. v. Hopper, 827 F.3d 1077 (D.C. Cir. 2016) (Cape Wind Project offshore, in Nantucket Sound).

An industry's inability to apply for an incidental take permit complicates the analysis when citizen groups challenge their BLM or BOEM land use permits. It is difficult for industries to cover their bases, when federal agencies do not know what type of permit is necessary to comply with the MBTA. Additionally, since wind and solar energy output partially depends on how many acres of land a project spans, these projects can cross over federal jurisdictions, creating a significant issue that can be resolved by the Biden Administration's rulemaking.[266]

Industries within the Second and Tenth Circuits can benefit from the ability to apply for incidental take permits, rather than being held to the fact-intensive standards developed by the courts.[267] The new permits will facilitate enforcement of the MBTA against energy projects, but may increase APA challenges to BLM and BOEM land use permits.

B. Incidental Take Permits Will Increase MBTA Challenges to Federal Land Use Permits

If the new incidental take permits become final, the unintended consequence of creating more MBTA-based challenges to BLM and BOEM land use permits will result. While these challenges ensure agency and project compliance with the MBTA, they also duplicate other environmental status checks and unnecessarily complicate the process of approving a wind energy project.[268] Requiring a wind project's incidental takes to be foreseeable for these challenges to succeed is not sufficient to limit the inefficiencies created by these allegations of BLM and BOEM liability—the defendants in these cases rarely dispute the possibility of harming birds.[269] A foreseeability requirement would not significantly alleviate the efficiency concerns with these challenges; accordingly, new regulations should eliminate MBTA challenges to BLM and BOEM permits. This allows BLM and BOEM's other environmental obligations to resolve big picture concerns about bird deaths while shifting the specific responsibility to apply for an incidental take permits to the energy projects.

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266. Wesoff, *supra* note 24.

267. *FMC Corp.*, 572 F.2d at 907; *Apollo Energies, Inc.*, 611 F.3d at 679.

268. *Pub. Emps. for Envtl. Responsibility*, 827 F.3d at 1081 ("The project has slogged through state and federal courts and agencies for more than a decade.").

269. *Id.* at 1088 ("the turbines would nonetheless kill 80-100 endangered roseate terns and ten threatened piping plovers over the life of the project.").

1. Increase of Regulatory Burden on Bureaus of Land and Ocean Energy Management

BLM and BOEM carry enough administrative responsibilities under NEPA and other statutes when assessing land use permits—requiring the agencies to ensure an energy project applies to the FWS for a take permit is inefficient.[270] The administrative approval of the Cape Wind Project met challenges under NEPA, the Outer Continental Shelf Lands Act, the National Historic Preservation Act, the MBTA, and the Endangered Species Act, in addition to the challenges to the Avian Protection Plan prepared with the BLM.[271] Adding incidental take permits to the equation partially resolves the jurisprudential confusion surrounding MBTA enforcement and hopefully encourages wind projects to seek incidental take permits in the early planning stages of their project.

The presence of incidental take permits also strengthens the argument that renewable energy projects must apply for a take permit from the FWS for its land use permit to comply with applicable law.[272] In this way, incidental take permits resolve the primary MBTA issues while creating subsidiary issues with BLM and BOEM licensing.

If incidental take permits are added to the FWS permitting scheme, a comprehensive mitigation strategy will not be enough for BLM and BOEM to avoid MBTA liability as it was in *Protect Our Communities*.[273] If the renewable energy projects, BLM, and BOEM know that the MBTA prohibits incidental takes, the burden lies with one of the three to ensure submission of an application for an incidental take permit to the FWS.[274] Since BLM and BOEM already have obligations to assess the project's holistic impact to wildlife and the environment, and their expertise lies more in land policy than in wildlife policy, the process of seeking an MBTA permit should not be their responsibility.[275] Administrative efficiency is served if the energy project involved is responsible for seeking an MBTA permit. Prosecution for failure to secure an incidental

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270. Sierra Club v. U.S. Army Corps of Eng'rs, 803 F.3d 31, 36–37, (D.C. Cir. 2015) (land permits for a wind project trigger NEPA's "hard look" requirement).

271. *Pub. Emps. for Envtl. Responsibility*, 827 F.3d 1077, 1081 (D.C. Cir. 2016).

272. *Id.* at 1089.

273. Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571, 578 (9th Cir. 2016).

274. *See* Scott & Folds, *supra* note 39.

275. *Leases and Permits*, *supra* note 38; *Lease and Grant Information*, *supra* note 38.

take permit incentivizes industry compliance more than setting aside BLM and BOEM's permitting actions.[276]

2. Why Solar and Wind Energy Projects Should Bear the Burden of Securing Incidental Take Permits

Developers of solar and wind energy projects invest significant resources and have a strong interest in streamlining approval of their projects.[277] Solar and wind energy projects are better equipped to commit resources to the specific project's MBTA compliance. For example, the Tule Wind Project had the single goal of constructing wind turbines, whereas BLM and BOEM deal with a variety of issues implicating federal land.[278] Also, energy projects would rather shoulder the responsibility to secure an incidental take permit than have their land use permits invalidated for BLM or BOEM's failure to comply with the MBTA.[279]

On a more basic level, the solar and wind energy industries make up the parties incidentally taking birds—this is not a *Glickman* situation, in which the Bureaus harm migratory birds.[280] The party taking birds should bear the sole responsibility of securing the take permit. Even though BLM and BOEM regulate the energy projects as part of their duty, their regulatory authority is not focused on wildlife protection, so BLM and BOEM should not be responsible for facilitating industry cooperation with the FWS.[281] Shifting this burden on industries alone ensures that such industries dedicate the appropriate resources to MBTA compliance—prosecution incentivizes cooperation more than the threat of setting aside a federal agency's permit.

Further, the projects are better positioned to assess their effects on migratory birds. With knowledge of their detailed plans and how their technology operates, solar and wind energy companies have a more

276. Although measures to protect birds should be preventative rather than retroactive, the hope is that prosecution incentivizes the solar and wind industries to apply for incidental take permits and employ mitigation measures.

277. Baurick, *supra* note 26.

278. Bureau of Land Management, *Our Mission*, BLM.gov, https://www.blm.gov/about/our-mission (last visited Feb. 11, 2023); *About Us*, BOEM.gov, https://www.boem.gov/about-boem [https://perma.cc/YA6S-9386] (last visited Feb 11, 2023).

279. Ogden, *supra* note 48, at 37 (industries would "prefer something more substantial than a vague promise that a prosecution will not follow an incidental taking if the voluntary guidelines are followed.").

280. Humane Soc'y v. Glickman, 217 F.3d 882, 886 (D.C. Cir. 2000).

281. Bureau of Ocean Energy Management, *supra* note 278.

detailed view of their environmental effects than an agency completing an Environmental Impact Statement. Solar and wind energy industries can more readily dedicate resources to studying their own environmental effects than high-volume, tightly budgeted federal agencies.

C. New FWS, BLM, or BOEM Regulations Can Address MBTA Challenges to Land Use Permits

The Biden administration can promote administrative efficiency by clarifying that land use permits may not be challenged for a solar or wind energy project's future violations of section 703 of the MBTA. The clarification will also increase levels of compliance with the MBTA by agencies and energy industries, protecting birds from preventable deaths. The new regulations implementing incidental take permits should contain a regulation specifying that the FWS's interpretation of the MBTA does not require BLM or BOEM to ensure that energy projects have an incidental take permit before granting their federal land use permit application. Alternatively, the application for an incidental take permit can be a prerequisite to apply for a land use permit. Either option eliminates the possibility of invalidating land use permits based on MBTA challenges to land use permits and helps streamline the energy project permitting process.

1. FWS Regulations Clarifying BLM & BOEM's Obligations Under the MBTA

By shifting the MBTA permitting burden to renewable energy projects rather than BLM and BOEM, the incidental take regulations can include a provision clarifying that they may not be construed to support a finding that land use permits are "not in accordance with law" under the APA.[282] This option would look similar in form to the provision in section 53 of the Federal Employer Liability Act.[283]

The ongoing disagreement about the proper interpretation of MBTA's "take" makes it unclear whether unpermitted incidental takes violate the MBTA. In turn, ambiguity exists regarding whether land use permits for projects that commit incidental takes align with the APA.[284]

Under the current framework, some circuits might conclude that BLM and BOEM acted in accordance with the law because the energy project's

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282. 5 U.S.C. § 706.

283. 45 U.S.C. § 53; ("*Provided,* That no such employee who may be injured or killed shall be . . .").

284. Vásquez, *supra* note 156.

incidental takes do not violate section 703. This questionable application of the MBTA to invalidate land use permits should be avoided so that energy projects, BLM, BOEM, and the FWS are on the same page. Additionally, based on current jurisprudence, a reviewing court presented with this issue faces the APA's hefty justiciability analysis to reach the question of whether the MBTA can invalidate land use permits, and is likely to find that land permitting Bureaus have fulfilled their MBTA obligations through NEPA Environmental Impact Statements and Avian Protection Plans. [285]

With these realities, all involved parties should prefer to eliminate MBTA-based challenges to energy project land use permits. The federal government's interest in renewable energy is served more efficiently by regulating the early phases of wind energy projects. The wind energy project would have a better idea of precisely which agencies it needs approval from rather than the current ambiguity about whether the project can comply with MBTA requirements by forming an Avian Protection Plan with BLM or BOEM. The specific agencies involved—FWS, BLM, and BOEM—would operate more efficiently without the risk of invalidated permits or litigation challenging agency MBTA compliance.

Because MBTA challenges often accompany challenges under other statutes as well, and the obligations under the MBTA are duplicative of Bureau obligations under other wildlife and environmental statutes, it is an unnecessary burden to allow a distinct MBTA challenge to land use permits under the MBTA. BLM and BOEM do not avoid all MBTA obligations under this proposal, only the challenges to land use permits for noncompliance with MBTA section 703.

2. Incidental Take Permits as Precursors to Federal Land Use Applications

If directly eliminating challenges to land use permits via FWS regulation is impractical due to the lack of their binding effect on reviewing courts, incidental take permits should be a requirement to apply for federal land use in enumerated circumstances.[286] Under this approach, the BLM and BOEM permitting regulations can be amended to require an incidental take permit for a wind or solar energy project to apply for a permit to build on federal land. Energy projects will be obligated to seek

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285. 5 U.S.C. § 702. Right of review requirements include standing, ripeness, and exhaustion of administrative remedies.

286. *See generally* JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION (2016).

an incidental take permit at the outset, eliminating the possibility of an MBTA challenge to the land use permit.

Changing BLM and BOEM regulations to require incidental take permits for wind and solar energy projects better serves the goal of proactively protecting birds. This alternative incentivizes industries to consider their effects on migratory birds in the early planning stages. It would also allow the FWS to begin examining each project's impact on migratory birds to build a record for BLM and BOEM to examine in considering the land use permit application.

This alternative would be relatively easy to implement because BLM and BOEM permits are tied to a specific project.[287] Requiring incidental take permits for wind farms as a precursor to receiving a land use permit for the wind farm fits logically into existing BLM regulations.[288] The regulations already contemplate different requirements for different uses of federal land: "[i]n determining the informational and procedural requirements, the authorized officer will consider the duration of the anticipated use, its impact on the public lands and resources and the investment required by the anticipated use."[289] A codification of special requirements for wind projects is consistent with the structure of existing regulations. The "informational and procedural requirements" for wind farms could include information on the project's harm to birds, and the procedural requirement of securing or applying for an incidental take permit.[290]

This requirement only slightly burdens wind energy projects, which would eventually commit resources to MBTA compliance in the form of a protection plan or defending a lawsuit challenging its land use permit.[291] It would eliminate MBTA issues from permit challenges, like *Protect Our Communities*, saddled with other administrative issues.[292] Lastly, it would promote genuine concern for wildlife in the competitive wind energy industry, which brings new dangers to old bird species with the innovative benefits it offers.

287. 43 C.F.R. § 2920.0-5 (2022).
288. *Id.* § 2920.0-6 (2022).
289. *Id.* § 2920.0-6(b) (2022).
290. *Id.*
291. *See* Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571, 577 (9th Cir. 2016) (discussing wind energy project's Avian Protection Plan).
292. *Id.*

III. CONCLUSION

The FWS's new incidental take permits will be controversial, as they are an additional regulatory hurdle to solar and wind energy developments. The new permit regulations may face administrative, congressional, and judicial challenges. The FWS's credibility and courts' deference to FWS regulations may have suffered from the recent changes in the interpretations of the MBTA's "take" language. But incidental take permits are the best way to protect agencies from liability in their licensing capacity because they will increase industry compliance with the MBTA and resolve uncertainty about what constitutes a "take."

If the Biden administration's proposed incidental take permits survive future shifts in executive power, Congress may amend the MBTA. Since the MBTA passed in response to the purposeful killing of birds, it's possible Congress did not intend to prohibit incidental takes under the MBTA.[293] An MBTA amendment after years of issuing incidental take permits to energy industries would be highly controversial. If there is an MBTA amendment, it should come before incidental take permits become entrenched in industry and administrative practice.

Overall, agency permitting should not be open to challenges for failing to ensure the grantee obtains an MBTA permit. With a broader definition of "take" being the progressive view of the MBTA and being better aligned with other wildlife statutes, clarifying that industries have the sole responsibility of seeking permits from the FWS will help shorten the list of challenges to land use permits in cases like *Public Employees* and *Protect Our Communities.*

293. United States v. Moon Lake Elec. Ass'n, Inc., 45 F.Supp.2d 1070, 1080 (D. Colo. 1999) ("the MBTA's legislative history indicates that Congress intended to regulate recreational and commercial hunting.").