COMMENTS

of

WASHINGTON LEGAL FOUNDATION

to the

U.S. FISH AND WILDLIFE SERVICE

Concerning

NOTICE OF INTENT TO REGULATE INCIDENTAL TAKE OF MIGRATORY BIRDS (DOCKET NO. FWS-HQ-MB-2014-0067)

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Re: Comments on Notice of Intent to Regulate Incidental Take of Migratory Birds; 80 Fed. Reg. 30,032 (May 26, 2015)

Dear Sir or Madam:

Washington Legal Foundation (WLF) appreciates this opportunity to submit these comments to the U.S. Fish and Wildlife Service (FWS or Service) in connection with its Notice of Intent to prepare a programmatic environmental impact statement (PEIS) to evaluate the potential environmental impacts of a proposal to authorize "incidental take" of migratory birds under the Migratory Bird Treaty Act (MBTA or Act), 16 U.S.C. §§ 703 *et seq.* The Notice of Intent states that FWS is considering "various approaches for authorizing incidental take of migratory birds" and, alternatively, is considering "a continuation of our practice of working with interested industry sectors to develop voluntary guidance that identifies best management practices or technologies that can effectively avoid or minimize avian mortality from hazards in those sectors." Notice of Intent, 80 Fed. Reg. 30,032, 30,034-35 (May 26, 2015).

FWS has requested input on 15 specific topics regarding implementation of a regulatory program governing the grant of permits for "incidental take" of migratory birds. *Id.* at 30,036.

WLF responds only to the first topic on FWS's list: "The approaches we are considering for authorizing incidental take." WLF strongly urges FWS to maintain its current "voluntary guidance" approach. We do so because a fair reading of the MBTA indicates that FWS lacks statutory authority to regulate activities that, while they may have an incidental effect on some migratory birds, are not directed at those birds.

In going forward with plans to prepare a PEIS regarding a permitting process governing conduct not intended to harm migratory birds, FWS is placing the cart before the horse. Any such permitting process—even if initially limited to a small number of industries—would constitute a vast expansion of FWS's current regulatory footprint. Before undertaking such an expansion, one would expect the agency to begin with a clear explication of its basis for claiming the requisite regulatory authority, followed by an opportunity for comments by those with opposing points of view. Yet, FWS has never adopted regulations asserting authority over what it refers to as "incidental take,"[1] nor has it ever provided a comprehensive explanation of its apparent belief that the MBTA grants it such authority.

The Notice of Intent states that it has been FWS's "longstanding position that the MBTA applies to take that occurs incidental to, and which is not the purpose of, an otherwise lawful activity." 80 Fed. Reg. at 30,034. But the Notice of Intent neither sets forth any arguments in support of that position nor cites to any documents in which the FWS has explained its position in more detail. As the FWS is well aware, several recent, well-reasoned court decisions have

[1] The term "incidental take" is unhelpful in attempting to discern the meaning of the MBTA, and WLF does not use it herein except when describing its use by FWS. The MBTA makes it unlawful to "take" a migratory bird. The meaning of that statutory term is key to determining whether FWS possesses authority under the MBTA to regulate activities that cause only incidental, indirect harm to migratory birds. Use of the term "incidental take" as a synonym for incidental, indirect harm is inappropriate because it assumes the answer to the statutory interpretation question—*i.e.*, that an "incidental take" is one of a number of different types of "take."

concluded that the MBTA does *not* authorize the FWS to regulate incidental, indirect harm to migratory birds. Accordingly, *before* FWS goes forward with development of a new regulatory program that will impose significant costs on the business community and that will undoubtedly face significant challenge in the courts, it is incumbent on the agency to begin by explaining in detail its views on the scope of its MBTA statutory authority and the legal basis for those views.

The MBTA declares that 22 specifically listed activities with respect to migratory birds "shall be unlawful at any time, by any means, or in any manner." The words included in the listed activities share a common theme: all suggest activity that is *intentionally* directed at migratory birds (or at related articles, such as nests or eggs). It is impossible to read that list and conclude that Congress intended (as FWS apparently now concludes) to criminalize any and all activity that ultimately leads to harm to a migratory bird, no matter how indirect the cause and without regard to the actor's intent.

In reaching a contrary statutory interpretation, FWS hangs its hat on inclusion of "take" among § 703's 22 prohibited activities. FWS's expansive definition of the word "take" is inconsistent with the ordinary understanding of that word. "Take" connotes an intentional act of seizure by the actor. *See, e.g.*, G.C. Merriam Co., *Webster's New Collegiate Dictionary* (1981) (defining the verb "take" as "1: to get into one's hands or into one's possession, power, or control: as: (a) to seize or capture physically; (b) to get possession of (as fish or game) by killing or capturing; or (c) to move against (as an opponent's piece in chess) and remove from play."). Nothing about the word "take" suggests a statutory intent to prohibit incidental, indirect harm to migratory birds, and FWS has pointed to nothing in the language or history of the FWS indicating that Congress intended "take" to be interpreted so broadly.

Nor has FWS ever promulgated regulations attempting to adopt a broadened definition of

"take." FWS's longstanding regulations define "take" to mean "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, capture, or collect." 50 C.F.R. § 10.12. Each of the words used by FWS in its own regulation to explain the word "take" connotes an active effort to harm a migratory bird, not actions that incidentally and indirectly may lead to such harm. Accordingly, any effort by FWS to establish an "incidental take" permitting program or otherwise restrict such activity would actually constitute a major reversal of the longstanding agency position as reflected in its formal regulations.

In further support of its claim that the MBTA authorizes it to regulate "incidental take," the FWS asserts, "we also have authorized incidental take by the Armed Forces during military-readiness activities (50 CFR 21.15) and in certain situations through special use permits described in 50 CFR 21.27." 80 Fed. Reg. at 30,034. Of course, the fact that FWS has on occasion given its blessing to "incidental take" by issuing permits under 50 C.F.R. § 21.27 says nothing about whether the FWS would have been authorized to *prohibit* that activity under the MBTA. More importantly, § 21.27 does not use the phrase "incidental take" and includes no language suggesting that those whose activities cause incidental harm to migratory birds must obtain FWS permission before engaging in such activity. Furthermore, FWS's claim with respect to military-readiness activities is false: the FWS has never "authorized incidental take" by the Armed Forces. To the contrary, Congress adopted legislation in 2002 that explicitly *exempted* the Armed Forces from any obligation to obtain a permit before engaging in military-readiness activities that could cause incidental, indirect harm to migratory birds.

Because a straightforward interpretation of the MBTA indicates that the FWS does not possess regulatory authority over activities that cause incidental, indirect harm to migratory birds, WLF urges FWS to adopt the last of the proposed regulatory approaches listed in the

Notice of Intent: "a continuation of our practice of working with interested industry sectors to develop voluntary guidance that identifies best management practices or technologies that can effectively avoid or minimize avian mortality from hazards in those sectors." 80 Fed. Reg. at 30,035. If FWS believes that threats to migratory birds require a stronger response, it should take its case to Congress and ask for new legislative authority. At the very least, FWS should delay development of a PEIS until it has had an opportunity to spell out in detail the legal basis for its claim of regulatory authority over "incidental take" and to provide stakeholders with an opportunity to comment on FWS's interpretation of the statute.

I. *Interests of Washington Legal Foundation*

Washington Legal Foundation is a public interest law firm and policy center based in Washington, D.C., with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly appears before federal and state courts and administrative agencies to urge adoption of environmental policies that strike a proper balance between environmental health and economic liberty. *See, e.g., Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (challenging EPA's Clean Air Act "tailoring rule"); *United States v. King*, 660 F.3d 1071 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2740 (2012) (urging reasonable enforcement policies for Underground Injection Control programs).

In particular, WLF regularly participates in judicial and regulatory proceedings that have addressed major issues regarding the scope of the Endangered Species Act and the Migratory Bird Treaty Act. *See, e.g., Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Center for Biological Diversity v. Pirie*, 191 F. Supp.

2d 161 (D.D.C. 2002).

WLF supports the MBTA's goal of preventing the indiscriminate slaughter of migratory birds by out-of-season hunters and others—an (unfortunately) all-too-frequent practice at the time of the MBTA's enactment in 1918. At the same time, WLF seeks to ensure that the MBTA is implemented in a manner that does not unnecessarily interfere with private property rights and other individual and business civil liberties.

II. *Background on the Migratory Bird Treaty Act*

Americans hunted and poached birds at a much greater rate in the late nineteenth and early twentieth centuries than they do today. Many species of bird populations declined rapidly, and the passenger pigeon notably went extinct in 1914.[2] Since then, the U.S. has entered into four migratory bird treaties. The U.S. signed the first of these treaties with Great Britain (on behalf of Canada) in 1916, seeking to curb the "indiscriminate slaughter" of migratory birds.[3] The Migratory Bird Treaty Act implemented this treaty in 1918, making it one of the oldest conservation laws in the country. The Act criminalizes specific acts that kill or traffic birds without permission from FWS.

A. Statute and Regulations

The Migratory Bird Treaty Act is codified at 16 U.S.C. §§ 703-712. Most relevant to FWS's proposals are §§ 703, 704, and 707. Section 703(a) declares a lengthy list of activities with respect to migratory birds to be "unlawful":

> Unless and except as permitted by regulations … 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

[2] Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 691–692 (2005).
[3] Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit., art. IX, Aug. 16, 1916, 39 Stat. 1702.

> barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or in part, of any such bird or any part, nest, or egg thereof.

16 U.S.C. § 703(a). Not included in the list is the phrase "incidental take," which FWS defined in its Notice of Intent as harm to birds "that occurs incidental to, and which is not the purpose of, an otherwise lawful activity." 80 Fed. Reg. at 30,034.

Section 704(a) grants the Secretary of the Interior authority to determine whether and to what extent to permit activities otherwise prohibited under § 703(a). The Secretary is further authorized by § 704(a) to issue regulations permitting and governing such activities; in the exercise of that authority, the Secretary has adopted regulations that create an FWS permitting program. Those wishing to engage in activities otherwise prohibited under § 703(a) may apply to FWS for an authorizing permit. The regulations make permits available for various activities, including import and export, banding or marking, scientific collecting, taxidermy, waterfowl sale and disposal, falconry, propagation, rehabilitation, depredation, and population control. 50 C.F.R. §§ 21.21–21.61. The "special purpose permits" regulation allows applicants to seek permits for activities not explicitly covered by another of the permitting regulations. 50 C.F.R. § 21.27.

Section 707 of the Act imposes criminal penalties for violating § 703. Anyone who "shall violate or fail to comply" with the statute commits a misdemeanor. 16 U.S.C. § 707(a). Anyone who, in violation of § 703(a), sells a migratory bird, or takes a migratory bird with intent to sell, commits a felony punishable by imprisonment of up to two years. 16 U.S.C. § 707(b).

FWS originally confined its enforcement of the MBTA to hunting, poaching, and other activities involving intentional harm to migratory birds.[4] In recent years, FWS has sought to expand its jurisdiction by, in some instances, enforcing the Act against those who did not act for the purpose of harming a migratory bird but whose conduct led at least indirectly to the harming of migratory birds.

B. Fish and Wildlife Service Notice of Intent

On May 26, 2015, the Service published a Notice of Intent to prepare a PEIS regarding a program to regulate "incidental take," or accidental bird deaths. FWS's proposal aims to expand the MBTA to combat the decline in bird populations caused by these accidental harms. According to FWS, urbanization, energy development, agriculture, and forestry have contributed to declining bird populations. Man-made structures and industrial activities also play a role in bird deaths. For example, birds can collide with structures, get electrocuted, encounter chemicals, and get caught in fisheries. While conceding that regulation alone will not solve the issue of declining avian populations, FWS believes it will mitigate the problem and provide conservation benefits.

The Service stated that it is considering four methods of regulation: general authorization, individual permits, memoranda of understanding (MOUs), and voluntary guidance. For the first option, FWS suggested that it could issue "general conditional incidental take authorizations" for well-known hazards using mandatory standards of operation and conservation. For entities whose activities present more specific or complex issues, the Service is considering requiring the entities to seek project-specific permits. The Service is also considering developing MOUs with

[4] *See* George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 182–183 (1979).

other federal agencies. The MOUs could authorize incidental avian harm by the agencies that agree to undertake appropriate mitigating actions, or they could direct agencies to restrict incidental harm to migratory birds by third parties regulated by those agencies. Finally, FWS is considering retaining its current system of voluntary guidance for various industries.

In crafting the regulations, FWS's stated goal is to minimize administrative burden on industry and the government. In addition, FWS plans to develop voluntary guidance with industry sectors (which is the current mode of regulating incidental harms). If it decides to implement a permit regime for "incidental takes," FWS states that it does not plan to enforce the program equally or against everyone. FWS will focus on "industries and activities that chronically cause significant bird mortality" in situations where "reasonable and effective measures to avoid or minimize take exist." 80 Fed. Reg. at 30,034.

III. *The MBTA Does Not Cover Incidental Harm to Birds*

According to FWS, its "longstanding position" is that the MBTA applies to what it refers to as "incidental take." But as explained below, FWS lacks authority to issue "incidental take" regulations; the MBTA cannot plausibly be interpreted as prohibiting acts not directed at birds and that, at most, result in incidental and indirect harm to them. FWS should therefore refrain from drafting "incidental take" regulations, and instead continue its current practice of issuing voluntary guidance to help industries conserve migratory birds.

A. *Statutory Language Does Not Encompass Incidental and Indirect Harm*

As noted above, the MBTA prohibits specified acts directed at migratory birds or objects associated with migratory birds:

> 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. . . .

16 U.S.C. § 703(a).

The statute lists 22 direct actions, and migratory birds are the object of each prohibited action. The listed actions share a common theme: all suggest activity that is *directed at* migratory birds. For example, one cannot "import" a migratory bird indirectly; importing is by definition a direct and intentional act. The two words often relied on by those urging an expansive definition of FWS regulatory authority—"take" and "kill"—share this connotation of directed action. We have previously cited the dictionary definition of "take," which connotes an intentional act of seizure. Dictionary definitions of "kill" are similar; the word connotes direct causation of death and does not include actions only remotely associated with the death of another. For example, the builder of a bridge would not be described as having "killed" a motorist who dies when his car collides with a bridge abutment.

Given the types of action prohibited by § 703(a), the statute does not cover conduct not directed at birds whereby a bird later dies. Thus, a migratory bird that flies into a power line is not killed or taken by the electrical company.

Even if the words "take" and "kill" could be interpreted more broadly if considered in isolation, their use in association with the 20 other acts listed in § 703(a) confirms their more limited meaning in the context of the MBTA. The principle of *noscitur a sociis* states that "a word is known by the company it keeps." *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015). This method of statutory interpretation "avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (internal quotation marks

omitted). *See also United States v. Williams*, 553 U.S. 285, 294 (2008) ("a word is given more precise content by the neighboring words with which it is associated").

"Take" and "kill" are surrounded by words like pursue, hunt, capture, and sell. It is self-evident that the acts of pursuing, hunting, capturing, and selling birds involve acts directed at those birds. No one can hunt or pursue birds by doing a completely unrelated activity, or by merely allowing an unrelated activity to take place. Applying the *noscitur a sociis* principle, take and kill must only cover purposeful acts directed at birds. Since the language surrounding "take" and "kill" applies only to purposeful acts, take and kill must likewise be limited. *See United States v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202 (D.N.D. 2012) (asserting that "take" refers only to intentional acts).

Indeed, the FWS regulation that defines "take" as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect," 50 C.F.R. § 10.12, mirrors the statute by limiting itself to words that connote conduct directed at migratory birds. Nothing in the regulation suggests that FWS understands the verb "take" as including any and all activity that ultimately leads to harm to a migratory bird, no matter how indirect the cause and without regard to the actor's intent.

Examining the language of nearby provisions in the MBTA, *noscitur a sociis* demands the same result. Sections 704(b) makes it unlawful for any person to "take any game bird by the aid of baiting." That use of the word "take" unambiguously is confined to intentional, direct acts; the baiting provision makes no sense if "take" covers unintended harms. Congress should not be deemed to have ascribed a different meaning to "take" in § 703(a) than the one conveyed by § 704(b).

Section 706 authorizes FWS enforcement personnel to make warrantless arrests of "any person committing a violation of [the MBTA] in his presence or view." This arrest authorization suggests that MBTA violations are capable of being viewed by an observer, as when an individual takes an action directed at a migratory bird. If so, this further suggests that bird injuries with only a remote connection to observable human activity, such as a bird caught in a wastewater disposal pit constructed years earlier, is not prohibited by the MBTA.

Congress has amended the MBTA on several occasions since its initial passage in 1918 to add to the list of prohibited activities. For example, it amended the Act in 1998 to add a provision making it unlawful to "take a migratory game bird by the aid of baiting, or on or over any baited area, if the person knows or reasonably should know that the area is a baited area." 16 U.S.C. § 704(b) (1). In each such instance, the new prohibition focused on activity directed at migratory birds—thereby reinforcing the view that "take" and the other activities listed in § 703(a) do not include activities whose effects on migratory birds are only incidental and indirect.

B. ***Legislative History Limits the Understanding of "Take"***

The legislative history of the MBTA supports this limited definition of take.[5] The treaty and subsequent legislation were reactions to the enormous rate at which people hunted and poached birds in the late nineteenth and early twentieth centuries. Many species of birds rapidly declined in population, and some species faced extinction. Congress's primary goal in drafting the MBTA was to meaningfully regulate both commercial and recreational hunting. As one Senator explained, "[n]obody is trying to do anything here except to keep pothunters [those who

[5] *See generally* Benjamin Means, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 MICH. L. REV. 823, 831–833 (1998).

hunt game for food, ignoring the rules of sport] from killing game out of season, ruining the eggs of nesting birds, and ruining the country by it. Enough birds will keep every insect off of every tree in America, and if you will quit shooting them they will do it." 55 Cong. Rec. 4816 (1917) (statement of Sen. Smith). Congress wanted the MBTA to combat "the avarice and brutality of man in their slaughter [of birds] for sale and for sport, unrestricted by regulations of any kind." 56 Cong. Rec. 7361 (1918) (statement of Rep. Stedman). Furthermore, Congress could never have gotten the support it received for the MBTA from the timber and farming industries if the law included such extensive land regulation. *See* 56 Cong. Rec. 7357-58 (1918).

Later amendments to the MBTA did not expand the definition of "take" or otherwise seek to regulate activity not directed at migratory birds. In 1960, Congress distinguished between different types of hunters and various penalties. Migratory Bird Treaty Act Amendment of 1960, Pub. L. No. 86–732, 74 Stat. 866. Congress did not discuss any types of violators other than hunters. The 1974 MBTA amendment also focused on bird-directed activity, as it banned selling illegally-obtained birds. *See* Migratory Bird Act Amendment of 1974, Pub. L. No. 93–300, 88 Stat. 190. *See also Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1580 (S.D. Ind. 1996) ("[The amendment] reflects an intent to prohibit activity that is intended to kill or capture birds. There is again no indication that Congress intended to reach activities not even intended to kill or capture birds."). Congress enacted this amendment the year after it drafted a much broader definition of "take" in the Endangered Species Act (ESA). 16 U.S.C. § 1532(19). Congress had the opportunity to broaden the MBTA definition of "take" to match the ESA definition but chose not to do so.

C. *Previous Court Rulings Agree on a Limited Definition of "Take"*

Many courts have found that the MBTA prohibits certain purposeful conduct directed at birds. Some courts have framed their conclusions in terms of the statute's purpose. Many courts adhere to the decades-old interpretation that the MBTA was enacted to combat hunting and poaching. *See United States v. Olson*, 41 F. Supp. 433, 434 (W.D. Ky. 1941) ("The fundamental purpose of the [MBTA is] … the protection of migratory birds from destruction in an unequal contest between the hunter and the bird."); *see also Newton Cnty. Wildlife Assoc. v. United States Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (agreeing with the Ninth Circuit that "take" means "physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918.") (quoting *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir.1991)); *Mahler*, 927 F. Supp. at 1579 ("The MBTA applies to activities that are intended to harm birds or to exploit harm to birds, such as hunting and trapping, and trafficking in birds and bird parts. The MBTA does not apply to other activities that result in unintended deaths of migratory birds."); *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502, 1510 (D. Or. 1991) ("I further find that the Act was intended to apply to individual hunters and poachers.").

Other courts explicitly define the word "take." Under the MBTA, take is "conduct directed at birds." *United States v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202, 1208 (D.N.D. 2012). *Accord Protect Our Cmtys. Found. v. Salazar*, No. 12cv2211–GPC(PCL), 2013 WL 5947137, at *18 (S.D. Cal. Nov. 6, 2013) (slip opinion) (supporting the proposition that "the MBTA was intended to prohibit conduct directed towards birds"); *United States v. Ray Westall Operating, Inc.*, No. CR 05–1516–MV, 2009 WL 8691615, at *7 (D.N.M. Feb. 25, 2009) ("The Court concludes that Congress intended to prohibit only conduct directed towards birds and did

not intend to criminalize negligent acts or omissions that are not directed at birds, but which incidentally and proximately cause bird deaths.").

The only plausible way to interpret "take" as used in the MBTA is: "conduct directed at birds." In addition to being in accord with common sense, this definition of take is driven by four factors: the language of the statute, the context in which the provision appears, the legislative history, and legal precedent.

IV. *FWS's Assertion of Authority over Conduct Not Directed at Birds Lacks Merit*

FWS has never issued a formal legal analysis explaining its expansive interpretation of the MBTA. Its interpretation can be discerned, however, from arguments it has raised in the course of litigation.

FWS has pointed to various statutory and regulatory provisions to support its view that the MBTA covers incidental harm to birds. First, FWS asserts that "take" and "kill" in § 703(a) have expansive definitions that cover all accidental bird deaths, even when the antecedent conduct is not directed at migratory bird deaths. Second, the Service has used the misdemeanor penalty provision in § 707 to argue that anything resulting in avian mortality is a take. Third, FWS points to the existence of its special purpose permit and military-readiness activities regulations as proof that the Service has long interpreted the MBTA as granting it authority to regulate incidental harms. FWS claims that it will exercise prosecutorial discretion to temper its use of what it asserts is its very broad enforcement authority. All of these arguments misconstrue the statute and fail to support FWS's expansive statutory interpretation.

A. *"Take" and Similar Words in Section 703(a) Should Not Be Read Expansively*

FWS claims that its "longstanding position" is that the MBTA applies to "incidental take," which it defines as "take that occurs incidental to, and is not the purpose of, an otherwise

lawful activity." 80 Fed. Reg. at 30,034. On multiple occasions, FWS has initiated proceedings against companies whose operations have inadvertently led to the deaths of migratory birds.

A few courts have agreed with FWS's position that the MBTA broadly prohibits actions that cause incidental harm. They have based their broad statutory interpretation on the introductory language in § 703(a), which makes it unlawful to engage in any of the 22 listed activities "by any means or in any manner." *See, e.g., United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 515 (E.D. Cal.), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978). That introductory language does not support FWS's position. For conduct to be covered by § 703(a), it must first fit within one of the 22 listed categories of prohibited conduct. As WLF has previously demonstrated, those 22 listed categories do not cover conduct that is not directed at migratory birds; the section's introductory language does not change the meaning of the words used to describe the 22 listed categories. The introductory language simply means that "tak[ing]" a migratory bird is prohibited by § 703(a) regardless of the means or method employed in directly harming the bird; but the action in question is not prohibited unless it constitutes a "take."

Comparing the MBTA and the ESA highlights the limited reach of "take" as used in the MBTA. The court in *Seattle Audubon Society v. Evans* contrasted the statutes and concluded that the MBTA did not apply to timber sales that destroyed spotted owl habitat. 952 F.2d 297, 303 (9th Cir. 1991). The court contrasted the different definitions of "take" in the MBTA and the ESA. Unlike the MBTA definition, the ESA definition includes the words "harass" and "harm." 16 U.S.C. § 1532(19). Regulations issued under the ESA define "harm" to include "habitat modification or degradation." 50 C.F.R. § 17.3. *See Seattle Audubon Society*, 952 F.2d at 303. The court found that "[h]abitat destruction causes 'harm' to the owls under the ESA but

does not 'take' them within the meaning of the MBTA." *Id*. That is, the court concluded that the MBTA does not cover indirect bird deaths.

B. *The Alleged Strict Liability Language in Section 707 Does Not Mean that the Statute Covers Incidental Harm*

The Service has pointed to the MBTA's penalty provisions as another source of statutory authority to regulate incidental harm. The MBTA's misdemeanor provision states that anyone who "shall violate any provisions" of the MBTA or "shall violate or fail to comply" with regulations issued under the MBTA "shall be deemed guilty of a misdemeanor." 16 U.S.C. § 707(a). The statute also punishes as a felony the "tak[ing]" of a migratory bird "with intent to sell," but limits application of the felony provision to those who "knowingly" violate the MBTA. 16 U.S.C. § 707(b).

The government has characterized § 707(a) as a "strict liability" offense in the sense that one need not be aware that one is violating the MBTA in order to be convicted of violating the Act. But whether a defendant lacking knowledge of the MBTA has actually committed an act that violates § 703(a) is an antecedent question that bears no logical relationship to the question of the *mens rea* required to bring misdemeanor charges against one who has, in fact, violated § 703(a). A penalty cannot be imposed absent conduct that constitutes a violation, and (as demonstrated above) conduct cannot violate the MBTA unless it is *directed at* migratory birds.

The existence of separate misdemeanor and felony provisions—the latter limiting convictions to those who act "knowingly" and the former containing no such limitation—provides no support for assertions that § 703(a) applies to activities that result in incidental harm to migratory birds. The misdemeanor and felony provisions address altogether different crimes; the latter focuses solely on the "sale" of migratory birds. *See Mahler v. United States Forest*

Service, 927 F. Supp. 1559 (S.D. Ind. 1996). Congress added the felony "knowing" violation to § 707 in 1986 to "close a loophole," allowing felony prosecution for the commercial trafficking of birds and bird parts. *Id*. at 1580–81. The longstanding misdemeanor provision applies much more broadly to *any* violation of the MBTA; the presence of alternative penalties was a later addition and thus does not indicate that the misdemeanor provision covers unintended harm.

Moreover, as with any criminal statute, doubts as to the meaning of the MBTA must be resolved in favor of a narrow construction. Thus, even if FWS's broad interpretation of the MBTA (that it is applicable to conduct not directed at migratory birds) were as plausible as the interpretation set forth by WLF in these comments, the Rule of Lenity would require that FWS's interpretation nonetheless be rejected.

The Supreme Court has reaffirmed multiple times that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). So in deciding whether Congress intended the word "take" to include incidental and indirect bird deaths, "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–222 (1952). It is inappropriate to criminalize incidental harm under the MBTA, as Congress did not "plainly and unmistakably" make this action a crime. *Bass*, 404 U.S. at 348 (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917)). *See also United States v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202, 1211 (D.N.D. 2012).

C. *No Existing Regulation Supports FWS's Claim of Authority to Regulate Incidental Harm*

FWS issues various permits that authorize "purposeful" take. 80 Fed. Reg. at 30,034. *See* 50 C.F.R. §§ 21.21–21.61. As evidence of its authority to regulate incidental harm, the Service states that it currently issues "incidental take" permits, too. The Service asserts that it has "authorized incidental take by the Armed Forces during military-readiness activities (50 C.F.R. 21.15) and in certain situations through special use permits described in 50 C.F.R 21.27." 80 Fed. Reg. at 30,034. Neither of these examples suggests that FWS has authority to regulate incidental harm. The special purpose regulation does not mention incidental take, and Congress mandated the military-readiness activities regulation and denied FWS authority to regulate incidental harms in military-training exercises.

1. *Special Purpose Permits*

FWS issues special purpose permits on a very limited basis, because of their strict requirements. First, the regulation only authorizes permits for "activities related to migratory birds." 50 C.F.R. § 21.27. Second, the special purpose permit requires "a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification." 50 C.F.R. § 21.27.

Most special purpose permits that have been granted were issued in conjunction with incidental take permits under the ESA. This is only possible when a bird species is cross-listed in both the MBTA and the ESA. On rare occasions, FWS has granted special purpose permits unrelated to ESA permits for conservation projects.

Section 21.27 is clearly limited to bird-related activities that will either help birds or conserve the environment in a "compelling" way. The regulation does not, as the Service claims,

provide evidence of regulatory authority beyond bird-centric conservation activities (which reflects the historic purpose of the statute). Most incidental harms, and the incidental harms most relevant to FWS's proposed regulations, do not involve bird-related activities or conservation.

Hence, the existence of this permit regulation does not strengthen FWS's claim that it has authority to regulate incidental harms. WLF does not deny that the Service has in recent years asserted authority over incidental harms when issuing special purpose permits. However, the mere assertion of authority by means of an FWS regulation does not strengthen the claim that the MBTA actually grants FWS such authority. Merely because FWS has on occasion given its blessing to "incidental take" by issuing permits under 50 C.F.R. § 21.27 says nothing about whether the FWS would have been authorized to *prohibit* that activity under the MBTA had the actor declined to seek a permit.

More importantly, § 21.27 does not use the phrase "incidental take" and includes no language suggesting that those whose activities cause incidental harm to migratory birds must obtain FWS permission before engaging in such activity. In other words, FWS did not adopt § 21.27 for the purpose of regulating activities that cause incidental harm; only later did FWS begin using the regulation for that purpose. Accordingly, the regulation's existence does not support FWS's interpretation of the MBTA.

2. *Military-Readiness Activities*

The Service claims that is has issued a regulation—50 C.F.R. § 21.15—that authorizes "incidental take for military-readiness activities." 80 Fed. Reg. at 30,034. This statement is false. Congress adopted legislation in 2002—Pub. L. 107-314, div. A, title III, § 315—stating unequivocally that the MBTA "shall not apply to the incidental taking of a migratory bird by a

member of the Armed Forces during a military readiness activity." It further ordered FWS to issue a regulation making clear that the MBTA does not apply. FWS complied with that mandate by issuing a regulation acknowledging that military-readiness activity is not subject to the MBTA. 50 C.F.R. § 21.15. Thus, contrary to FWS's false statement, FWS possesses no power either to authorize or prohibit "incidental take for military readiness activity."

Congress's directive explicitly required the Secretary of the Interior to "prescribe regulations to exempt the Armed Forces for the incidental taking of migratory birds during military-readiness activities." 116 Stat. 2509, § 315(d). Additionally, FWS's placement of the regulation in the "General Requirements and Exceptions" section, 50 C.F.R. Pt. 21, Subpt. B, rather than the permit section reinforces the fact that the statute exempts activities from FWS regulation. It is not an area over which FWS can exercise any regulatory authority, and when the military engages in military-readiness activities, it does not need FWS's "permission" to do so.

Indeed, the 2002 legislation cuts against FWS's interpretation of the MBTA. The only time that it has addressed FWS's claim of authority over "incidental take," Congress rejected that claim. Congress went so far as to order the Secretary of the Interior to adopt the § 21.15 regulation to reinforce that FWS could *not* regulate military-readiness activities. At the very least, Congress's flat rejection of the "incidental take" concept in the military context cannot be viewed as an acceptance of that concept in other contexts.

D. *Prosecutorial Discretion is an Unacceptable Method of Limiting Enforcement*

FWS claims that, under its proposed new regulations, it would not "intend to expand [its] judicious use of [] enforcement authority under the MBTA." 80 Fed. Reg. at 30,034. That is, the Service states that it will not prosecute every violation of the Act. FWS notes that it has

"historically pursued criminal prosecution under the Act only after notifying an industry of its concerns regarding avian mortality, working with the industry to find solutions, and proactively educating industry about ways to avoid or minimize take of migratory birds … [FWS] will focus on industries and activities that involve significant avian mortality." *Id*.

Prosecutorial discretion is an unacceptable method of enforcing the statute. Although FWS argues that the MBTA should be interpreted as applying to incidental and indirect harms to migratory birds, even it does not claim that Congress intended to impose criminal responsibility on a driver whose car windshield strikes a bird. Yet rather than seeking to draw a clear line between regulated and unregulated conduct, FWS argues that anyone who lacks an FWS permit and whose conduct results in incidental and indirect harm has violated the statute. It simply asks the public to trust that it will act responsibly in deciding whom to prosecute. As one federal court has observed in response to FWS's position, "proper construction of a criminal statute cannot depend upon the good will of those who must enforce it." *Moon Lake Elec. Assoc.*, 45 F. Supp. 2d 1070, 1084 (D. Colo. 1999).

The rule of law requires regulatory agencies to specify in advance the scope of prohibited conduct so that companies and others subject to the law can comply. Promises of discretion are especially inappropriate to limit enforcement of the MBTA, given the willingness of some federal courts to allow private parties to sue to enforce the MBTA even when FWS has decided not to undertake enforcement activity. *Pirie*, 191 F. Supp. 2d at 191. Therefore, prosecutorial discretion by FWS gives no assurance that companies will not face liability.

V. *FWS's Hesitation to Regulate the Wind-Energy Industry Indicates that Avian Conservation Is Not Its Top Priority*

In its Notice of Intent, the Service lists four industry operations it seeks to regulate: oil and gas wastewater disposal pits, gas burner pipes at oil production sites and other locations, communication towers, and electronic transmission and distribution lines. 80 Fed. Reg. at 30,034. FWS also offers that it "may" later regulate the wind-energy industry. *Id*. At present, FWS is not sure whether it will regulate wind-energy generation like the other listed industries. *Id*.

The Service may be cautious about regulating wind-energy generation because it could be difficult to mitigate avian mortality caused by collisions with windmills and wind turbines. Moreover, the current Administration heavily favors the wind industry. FWS recently adopted 30-year take permits for golden eagles and bald eagles, for example, and used the word "wind" sixteen times in its final rule. 78 Fed. Reg. 73,704. FWS evidently agrees with the Administration's focus on renewable wind energy, even if its promotion kills the very birds that MBTA is designed to protect.

Still, wind-energy generation kills around 573,000 birds every year,[6] and this number will grow to 1.4 million annual deaths by 2030.[7] In 2004 alone, a study at the Altamont Pass wind farm found 116 golden eagles, 300 red-tailed hawks, 703 mourning doves, and 2,557 western meadowlarks were killed by the installations.[8] Furthermore, these figures are likely wildly

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[6] K. Shawn Smallwood, *Comparing Bird and Bat Fatality-Rate Estimates among North American Wind-Energy Projects*, 37 WILDLIFE SOC. BULLETIN 19–33 (2013).

[7] Scott Loss et al., *Estimates of Bird Collision Mortality at Wind Facilities in the Contiguous United States*, Smithsonian Institution Migratory Bird Center (SMBC), U.S. Fish and Wildlife Service (FWS) and Oklahoma State University (OSU), 168 BIOLOGICAL CONSERVATION 201–209 (2013).

[8] K. Shawn Smallwood and Carl G. Thelander, *Developing Methods to Reduce Bird Mortality in the Altamont Pass Wind Resource Area*, prepared for Ca. Energy Comm'n 73 (2004), *available at* http://www.energy.ca.gov/pier/project_reports/500-04-052.html.

underestimated. The wind-energy studies confine their searches to a small 75-meter radius around each turbine. Larger turbines catapult bird carcasses much further, so many of the carcasses would not have been discovered during a search limited to the immediate vicinity of each turbine. Additionally, the grounds are searched periodically instead of daily. This time lapse allows scavengers and wind farm employees to remove the carcasses before the land is searched.[9]

The wind-energy industry certainly involves the level of "significant avian mortality" which FWS expressed its intent to regulate. 80 Fed. Reg. at 30,034. In *United States v. Brigham Oil & Gas, L.P.*, the government enforced the MBTA against three oil companies whose operations only killed between one and four birds. 840 F. Supp. 2d 1202, 1203 (2012). Against that tiny number, the mortality of MBTA-protected birds due to wind-energy generation is astonishing.

WLF does not quarrel with FWS's decision to give what amounts to a "free pass" to the wind-energy industry. Indeed, given our view that the MBTA only applies to conduct directed at migratory birds and that the wind-energy industry's erection of wind turbines is not directed at birds, WLF believes that FWS lacks authority under the MBTA to regulate the wind-energy industry.

Rather, our concern is that FWS's declared intent to apply its "incidental take" restrictions to the oil and gas industries while simultaneously exempting a rival industry whose activities lead (albeit indirectly) to huge numbers of avian deaths calls into question whether FWS's proposed regulations are actually motivated by a desire to prevent declines in bird

[9] Jim Weigand, *Hiding "Avian Mortality": Where 'Green' is Red (Part I: Altamont Pass)*, Master Resource (Sept. 4, 2013), *available at* https://www.masterresource.org/cuisinarts-of-the-air/hiding-avian-mortality-altamont-pass/.

populations. This seemingly inconsistent treatment of rival industries suggests that FWS's true motivation is a desire to take sides in ongoing public debates about future energy development in this country; it puts FWS in a position to bludgeon industries generally disfavored by the environmental movement while favoring a rival industry.

Arbitrary and capricious decision-making of this sort has no place in the federal government. If FWS intends to go forward with its proposed "incidental take" regulations, WLF urges FWS to establish strict procedures to ensure that enforcement priorities are based solely on criteria relevant to minimizing avian deaths, not on political favoritism for certain industries.

VI. *WLF Cautions Against Using the Responsible Corporate Officer Doctrine in MBTA Enforcement*

WLF has long opposed use of the responsible corporate officer doctrine as a means of bringing criminal charges against corporate executives whose employees (unbeknownst to the executives) have violated some federal law. Because the MBTA's misdemeanor provision does not include a *mens rea* requirement, WLF is fearful that irresponsible prosecutors might be tempted to use FWS's proposed "incidental take" regulations to threaten criminal charges against executives of companies whose activities may result in some incidental and indirect harm to migratory birds. WLF's well-founded fear is an additional reason for FWS to use extreme caution before proceeding with its proposed regulations.

The responsible corporate officer doctrine, commonly known as the *Park* doctrine, originated in two cases involving the Food, Drug, and Cosmetic Act (FDCA). In *United States v. Dotterweich*, the Supreme Court held that a corporate officer may be held personally liable for the corporation's violation of strict liability provisions of the FDCA because the officer had a "responsible share in furtherance of the transaction which the statute outlaws." 320 U.S. 277,

284 (1943). The court later elaborated that strict liability under the FDCA may be imputed to a corporate officer who "had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so." *United States v. Park*, 421 U.S. 658, 673 (1975). The responsible corporate officer doctrine imposes strict, vicarious liability. Liability is strict because no *mens rea* is required, and liability is vicarious because officers are held personally liable for companies' violations.

If FWS goes forward with its proposed regulations, prosecutors will likely be tempted to threaten *Park*-doctrine prosecutions whenever incidental harm to migratory birds is alleged to have occurred. Such threats are extreme powerful. Few companies are willing to risk criminal sentences for their executives; thus, in the face of such threats, they have no realistic choice but to accede to whatever mitigating actions the government demands, regardless of the expense. WLF does not know whether or not FWS is proposing its "incidental take" regulations in order to create a tool that will allow for the bludgeoning of companies into submission to whatever actions FWS desires. Whether or not that is FWS's aim, it needs to be aware of the dangerous tool it is creating.

In situations involving conduct directed at migratory birds, such as hunting and poaching, the Service can plainly determine the person who is responsible. It is easy to arrest a hunter, and the MBTA envisions such interactions. The same cannot be said when birds die accidentally after coming into contact with industrial equipment. The *Park* doctrine would provide an all-too-easy solution to causation issues that would inevitably arise in connection with efforts to bring criminal charges for "incidental takes."

Use of the *Park* doctrine in MBTA enforcement would be irresponsible. As WLF has well documented, its use is the opposite of prosecutorial discretion.[10] It is a powerful weapon to wield against corporations to achieve compliance with more extensive regulations. Yet, WLF fears that its eventual use (or at least the threat of its use) is all but inevitable if FWS goes forward with its proposed regulations.

VII. *Conclusion*

The MBTA does not cover accidental harm to migratory birds. Therefore, we respectfully urge FWS not to go forward with plans to establish an "incidental take" permitting process and instead to continue its current practice of issuing voluntary guidance that identifies best management practices or technologies that can effectively avoid or minimize avian mortality.

Respectfully submitted,

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[10] *See* Washington Legal Foundation, *Special Report: Federal Erosion of Business Civil Liberties* 1-11–1-17 (Cory L. Andrews ed., 2010); Brian Stimson & Kimyatta McClary, *"Responsible Corporate Officer:" Business Executives Face Strict Liability Under Novel Criminal Law Doctrine*, Washington Legal Foundation (2010), *available at* http://www.wlf.org/Upload/legalstudies/legalbackgrounder/4-9-20Stimson_LegalBackgrounder.pdf.