



July 27, 2015

Public Comments Processing  
Attention: FWS-HQ-MB-2014-0067  
Division of Policy and Directives Management  
U.S. Fish and Wildlife Service  
5275 Leesburg Pike, MS-PPM  
Falls Church, VA 22041-3803

**Re: Migratory Bird Permits; Programmatic Environmental Impact Statement,  
80 Fed. Reg. 30,032 (Notice of Intent May 26, 2015):  
Comments of the American Petroleum Institute and the Independent Petroleum As-  
sociation of America**

Dear Madam or Sir:

The American Petroleum Institute ("API") and the Independent Petroleum Association of America ("IPAA") submit these comments on the above-captioned Notice of Intent.

API is a national trade association representing over 625 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

IPAA is a national trade association representing the thousands of independent crude oil and natural gas explorers and producers in the United States. It also operates in close cooperation with forty-four unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies that provide services and supplies to the domestic industry. IPAA is dedicated to ensuring a strong and viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy developed in an environmentally responsible manner is essential to the national economy.

API and IPAA support the goal of the U.S. Fish and Wildlife Service ("the Service") to conserve migratory birds and believe it can be achieved in conjunction with responsible development of our nation's natural resources. As these comments will explain, however, we have significant questions whether the approaches described in the Notice of Intent are either authorized by or

consistent with the intent of the statute upon which the Service relies. We are also concerned with the efficacy of the program proposed, and whether it singles out activities of our industry over a more comprehensive assessment of the threats that avian species face.

## 1. The Service should evaluate a “No Action Alternative”

The premise for an incidental take permit (“ITP”) program under the Migratory Bird Treaty Act<sup>1</sup> (“MBTA”) is “the Service’s longstanding position that the MBTA applies to take that occurs incidental to, and which is not the purpose of, an otherwise lawful activity.”<sup>2</sup> Importantly, the new ITP program would apply for the first time to avian fatalities not caused by human action. That is, the Service identifies several industries or activities that it asserts are subject to a take prohibition on “incidental takes,” including oil, gas, and wastewater disposal pits, methane or other gas burner pipes, communications towers, electric transmission and distribution lines, and wind energy facilities.<sup>3</sup> These industries and “activities” all share a common feature—in none of them is a person acting directly to bring about the taking or killing of a protected bird. Instead, in each of them the birds themselves are the actors, colliding or otherwise interacting with industrial structures.

The federal courts have not uniformly accepted the Service’s position that the MBTA prohibits these sorts of “passive takes.” The Courts of Appeals for the Second, Eighth, Ninth, and Tenth Circuits are divided evenly on whether the MBTA take prohibition could *ever* apply to activities beyond hunting or poaching. For example, a long line of Ninth Circuit cases hold that an “unlawful ‘taking’ under the MBTA ‘describes 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.’”<sup>4</sup> Along with similarly conflicting opinions out of numerous federal district courts, this split in authority reflects a lack of consensus among the federal courts on the scope of MBTA liability.<sup>5</sup> It is therefore appropriate for the Service to evaluate a “No Action Alternative” under which this division of authorities is reconciled in the courts or Congress provides the necessary clarification to the scope of the MBTA.<sup>6</sup> In any case, the Service is obliged to explain the legal

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<sup>1</sup> 16 U.S.C. § 703, *et seq.*

<sup>2</sup> 80 Fed. Reg. 30,032, 30,034 (May 27, 2015).

<sup>3</sup> *See id.*

<sup>4</sup> *See City of Sausalito v. O’Neill*, 386 F.3d 1186, 1225 (9th Cir. 2004) (quoting *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991)). *But see, e.g., United States v. Apollo Energies, Inc.*, 611 F.3d. 679 (10th Cir. 2010) (reasoning that the scope of statutory liability is not limited to hunting or poaching).

<sup>5</sup> *See infra* Section 1(D) (summarizing the division of authorities on the scope of MBTA liability).

<sup>6</sup> The No Action Alternative should include a full analysis of the best science available on the impacts of various human activities on birds and whether continuing those activities in the sectors mentioned in the Notice of Intent will have discernible effects on bird populations. It should also include a detailed expla-

justification for a nationwide rule under its “longstanding position” in light of these conflicting authorities.

The plain language of the statute, its legislative history, and the divided authorities addressing the scope of the take prohibition provide ample grounds for the Service to evaluate a No Action Alternative with respect to these passive “takes.” We address each of these matters in more detail below.

**A. The plain language of the MBTA unambiguously prohibits only human actions directed against birds**

The first step in interpreting a statute is to examine the plain language of the statute.<sup>7</sup> To determine the plain meaning of a statute, it is necessary to consider the language of the particular statutory provision, as well as the language and design of the statute as a whole, its object and policy.<sup>8</sup>

Nothing in the plain language of the MBTA suggests that the statute covers passive impacts that result from lawful activities. The statute provides in relevant part:

. . . 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, . . . [or transport] any migratory bird, any part, nest, or egg of any such bird . . . .<sup>9</sup>

The terms “take” and “kill” in Section 703 are verbs that ordinarily denote action. In addition, both verbs appear in a list of action verbs that require purposive behavior, that is, “to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale . . . .”<sup>10</sup>

The Courts of Appeal for the Eighth and Ninth Circuit agree that the plain language of Section 703 does not prohibit passive impacts. In *Newton Cty. Wildlife Ass’n v. U.S. Forest Serv.*,<sup>11</sup> an environmental group argued that the Forest Service must obtain an incidental take permit before authorizing logging operations that would kill MBTA-protected birds. A unanimous panel of the Eight Circuit disagreed.

Initially, we note that MBTA’s plain language prohibits conduct directed at migratory birds—“pursue, hunt, take, capture, kill, possess,” and so forth. . . . It would stretch this 1918 statute far beyond the bounds of reason to construe it as an abso-

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nation of the Service’s current procedures for managing and enforcing incidental take, so the public can contrast this approach with the other proposed alternatives.

<sup>7</sup> See *Jimenez v. Quarterman*, 555 U.S. 113 (2009).

<sup>8</sup> See *Crandon v. United States*, 494 U.S. 152, 158 (1990).

<sup>9</sup> 16 U.S.C. § 703.

<sup>10</sup> *Id.*

<sup>11</sup> 113 F.3d 110 (8th Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998).

lute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds.<sup>12</sup>

The Ninth Circuit goes further, holding in an unbroken line of cases spanning twenty-five years that the plain language of Section 703 prohibits only the actions of hunters and poachers.

The definition describes physical conduct of the sort engaged in by hunters and poachers. \* \* \* We are not free to give words a different meaning than that which Congress and the Agencies charged with implementing congressional directives have historically given them . . . .<sup>13</sup>

There is nothing in the plain language of the statute to suggest that otherwise lawful activities that may inadvertently result in the death of a bird fall within the scope of the MBTA.

**B. The MBTA’s legislative history supports a narrow interpretation limited to action directed against birds**

Nothing in the MBTA’s legislative history suggests that the terms “take” and “kill” refer to passive impacts resulting from otherwise lawful activities not directed at wildlife. The MBTA was initially enacted to implement a December 8, 1916 treaty between the United States and Great Britain, with the stated purpose “of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless . . . .”<sup>14</sup> The United States and Great Britain agreed that “as an effective means of preserving migratory birds there shall be established . . . close seasons during which no hunting shall be done except for scientific or propagating purposes under permits issued by proper authorities.”<sup>15</sup> Congress later amended the MBTA to give effect to similar conventions for the protection of migratory birds with Mexico, Japan, and the Soviet Union.<sup>16</sup>

The Congressional Record reveals that the Act’s drafters were particularly concerned about unregulated hunting and poaching. Senator Smith—the sponsor of the MBTA—remarked that “[t]his law is aimed at the professional pothunter” and that “[n]obody is trying to do anything here except to keep pothunters from killing game out of season.”<sup>17</sup>

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<sup>12</sup> *Id.* at 115 (emphasis in original).

<sup>13</sup> *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 302–303 (9th Cir. 1991). *Accord City of Sausalito*, 386 F.3d at 1225. *But cf.*, *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010) (holding without explicit reasoning that equipment can “take” or “kill” migratory birds).

<sup>14</sup> Convention for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-U.K., 39 Stat. 1702.

<sup>15</sup> *Id.* Art. II.

<sup>16</sup> *See Alaska Fish and Wildlife Fed’n and Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 940 (9th Cir. 1987) (summarizing conventions), *cert. denied sub nom.*, 485 U.S. 988 (1988).

<sup>17</sup> *See, e.g.*, 55 Cong. Rec. 4402 and 4816.

As one court analyzing the international conventions observed:

The language in the conventions indicates that the primary method for insuring the preservation of migratory birds is to regulate conduct directed toward migratory birds, primarily hunting and the taking of nests and eggs. Each of the conventions expressly states the parties agree to establish close seasons when hunting is prohibited. There is no express language in the conventions suggesting that the United States and Great Britain, Mexico, Japan and the Soviet Union agreed to criminalize negligent acts or omissions that are not directed at migratory birds but which incidentally and proximately cause the deaths of migratory birds.<sup>18</sup>

At least two federal district courts have stated that “[t]he fundamental purpose of this act is to protect migratory birds ‘from destruction in an unequal contest between hunter and bird . . . .’”<sup>19</sup>

In 2002, Congress amended the MBTA to allow for bird takes resulting from the Navy’s live-fire training exercises.<sup>20</sup> This amendment was enacted after *Center for Biological Diversity v. Pirie*,<sup>21</sup> in which the federal district court for the District of Columbia held that the military’s bombardment of the island of Farallon de Medinilla in the Marianas Islands was prohibited by the MBTA.<sup>22</sup> Of particular importance, the *Pirie* decision explicitly found that the live-fire exercises were actively directed human activities that resulted in the death of protected birds.<sup>23</sup> The 2002 amendment therefore directed the Service to promulgate an ITP program for these “military readiness activities.” The 2002 amendment specifically exempts from its coverage all “passive” features on the installation, including “administrative offices, military exchanges, commissaries, water treatment facilities, storage facilities, schools, housing, motor pools, laundries, morale, welfare and reaction activities, shops and mess halls; the operation of industrial activities; and the construction or demolition of facilities.”<sup>24</sup> The 2002 amendment does not therefore disturb

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<sup>18</sup> *United States v. Ray Westall Operating Inc.*, No. CR-05-1516, 2009 WL 8691615 at \*4 (D.N.M. Feb. 25, 2009). *But cf. United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal. 1978), (“The fact that Congress was primarily concerned with hunting does not, however, indicate that hunting was its sole concern.”), *aff’d on other grounds*, 578 F.2d 259 (9th Cir. 1978), *and abrogated by Seattle Audubon Soc.*, 952 F.2d at 302–303.

<sup>19</sup> *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502, 1509–10 (D. Ore. 1991) (quoting *United States v. Olson*, 41 F. Supp. 433, 434 (W.D. Ken. 1941)).

<sup>20</sup> See P.L. 107-314, 16 STAT. 2458, Bob Stump National Defense Authorization Act for Fiscal Year 2003 § 315 (2002).

<sup>21</sup> 191 F. Supp. 2d 161 (D.D.C. 2002), *vacated as moot sub nom*, Nos. 02-5163, 02-5180, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003) (vacating opinion and judgment below as moot after enactment of the 2002 amendment).

<sup>22</sup> *See id.* at 174.

<sup>23</sup> *See id.* (“Defendants’ own documents amply establish that defendants are knowingly engaged in activities that have the direct consequence of killing and harming migratory birds.”).

<sup>24</sup> P.L. 107-314 at § 315(f)(2).

the pre-existing legislative intent of the act, which did not extend to passive impacts to protected birds.

**C. Any interpretation of the take prohibition must follow the rule of lenity, avoid reliance on prosecutorial discretion, and avoid absurd results**

Though the split in authorities over the plain meaning of the statute should counsel the Service to consider a “No Action Alternative,” the Service should also interpret any ambiguous statutory terms in accordance with the rule of lenity, to avoid an interpretation that relies wholly on prosecutorial discretion for its application, and to avoid absurd results.

1. The Service should follow the rule of lenity in interpreting the scope of the MBTA

For criminal statutes like the MBTA, the well-established rule of lenity dictates that any ambiguity as to the precise scope and nature of criminal liability must be construed narrowly and in favor of the defendant. The rule of lenity “vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.”<sup>25</sup> The fundamental premise of the Service’s suggested ITP program is a regulatory interpretation of the scope of a criminal statute, and therefore the rule of lenity should be followed in the rulemaking. A broad interpretation of the MBTA that would impose criminal liability on the owner of any structure or on any activity that results in a bird death, however passive and far removed from an activity directed at birds, would be contrary to the rule of lenity and should not be adopted by the Service.

2. The Service should not rely on enforcement or prosecutorial discretion in bounding the limits of the MBTA

The Service has argued that a broad reading of the MBTA is not problematic because the Service can exercise its prosecutorial discretion to focus on those activities that result in the largest number of bird deaths and where established methods exist to prevent bird takes. However, the fact that the Service can exercise its prosecutorial discretion does not rescue the Service’s overly broad interpretation. Courts are generally reluctant to rely on prosecutorial discretion to avoid an unreasonable or unconstitutional application of a statute to certain conduct.<sup>26</sup>

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<sup>25</sup> *United States v. Santos*, 553 U.S. 507, 514 (2008) (citations omitted).

<sup>26</sup> See e.g., *United States v. Stevens*, 559 U.S. 460 (2010) (discusses “the danger in putting faith in government representations of prosecutorial restraint”); *United States v. Chevron USA, Inc.*, No. CR-09-0132, 2009 WL 3645170 at \*5 n.8 (W.D. La. Oct. 30, 2009) (“The government’s response that prosecutorial discretion is sufficient to protect the innocent in these [MBTA] situations is scant comfort . . . .”); *United States v. Moon Lake Electric Ass’n., Inc.*, 45 F. Supp. 2d 1070, 1084 (D. Colo. 1999) (agreeing “that courts should not rely on prosecutorial discretion to ensure that a statute does not ensnare those beyond its

3. The Service should interpret the MBTA so as to avoid absurd results

The scope of the MBTA is vast. Migratory birds include “many of the most numerous and least endangered species one can imagine.”<sup>27</sup> A review of the Department of the Interior’s list of migratory birds reveals that the MBTA protects almost all species of North American birds, including crows and many types of pigeons.<sup>28</sup>

The list of human activities that could result in bird deaths is equally broad in scope.<sup>29</sup> According to the Service, “[v]ast numbers of birds are killed due to collisions with human structures and equipment, poisoning by pesticides and contaminants, and attacks by cats and other introduced predators.”<sup>30</sup> For example, building window strikes may account for 599 million bird deaths each year; cars may kill 200 million birds or more each year; and domestic feral cats may kill around 2.4 billion songbirds and other avian species each year.<sup>31</sup>

Interpreting the MBTA to apply to passive impacts that result from otherwise lawful activities would criminalize countless everyday activities. To avoid arbitrary and capricious application of the statute through a regulatory program that governs some but not all major causes of migratory bird deaths, the government would have to begin to regulate driving, cat ownership, window installation, farming, and many other everyday activities. Such a construction of the statute is not only plainly absurd, it would be nearly impossible to implement in practice.

The Supreme Court has held that a strict interpretation of a statute is not dispositive “in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters’ [in which case] the intention of the drafters, rather than the strict language controls.”<sup>32</sup> The Service should interpret the statute to avoid criminalizing widespread, common conduct in a way that could not have been intended by the drafters of the statute.

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proper confines,” and stating that “proper construction of a criminal statute cannot depend upon the good will of those who must enforce it.”).

<sup>27</sup> *Mahler v. United States Forest Serv.*, 927 F. Supp. 1559, 1576 (S.D. Ind. 1996).

<sup>28</sup> *See* 50 C.F.R. § 10.13.

<sup>29</sup> *Cf. Apollo Energies*, 611 F.3d at 689 (“The actions criminalized by the MBTA may be legion, but they are not vague.”).

<sup>30</sup> *See* U.S. FISH & WILDLIFE SERV., MIGRATORY BIRD MORTALITY, MANY HUMAN-CAUSED THREATS AFFLICT OUR BIRD POPULATIONS (2002).

<sup>31</sup> *See* DEPT. OF THE INTERIOR, NORTH AMERICAN BIRD CONSERVATION INITIATIVE, U.S. COMMITTEE, THE STATE OF THE BIRDS REPORT at 11 (2014).

<sup>32</sup> *United States v Ron Pair Enter.*, 489 U.S. 235, 242 (1989). *See also* 75 Fed. Reg. 31,514, 31,542 (collecting cases applying the “absurd results” doctrine).

**D. A majority of courts reject the notion that indirect or passive “takes” violate the MBTA**

There is a split among federal courts on the issue whether the MBTA applies to passive “takes” from lawful activities not directed at birds. Some courts have held defendants liable for avian fatalities even when they were unintentional results of lawful commercial activities. However, a majority of federal courts have recognized that the text of the MBTA and implementing regulations warrant the conclusion that to “take” or “kill” a migratory bird refers to conduct directed against wildlife, and does not include otherwise lawful activities which result in passive “takes.” Courts have made this holding in two different contexts: (1) claims against federal agencies alleging that the agency action resulted in bird takes; and (2) criminal prosecutions against companies whose commercial operations have resulted in passive bird “takes.”

1. Claims against federal agencies for indirect or passive “takes” have uniformly failed

Public interest plaintiffs have a long history of arguing that the MBTA prohibits federal actions that may result in the death of a bird. Many courts dispose of these claims by concluding that the United States is not a person subject to the Section 703 take prohibitions. Others reject the claims by concluding that the indirect, lethal effects on birds occasioned by a federal action—in most cases, a government approval of some kind—are not subject to the take prohibition. Still others reject the notion that the take prohibition applies to anything other than hunting and poaching activities. There appears to be no authority in these cases for the proposition that indirect, passive impacts to bird species can constitute a violation of Section 703.

For example, in *Seattle Audubon Soc’y v. Evans*, the Ninth Circuit considered whether the Forest Service and the Bureau of Land Management violated the MBTA by selling and logging timber from areas that may provide suitable habitat for the northern spotted owl.<sup>33</sup> The court distinguished the definition of “take” under the MBTA from that under the Endangered Species Act (“ESA”), which defines “take” broadly to include “harass” and “harm,” in addition to the verbs included in the MBTA definition.<sup>34</sup> The Court found that the definition in the MBTA was limited to the sort of conduct engaged in by hunters and poachers and held that habitat destruction did not amount to a “taking” under the MBTA.<sup>35</sup>

A few years later, the Eighth Circuit adopted a similar line of reasoning. In *Newton County Wildlife Association v. U.S. Forest Serv.*,<sup>36</sup> the court considered the question whether activities that “indirectly” kill migratory birds (in that case, logging from timber sales) are subject to criminal

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<sup>33</sup> 952 F.2d at 302.

<sup>34</sup> *Id.* at 303.

<sup>35</sup> *Id.*

<sup>36</sup> 113 F.3d at 115.

sanction under the MTBA. The Court held that “the ambiguous terms ‘take’ and ‘kill’ in Section 703 mean ‘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.’”<sup>37</sup> The Court further stated that it would “stretch this 1918 statute beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct such as timber harvesting, that indirectly results in the death of migratory birds.”<sup>38</sup> That same year, the Eleventh Circuit held in a case challenging the Forest Service’s approval of timber projects that “the MBTA does not apply to the federal government.”<sup>39</sup> As a result, “no violation of the MBTA could occur by any formal action of the Forest Service.”<sup>40</sup>

The D.C. Circuit has departed from this majority position and has concluded that the United States is a person subject to the Section 703 take prohibition. In *Humane Society v. Glickman*,<sup>41</sup> the court held that the direct action by the Department of Agriculture in killing or taking nuisance Canada geese was a violation of the MBTA.<sup>42</sup> However, even in the D.C. Circuit, no federal agency has been found responsible for indirect or passive “takes.” In *Public Employees for Envtl. Responsibility v. Beaudreau*,<sup>43</sup> the D.C. Circuit declined to reach the precise question of whether the scope of the statute was limited to human activity directed at wildlife,<sup>44</sup> but did offer that “on its face, the [MBTA] does not appear to extend to agency action that only potentially and indirectly could result in the taking of migratory birds.”<sup>45</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* A number of additional cases address the issue of whether the MBTA is limited to conduct directed at migratory birds in the context of timber sales or logging activities, reaching similar conclusions to those in the Eighth and Ninth Circuits. *See e.g., Curry v. U.S. Forest Serv.*, 988 F. Supp. 541, 549 (W.D. Pa. 1997) (holding that MBTA did not allow for the challenge to a Forest Service timber sale and concluding that impacts to birds from logging operations were not prohibited by the MBTA); *Mahler*, 927 F. Supp. at 1573 (holding that the MBTA was inapplicable to indirect taking of birds through habitat destruction or logging); *Citizens Interested in Bull Run*, 781 F. Supp. at 1509–10 (declining to extend the MBTA to a timber sale that could impact habitat for northern spotted owl).

<sup>39</sup> *Sierra Club v. Martin*, 110 F.3d 1551, 1556 (11th Cir. 1997).

<sup>40</sup> *Id.*

<sup>41</sup> 217 F.3d 882 (D.C. Cir. 2000).

<sup>42</sup> *Id.* at 888.

<sup>43</sup> 25 F. Supp. 3d 67 (D.D.C. 2014), *appeal dismissed sub nom.*, Nos. 14-5117, *et al.*, 2014 WL 3014869 (D.C. Cir., June 11, 2014).

<sup>44</sup> *See id.* at 117, n.28.

<sup>45</sup> *Id.* at 117. *Cf. Pirie*, 191 F. Supp. 2d at 174 (limiting description of Department of Defense violations to live-fire exercises).

Though these cases evaluate whether the United States—and not private persons—can be responsible for MBTA violations, they are instructive for their interpretations of the Section 703 take prohibition, interpretations that are also relevant to the Service’s interpretation here.

2. Enforcement cases against companies or individuals for passive “takes” are decidedly mixed

Courts have applied the same reasoning to criminal prosecutions against project developers, rejecting the notion that the Act imposes criminal liability for otherwise lawful activities resulting in passive bird “takes.” For example, in *U.S. v. Brigham Oil and Gas, LP*,<sup>46</sup> the court held that the use of reserve pits in upstream oil and gas production operations that led indirectly to bird deaths did not violate the MBTA. The court reasoned that the MBTA was intended to prohibit conduct directed towards birds and did not intend to criminalize acts or omission which are not directed but which incidentally cause bird deaths.

In *United States v. Chevron USA, Inc.*, the court denied a tender of a guilty plea by an oil company for alleged “takes” of pelicans trapped in a caisson used to protect a wellhead.<sup>47</sup> The court held that the MBTA and its implementing regulations “were clearly not intended to apply to commercial ventures where, occasionally, protected species might be incidentally killed as a result of totally legal and permissible activities,” and observing that the government’s view would allow “the government to criminally prosecute an automobile driver if a protected species was killed when it flew into the driver’s windshield, or to criminally prosecute a home owner, if a protected species was killed when it flew into a picture window at his home.”<sup>48</sup>

Similarly, in *United States v. Ray Westall Operating, Inc.*, the court reversed the conviction of an oil company under the MBTA for alleged “takes” of birds that entered an oil evaporation pit through an opening in the protective wire caused by vandalism. The court concluded 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.”<sup>49</sup>

As a last example, in *United States v. Rollins*, the court declined to uphold a conviction of a farmer whose pesticide application had resulted in the deaths of a flock of geese, holding that such an application of the MBTA would be unconstitutionally vague.<sup>50</sup> The court held that while statutes do not have to be drafted with “mathematical certainty,” “farmers have a right to know

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<sup>46</sup> 840 F. Supp. 2d 1202 (D.N.D. 2012), *appeal dismissed*, Nos. 12-1375 (8th Cir. Apr. 18, 2012).

<sup>47</sup> No. CR-09-0132, 2009 WL 3645170 at \*5 (W.D. La. Oct. 30, 2009).

<sup>48</sup> *Id.*

<sup>49</sup> No. CR 05-1516-MV, 2009 U.S. Dist. LEXIS 130674, at 1 (D.N.M. Feb. 25, 2009).

<sup>50</sup> 706 F. Supp. 742, 745 (D. Idaho 1989).

what conduct of theirs is criminal, especially where that conduct consists of common farming practices carried out for many years in the community.”<sup>51</sup>

On the other hand, there are certainly decisions that *have* imposed criminal liability based on passive “takes” of protected birds. In *United States v. Apollo Energies, Inc.*,<sup>52</sup> the Tenth Circuit held that birds trapped in heater-treaters constituted a criminal violation of the MBTA if there could be proven proximate causation between the use of the device and the bird death. The court distinguished the federal action case in *Newton County* by asserting that the decision, like other timber cases, had addressed activity that modified bird habitat. The court stated, “[w]hile the MBTA’s scope, like any statute, can test the far reaches in application, we do not have that case before us. The question here is whether unprotected oil field equipment can take or kill migratory birds.”<sup>53</sup>

In *United States v. FMC Corp.*,<sup>54</sup> the Second Circuit held that the indirect poisoning of birds resulting from a wastewater pond contaminated with toxic substances created strict liability and was a violation of the MBTA. The court found that the manufacturing of a toxic pesticide constituted an affirmative act sufficient to trigger the MBTA and also noted that failure to act can also result in criminal liability. The court’s decision was not based on an analysis of the context of the MBTA or its legislative history, but relied on various tort notions of strict liability.<sup>55</sup>

Similarly, in *United States v. Corbin Farm Services*,<sup>56</sup> the court upheld criminal charges against a pesticide application company and three individuals whose misapplication of pesticides killed ducks. The court held that the MBTA imposes liability for acts committed without the intent to violate, where the violator is in a position to prevent the harm and the penalties are minor. *Id.*

Finally, in *United States v. CITGO Petroleum Corp.*,<sup>57</sup> the court upheld criminal charges against a refinery operator. The charges were related to the death of a number of MBTA-protected species that had died in open tanks at the refinery. The tanks were required by law to be covered, and the court held that it was reasonable for CITGO to have known that their unlawfully uncovered tanks could have impacted wildlife.<sup>58</sup>

Due to this profound split in authorities over the scope of MBTA liability in criminal enforcement matters, it is appropriate for the Service to evaluate a “No Action Alternative” under which

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<sup>51</sup> *Id.* at 745.

<sup>52</sup> 611 F.3d 679 (10th Cir. 2010).

<sup>53</sup> *Id.* at 686.

<sup>54</sup> 572 F.2d 902, 907 (2d Cir. 1978).

<sup>55</sup> *Id.* at 907.

<sup>56</sup> 444 F. Supp. at 535–36.

<sup>57</sup> 893 F. Supp. 2d 841 (S.D. Tex. 2012).

<sup>58</sup> *See id.* at 848.

this division of authorities is reconciled in the courts or Congress provides the necessary clarification to the scope of the MBTA.<sup>59</sup> In any case, the Service is obliged to explain the legal justification for a nationwide rule under its “longstanding position” in light of these conflicting authorities.

## **2. Voluntary compliance with industry-specific best management practices through Avian Protection Plans would be more effective and efficient than an ITP program**

Rather than promulgating a nationwide passive “take” regulation in the face of conflicting judicial authorities, the Service should encourage and expand the use of best management practices (“BMPs”) in Avian Protection Plans (“APPs”). The Notice of Intent indicates that the Service is considering such a program and we urge the Service to select it if a No Action Alternative is not chosen.

The oil and gas industry already has a well-developed body of BMPs, identified over the course of decades and in close collaboration with federal and state wildlife agencies. These BMPs are included in the Bureau of Land Management’s programmatic planning documents, such as resource management plans, and are applied as Conditions of Approval to individual oil and gas permits, sundry notices, or rights-of-way. In fact, many operators are already proactively including avian protection measures in their federal permit applications as project design features. A separate MBTA permitting program would be duplicative and a wasteful use of limited federal resources with little, if any, added conservation value.

The Service should instead focus its efforts and limited resources to build on existing BMPs and develop flexible but effective APP guidelines for the oil and gas industry similar to the guidelines developed for the electric utility industry.<sup>60</sup> An APP is a company-specific document that delineates a program designed to reduce the operational and avian risks that result from avian interactions with company facilities. Although each company’s APP will be different, the overall goal of any APP should be to reduce avian mortality.

APPs should also include adaptive management protocols to identify areas of high take and to modify operations and activities in those areas. An APP guidance document would serve as a tool box from which industry can select and tailor components as necessary to operate under, monitor activities, and voluntarily report any passive “take.” Companies can either choose to rely on the guidelines or may choose instead to develop their own internal construction standards that

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<sup>59</sup> The No Action Alternative should include a full analysis of the best science available on the impacts of various human activities on birds and whether continuing those activities in the sectors mentioned in the Notice of Intent will have discernible effects on bird populations.

<sup>60</sup> See FISH AND WILDLIFE SERV. AND THE EDISON ELECTRIC INSTIT. AVIAN POWER LINE INTERACTION COMMITTEE (APLIC), AVIAN PROTECTION PLAN GUIDELINES (Apr. 2005).

meet or exceed these guidelines.<sup>61</sup> An APP policy could couple the use of BMPs with a commitment by the Service to the exercise of enforcement discretion for situations in which the BMPs did not avoid all impacts to MBTA species.<sup>62</sup>

The development of APPs is an approach that emphasizes long-term proactive conservation partnerships between the oil and gas industry, the conservation community, and the Service. It provides a framework for addressing migratory bird hazards, committing oil and gas companies to evaluate their operations and work with the Service to conserve federally protected migratory birds.

### **3. If the Service promulgates an ITP program under the MBTA, oil and gas operations should qualify for a general permit, and permits must contain sensible conditions**

If the Service nevertheless chooses to promulgate an MBTA ITP regulation, it is imperative that it do so in a manner that takes into account the extensive body of best practices and existing protection mechanisms for migratory birds. In particular, all oil and gas upstream and midstream operations should qualify for a general permit program, recognizing the well-developed existing body of BMPs.

Currently, the Notice of Intent indicates that the Service is considering general incidental take authorizations “for some types of hazards to birds associated with particular industry sectors” and lists only two types of hazards associated with oil and gas facilities: (1) oil, gas and wastewater disposal pits and (2) methane or other gas burner pipes at oil production sites. However, the oil and gas industry, in close coordination with state and federal wildlife agencies and land management agencies, has developed well-established BMPs to address a wide array of additional hazards associated with upstream and midstream operations. These BMPs are continually evolving, as operators gain additional experience and develop innovative new methods to minimize takes.

There is little reason to limit a general take permit program to the narrow set of hazards listed in the Notice of Intent. Instead, a general permitting program should ensure that all oil and gas operations are eligible for a general permit and should incorporate the full range of existing best practices.<sup>63</sup> Alternatively, the Service should consider using its inherent authority to exempt *de*

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<sup>61</sup> Considering the potential for differences among areas as different at the Gulf of Mexico and the North Slope of Alaska, effective guidelines and a well-supported voluntary program are more likely than a universal permitting program to achieve an optimum balance of conservation benefit and economic impacts.

<sup>62</sup> See, e.g., U.S. FISH AND WILDLIFE SERV., LAND-BASED WIND ENERGY GUIDELINES (Mar. 23, 2012).

<sup>63</sup> The Service should also consider an activity-based programmatic approach similar to that under the Clean Water Act’s nationwide permit program. That program covers specific activities that may be used across a number of industry sectors. Similarly, the Service should consider an approach utilizing the permit-by-rule method, which may also improve the approval process for activities that present known hazards and with known and effective mitigation techniques.

*minimis* activities from the scope of its regulations. In *Alabama Power v. Costle*,<sup>64</sup> the D.C. Circuit held:

Categorical exemptions may also be permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered *de minimis*. It is commonplace, of course, that the law does not concern itself with trifling matters, and this principle has often found application in administrative contexts.<sup>65</sup>

The Service should evaluate an alternative under which *de minimis* levels of passive “take,” including at oil and gas facilities, would be explicitly exempted from regulation under the ITP program.

**A. The Service should conduct a comprehensive cost-benefit analysis of any ITP regulation**

The Service will be obliged to prepare a Regulatory Impact Analysis (“RIA”) in support of any MBTA ITP regulation or rule.<sup>66</sup> The RIA must evaluate information concerning the need for and consequences of the rule, ensure that the net benefits of the rule outweigh the net costs, and assist in selecting an alternative involving the least net cost to society.<sup>67</sup> Information supporting each of these analyses should be collected and discussed as a part of the Service’s programmatic environmental impact statement. This information should include: specific information about the benefits to society as a result of lowering passive “takes” in the oil and gas sector, including detailed, scientifically-defensible information about species and population level impacts; information that compares those benefits to the benefits of similar reductions in passive “takes” from other human activities (*e.g.*, building windows, cats, and cars); the cost to industry to comply with any proposed ITP regulation (including the cost of delay in construction projects while awaiting a permit); and the cost to the government of implementing an ITP regulation.

**B. Practical constraints—challenges regarding calculating take estimates, compensatory mitigation, and access**

The Service should recognize the challenges in developing an ITP program by the end of 2016, which we understand to be the Service’s current goal. This is insufficient time to allow for a well thought out and considered rulemaking. With one migratory season remaining on that timeline, there is insufficient time to fully study and understand the number of birds that are impacted by the activities that may be covered by this program. Furthermore, additional data is necessary to

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<sup>64</sup> 636 F.2d 323 (D.C. Cir. 1979).

<sup>65</sup> *Id.* at 360.

<sup>66</sup> *See* Exec. Order No. 12,291 § 2 (Feb. 17, 1981).

<sup>67</sup> *See id.*

analyze the current environmental conditions and potential environmental effects related to bird mortality, and such information must be provided to the public, characterized, and analyzed to determine whether an ITP program is advisable.

An ITP program under the MBTA would have to address a number of further practical constraints. First, the Service must develop a systematic approach to estimate the number of takes that would result from a certain activity. The lack of an accepted take estimate model led to extraordinary delays in issuing incidental take permits under existing ITP programs for the ESA and the Bald and Golden Eagle Protection Act (“BGEPA”). In analyzing the creation of yet a third ITP program, the Service should consider the practical implications and considerable uncertainty resulting from the lack of a reliable method to calculate take estimates. Before implementing an ITP program, the Service must work to establish a workable system for estimating the number of fatalities expected at oil and gas facilities.

Second, the Service very likely does not have the legal authority under the MBTA to require compensatory mitigation for takes. Unlike the ESA’s explicit statutory provision allowing for mitigation to be included in the terms and conditions of an ITP,<sup>68</sup> the MBTA has no such provision. MBTA permit conditions are limited to implementing the purposes of the various migratory bird conventions, which do not include habitat-related mitigation requirements. We are aware of no court that has held that the Service has the authority under the MBTA to regulate habitat, including requiring habitat-related mitigation for otherwise prohibited takes.<sup>69</sup> The Service should discuss its legal authority for requiring compensatory mitigation as a part of any MBTA ITP program.

Third, if the Service does intend to establish a system of compensatory mitigation, that system must be reasonable. Efforts under the BGEPA ITP program to impose compensatory mitigation requirements have been fraught with difficulties in evaluating the resource equivalency values of the impacted eagles as well as identifying suitable compensatory actions. With over 1,000 birds protected under the MBTA, any compensatory mitigation process must be sensible and streamlined. It is unlikely that all permit-authorized takes will require compensatory mitigation. Mitigation for low-risk hazards or for species that are abundant on the landscape may be unreasonably expensive or unnecessary to implement. The required compensation should in the end be proportional to both the risk of take and the impact of a take on a specific species.

Last, the Service must consider potential challenges in implementing an ITP in circumstances where the mineral estate and surface estate are held separately. In such split estate situations, the

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<sup>68</sup> See 16 U.S.C. § 1539(a)(2)(A)(ii).

<sup>69</sup> See, e.g., *Seattle Audubon Soc’y*, 952 F.2d at 303 (concluding that habitat destruction is not a taking under the MBTA); *Curry*, 988 F. Supp. at 549 (concluding that impacts to birds from logging operations were not prohibited by the MBTA); *Mahler*, 927 F. Supp. at 1573 (holding that the MBTA was inapplicable to indirect taking of birds through habitat destruction or logging); *Citizens Interested in Bull Run*, 781 F. Supp. at 1510 (D. Or. 1991) (declining to extend the MBTA to a timber sale that could impact habitat for northern spotted owl ).

ability of individual companies to access their mineral estates and their rights of use of the surface may each vary, as both a legal and a practical matter. Rules regarding access to surface estates vary across the many U.S. jurisdictions, and landowners may be unwilling to grant access to their land for compliance with, or enforcement of, an ITP program. Any ITP program must recognize these challenges and avoid placing undue restrictions on a company's ability to access its property rights beneath both private and public lands, or avoid imposing obligations on a company that would require rights of ownership or use of the surface that the company may not possess.

**C. The Service must streamline compliance with “cross-cutting” statutes that will be triggered by the issuance of MBTA permits**

Issuing an individual or general ITP is a federal action that will trigger a number of reviews and consultations, including at a minimum the following:

*Environmental Review under the National Environmental Policy Act.* An incidental take permit under the MBTA would require an analysis under NEPA, potentially leading to a costly and time-consuming environmental review process.

*Consultation under Section 7 of the Endangered Species Act.* Prior to issuing an MBTA take permit, the Service will have to evaluate whether the proposed activity is likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat.

*Consultation under Section 106 of the National Historic Preservation Act.* The Service would be required to analyze the impacts of its activity on any cultural or historical resources, which may require consultations with a state or tribal historic preservation office and the negotiation of a Memorandum of Agreement specifying the terms for the activity.

Depending on the location of the permitted facility, issuing an ITP may trigger consultation under the Coastal Zone Management Act and the Magnuson-Stevens Fishery Conservation and Management Act.

If the Service decides to proceed with an ITP program, the Service must establish streamlined environmental review procedures under NEPA (*e.g.*, categorical exclusions for general permits), and streamlined consultation procedures under the other statutes (*e.g.*, using programmatic consultation agreements or memoranda of agreement with other agencies). In addition, the Service must establish procedures and policies for coordinating these reviews with the overall project review to minimize the sources of schedule delay and the potential for conflict.

In evaluating the alternatives presented in the Notice of Intent, the Service should consider the fact that compliance with even streamlined procedures will be substantive and time-consuming, and each cross-cutting statute will afford project opponents the ability to challenge projects in federal court under the Administrative Procedure Act. “Federalizing” oil and gas development

nationwide on private land will only slow and complicate development. All these matters should be evaluated as impacts of an ITP program.

**D. The Service would require significant additional resources to implement an MBTA ITP program**

If the Service elects to proceed with promulgating an MBTA ITP program, it must address how it expects to carry out an effort that would require the issuance of permits for more than 1,000 avian species, in addition to processing permit applications under the MBTA, ESA and BGEPA that are already its responsibility.

According to the FY 2016 budget justification, the Service's eight Regional Migratory Bird Permit Offices already process more than 11,000 applications annually.<sup>70</sup> These applications are very different in nature and significantly less complex than would be those filed by project developers under the proposed MBTA program. It is unclear whether the already very busy staff of the Regional Migratory Bird Permit Offices would have the capacity to handle the volume of additional complex applications from regulated entities if the ITP program were to be enacted.

Considering these resource constraints and the expansive nature of an ITP program, there is a legitimate public interest in describing how the Service will support such a program with foreseeable staffing and resources.

**4. Conclusion**

In summary, we respectfully request that the Service include the following within the scope of the draft programmatic environmental impact statement.

1. The Service should evaluate a No Action Alternative that takes into account the profound division in authority among the federal courts regarding whether passive "takes" fall within the Section 703 take prohibition.
2. The Service should explain clearly the legal basis for any permitting program that includes passive "takes." This legal basis explanation should address the existing judicial opinions, the legislative history and the plain language of the statute, the rule of lenity, the use of prosecutorial discretion, and the absurd results doctrine.
3. If the Service concludes that the scope of the MBTA take prohibition extends to passive "takes," the Service should evaluate and select an alternative that allows for the application of best management practices through the use of avian protection plans.
4. The Service should investigate and evaluate the costs and benefits of each of its proposals.

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<sup>70</sup> See Fiscal Year Budget Justification at MB-8.

5. The Service should articulate the legal authority for imposing compensatory mitigation as a condition of an ITP.
6. The Service should evaluate the following sensible conditions to any ITP regulation that it might promulgate: (a) identify those covered activities that result in *de minimis* impacts to MBTA species at a facility and specifically exempt those activities from the permit requirement under the principles articulate in *Alabama Power v. Costle*; (b) if no *de minimis* exemptions are considered, evaluate general take permits that will provide take coverage for all relevant aspects of oil and gas operations; (c) practical methods of estimating take at covered facilities; and (d) practical methods commensurate with risk and impact for the implementation of any compensatory mitigation program.
7. The Service must evaluate and explain how it intends to comply with cross-cutting statutes like the Endangered Species Act, the National Historic Preservation Act, the National Environmental Policy Act, and others.
8. The Service should evaluate and explain how it intends to secure the administrative resources necessary to implement an ITP permitting program.

API and IPAA value the opportunity to provide comments on the Notice of Intent.

Sincerely,



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