



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 10

[Docket No. FWS–HQ–MB–2018–0090; FF09M22000–201–FXMB1231090BPP0]

RIN 1018–BD76

Regulations Governing Take of Migratory Birds

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS, Service, we), define the scope of the Migratory Bird Treaty Act (MBTA or Act) as it applies to conduct resulting in the injury or death of migratory birds protected by the Act. We determine that the MBTA’s prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same, apply only to actions directed at migratory birds, their nests, or their eggs.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Public comments submitted on the proposed rule and supplementary documents to the proposed rule, including the environmental impact statement and regulatory impact analysis, may be found at the Federal rulemaking portal <http://www.regulations.gov> in Docket No. FWS–HQ–MB–2018–0090.

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SUPPLEMENTARY INFORMATION:

Background

The Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703 *et seq.*) was enacted in 1918 to help fulfill the United States’ obligations under the 1916 “Convention between the United States

and Great Britain for the protection of Migratory Birds.” 39 Stat. 1702 (Aug. 16, 1916) (ratified Dec. 7, 1916) (Migratory Bird Treaty). The list of applicable migratory birds protected by the MBTA is currently codified in title 50 of the Code of Federal Regulations at 50 CFR 10.13.

In its current form, section 2(a) of the MBTA provides in relevant part that, unless permitted by regulations, it is unlawful:

at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof

16 U.S.C. 703(a).

Section 3(a) of the MBTA authorizes and directs the Secretary of the Interior to “adopt suitable regulations” allowing “hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof” while considering (“having due regard to”) temperature zones and “distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds.” 16 U.S.C. 704(a).

Section 3(a) also requires the Secretary to “determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions [listed in section 2 between the United States and Canada, Mexico, Russia, and Japan]” to adopt such regulations allowing these otherwise-prohibited activities. *Id.*; *see also* Convention between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702, amended by the Protocol between the United States and Canada Amending the 1916 Convention for the Protection of Migratory Birds in Canada and the United States, U.S.-Can., Dec. 14, 1995, T.I.A.S. 12721; Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311, and Agreement Supplementing the Agreement of February 7, 1936, U.S.-Mex., Mar. 10, 1972, 23 U.S.T. 260; Convention between the Government of the United States of America and the Government of

Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and their Environment, U.S.-Japan, Mar. 4, 1972, 25 U.S.T. 3329; and Convention between the United States of American and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and their Environment, U.S.-U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647.

On December 22, 2017, the Principal Deputy Solicitor of the Department of the Interior, exercising the authority of the Solicitor pursuant to Secretary's Order 3345, issued a legal opinion, M-37050, "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take" (M-37050 or M-Opinion). The Solicitor's interpretation marked a change from prior U.S. Fish and Wildlife Service interpretations and an earlier Solicitor's Opinion, M-37041, "Incidental Take Prohibited Under the Migratory Bird Treaty Act." The Office of the Solicitor performs the legal work for the Department of the Interior, including the U.S. Fish and Wildlife Service (hereafter "Service"). The Service is the Federal agency delegated the primary responsibility for managing migratory birds.

M-37050 thoroughly examined the text, history, and purpose of the MBTA and concluded that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to actions that are directed at migratory birds, their nests, or their eggs. On August 11, 2020, a district court vacated M-37050, holding that the language of the MBTA plainly prohibits incidental take, despite multiple courts failing to agree on how to interpret the relevant statutory language. *Natural Res. Defense Council v. U.S. Dep't of the Interior*, 2020 WL 4605235 (S.D.N.Y.). The Department of Justice filed a notice of appeal on October 8, 2020. We respectfully disagree with the district court's decision and have addressed the court's findings where appropriate in the discussion below. Moreover, M-37050 is consistent with the Fifth Circuit appellate court decision in *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015), which held that the MBTA does not prohibit incidental take.

This rule addresses the Service's responsibilities under the MBTA. Consistent with the language and legislative history of the MBTA, as amended, and relevant case law, the Service

defines the scope of the MBTA's prohibitions to reach only actions directed at migratory birds, their nests, or their eggs.

Provisions of the Final Rule

Scope of the Migratory Bird Treaty Act

As a matter of both law and policy, the Service hereby adopts the conclusion of M-37050 in a regulation defining the scope of the MBTA. M-37050 is available on the Internet at the Federal eRulemaking Portal: <http://www.regulations.gov> in Docket No. FWS-HQ-MB-2018-0090 and at <https://www.doi.gov/solicitor/opinions>.

The text and purpose of the MBTA indicate that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same only criminalize actions that are specifically directed at migratory birds, their nests, or their eggs.

The relevant portion of the MBTA reads, "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 . . . any migratory bird, [or] any part, nest, or egg of any such bird." 16 U.S.C. 703(a). Of the five referenced verbs, three—pursue, hunt, and capture—unambiguously require an action that is directed at migratory birds, nests, or eggs. To wit, according to the entry for each word in a contemporary dictionary:

- Pursue means "[t]o follow with a view to overtake; to follow eagerly, or with haste; to chase." WEBSTER'S REVISED UNABRIDGED DICTIONARY 1166 (1913);
- Hunt means "[t]o search for or follow after, as game or wild animals; to chase; to pursue for the purpose of catching or killing." *Id.* at 713; and
- Capture means "[t]o seize or take possession of by force, surprise, or stratagem; to overcome and hold; to secure by effort." *Id.* at 215.

Thus, one does not passively or accidentally pursue, hunt, or capture. Rather, each requires a deliberate action specifically directed at achieving a goal.

By contrast, the verbs “kill” and “take” are ambiguous in that they could refer to active or passive conduct, depending on the context. *See id.* at 813 (“kill” may mean the more active “to put to death; to slay” or serve as the general term for depriving of life); *id.* at 1469 (“take” has many definitions, including the more passive “[t]o receive into one’s hold, possession, etc., by a voluntary act” or the more active “[t]o lay hold of, as in grasping, seizing, catching, capturing, adhering to, or the like; grasp; seize;—implying or suggesting the use of physical force”).

Any ambiguity inherent in the statute’s use of the terms “take” and “kill” is resolved by applying established rules of statutory construction. First and foremost, when any words “are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar.” ANTONIN SCALIA & BRYAN A. GARNER, *READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS*, 195 (2012); *see also Third Nat’l Bank v. Impac, Ltd.*, 432 U.S. 312, 321 (1977) (“As always, ‘[t]he meaning of particular phrases must be determined in context’” (quoting *SEC v. Nat’l Sec., Inc.*, 393 U.S. 453, 466 (1969)); *Beecham v. United States*, 511 U.S. 368, 371 (1994) (the fact that “several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well”). Section 2 of the MBTA groups together five verbs—“pursue,” “hunt,” “take,” “capture,” and “kill.” Accordingly, the statutory construction canon of *noscitur a sociis* (“it is known by its associates”) counsels in favor of reading each verb to have a related meaning. *See* SCALIA & GARNER at 195 (“The canon especially holds that ‘words grouped in a list should be given related meanings.’” (quoting *Third Nat’l Bank*, 432 U.S. at 322)).

Thus, when read together with the other active verbs in section 2 of the MBTA, the proper meaning is evident. The operative verbs (“pursue, hunt, take, capture, kill”) “are all affirmative acts . . . which are directed immediately and intentionally against a particular animal—not acts or omissions that indirectly and accidentally cause injury to a population of animals.” *Sweet Home*, 515 U.S. at 719–20 (Scalia, J., dissenting) (agreeing with the majority opinion that certain terms in the definition of the term “take” in the Endangered Species Act

(ESA)—identical to the other prohibited acts referenced in the MBTA—refer to deliberate actions, while disagreeing that the use of the additional definitional term “harm”—used only in the ESA—meant that “take” should be read more broadly to include actions not deliberately directed at covered species); *see also United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 489 n.10 (5th Cir. 2015) (“Even if ‘kill’ does have independent meaning [from ‘take’], the Supreme Court, interpreting a similar list in the [Endangered Species Act], concluded that the terms pursue, hunt, shoot, wound, kill, trap, capture, and collect, generally refer to deliberate actions”); *cf. Sweet Home*, 515 U.S. at 698 n.11 (Congress’s decision to specifically define “take” in the ESA obviated the need to define its common-law meaning). We explain the meaning of the terms “take” and “kill” in the context of section 2 in turn below.

The notion that “take” refers to an action directed immediately against a particular animal is supported by the use of the word “take” in the common law. As the Supreme Court has instructed, “absent contrary indications, Congress intends to adopt the common law definition of statutory terms.” *United States v. Shabani*, 513 U.S. 10, 13 (1994). As Justice Scalia noted, “the term [‘take’] is as old as the law itself.” *Sweet Home*, 515 U.S. at 717 (Scalia, J., dissenting). For example, the Digest of Justinian places “take” squarely in the context of acquiring dominion over wild animals, stating:

[A]ll the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them. . . . Because that which belongs to nobody is acquired by the natural law by the person who first possesses it. We do not distinguish the acquisition of these wild beasts and birds by whether one has captured them on his own property [or] on the property of another; but he who wishes to enter into the property of another to hunt can be readily prevented if the owner knows his purpose to do so.

Geer v. Connecticut, 161 U.S. 519, 523 (1896) (quoting DIGEST, Book 41, Tit. 1, De Acquir. Rer. Dom.). Likewise, Blackstone’s Commentaries provide:

A man may lastly have a qualified property in animals *feroe naturae, propter privilegium*, that is, he may have the privilege of hunting, taking and killing them in exclusion of other persons. Here he has a transient property in these animals usually called game so long as they continue within his liberty, and may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases.

Id. at 526–27 (1896) (quoting 2 BLACKSTONE COMMENTARY 410).

Dictionary definitions of the term “take” at the time of MBTA enactment were consistent with this historical use in the context of hunting and capturing wildlife. For example, Webster’s defined “take” to comprise various actions directed at reducing a desired object to personal control: “to lay hold of; to seize with the hands, or otherwise; to grasp; to get into one’s hold or possession; to procure; to seize and carry away; to convey.” WEBSTER’S REVISED UNABRIDGED DICTIONARY 1469 (1913).

Thus, under common law “[t]o ‘take,’ when applied to wild animals, means to reduce those animals, by killing or capturing, to human control.” *Sweet Home*, 515 U.S. at 717 (Scalia, J., dissenting); *see also CITGO*, 801 F.3d at 489 (“Justice Scalia’s discussion of ‘take’ as used in the Endangered Species Act is not challenged here by the government ... because Congress gave ‘take’ a broader meaning for that statute.”). As is the case with the ESA, in the MBTA, “[t]he taking prohibition is only part of the regulatory plan..., which covers all stages of the process by which protected wildlife is reduced to man’s dominion and made the object of profit,” and, as such, is “a term of art deeply embedded in the statutory and common law concerning wildlife” that “describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).” *Sweet Home*, 515 U.S. at 718 (Scalia, J., dissenting). The common-law meaning of the term “take” is particularly important here because, unlike the ESA, which specifically defines the term “take,” the MBTA does not define “take”—instead it includes the term in a list of similar actions. Thus, the *Sweet Home* majority’s ultimate conclusion that Congress’s decision to define “take” in the ESA obviated the need to divine its common-law meaning is inapplicable here. *See id.* at 697, n.10. Instead, the opposite is true. Congress intended “take” to be read consistent with its common law meaning—to reduce birds to human control.

It is also reasonable to conclude that the MBTA’s prohibition on killing is similarly limited to deliberate acts that result in bird deaths. *See Newton County Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (“MBTA’s plain language prohibits conduct

directed at migratory birds [T]he ambiguous terms ‘take’ and ‘kill’ in 16 U.S.C. 703 mean ‘physical conduct of the sort engaged in by hunters and poachers’” (quoting *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991)); *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 489 n.10 (5th Cir. 2015) (“there is reason to think that the MBTA’s prohibition on ‘killing’ is similarly limited to deliberate acts that effect bird deaths”).

By contrast, the *NRDC* court interpreted “kill” more expansively, holding that, in combination with the phrase “by any means or in any manner,” the MBTA unambiguously prohibits incidental killing. The court centered its reading of section 2 around its conclusion that any means of killing migratory birds is prohibited, whether the killing is the result of an action directed at a migratory bird or wholly the result of passive conduct. While the term “kill” can certainly be interpreted broadly in a general sense, we disagree that “kill” should take on its most expansive meaning in the context of section 2 of the MBTA.

Additionally, the *NRDC* court found no meaningful difference between active and passive definitions of the term “kill.” The court focused on one possible reading of “kill,” meaning “to deprive of life,” which could be construed as either active or passive conduct. However, the term “kill” can be read purely as an active verb, meaning, “to put to death; to slay.” When contrasted with the more passive definition as the general term for depriving of life, the difference is clear. Focusing on that difference and reading the term “kill” in relation to the other prohibited actions in section 2 before it, there is a compelling reason to read the term “kill” in an active sense. That is, all the words before the word “kill” are active verbs. Thus, the *NRDC* court erred in conflating the active and passive definitions of the word “kill” and finding no meaningful difference between the two. The cases cited by the court in footnote 13 interpreting the term “kill” do so in the context of criminal homicide, which unsurprisingly interprets “kill” in the broader sense. These cases are also inapposite because they do not interpret the term “kill” in relation to adjacent, related terms that could be read to limit effectively the scope of “kill” in its general sense. Instead, because the term “kill” is ambiguous in the context of section 2, we must

read “kill” along with the preceding terms and conclude they are all active terms describing active conduct.

The *NRDC* district court predicated its broad reading of “kill” primarily on the notion that a narrower reading would read the term out of the Act by depriving it of independent meaning. The court reasoned that it is difficult to conceive of an activity where “kill” applies, but “hunt” and “take” do not. To the contrary, there are several situations where “kill” retains independent meaning. For example, consistent with a product’s usage as authorized by the Environmental Protection Agency and based on its intended usage, a farmer could spread poisoned bait to kill birds depredate on her crops. That action is directed at birds but does not “take” them in the common law sense that “take” means to reduce wildlife to human physical control, and it could also not be fairly characterized as hunting, pursuing, or capturing them either. Instead, the action was directed at protecting the farmer’s crops from the birds, but not physically possessing or controlling the birds in any way other than killing them. Likewise, a county road and highway department could use machinery to destroy bird nests under a bridge. Any chicks within those nests would likely be destroyed killing those chicks, but the maintenance workers would not “take” them in the common law sense. Moreover, as noted above, at least two appellate courts have specifically found that the terms “take” and “kill” are ambiguous and apply to physical conduct of hunters and poachers. *Newton County; Seattle Audubon*.

This conclusion is also supported by the Service’s longstanding implementing regulations, which define “take” to mean “to pursue, hunt, shoot, wound, kill, trap, capture, or collect” or attempt to do the same. 50 CFR 10.12. The component actions of “take” involve direct actions to reduce animals to human control. As such, they “reinforce[] the dictionary definition, and confirm[] that ‘take’ does not refer to accidental activity or the unintended results of passive conduct.” *Brigham Oil & Gas*, 840 F. Supp. 2d at 1209.

To support an argument that the terms “take” and “kill” should be read expansively to include incidental conduct, a number of courts including the *NRDC* court, as well as the prior M-

Opinion, focused on the MBTA's direction that a prohibited act can occur "at any time, by any means, in any manner" to support the conclusion that the statute prohibits any activity that results in the death of a bird, which would necessarily include incidental take. However, the quoted statutory language does not change the nature of those prohibited acts and simply clarifies that activities directed at migratory birds, such as hunting and poaching, are prohibited whenever and wherever they occur and whatever manner is applied, be it a shotgun, a bow, or some other creative approach to deliberately taking birds. *See generally CITGO*, 801 F.3d at 490 ("The addition of adverbial phrases connoting 'means' and 'manner,' however, does not serve to transform the nature of the activities themselves. For instance, the manner and means of hunting may differ from bow hunting to rifles, shotguns, and air rifles, but hunting is still a deliberately conducted activity. Likewise, rendering all-inclusive the manner and means of 'taking' migratory birds does not change what 'take' means, it merely modifies the mode of take.").

The *NRDC* court countered that referencing different manners of taking birds does not give effect to the "by any means and in any manner" language, but instead clarifies the term "hunt" because the referenced activities are primarily different means of hunting. However, other actions such as poisoning bait to control birds depredating on crops would "kill" birds outside the context of hunting. Many other methods of hunting, capturing, pursuing, taking, or killing birds no doubt exist, and that is precisely the point. Congress used the operative language to ensure that any method employed could amount to a violation of the MBTA, so long as it involves one of the enumerated prohibited actions and is directed at migratory birds.

The prior Solicitor's Opinion, M-37041, took a different tack from the *NRDC* court and assumed that because the criminal misdemeanor provision of the MBTA is a strict-liability crime, meaning that no *mens rea* or criminal intent is required for a violation to have taken place, *any* act that takes or kills a bird must be covered as long as the act results in the death of a bird. In making that assumption, M-37041 improperly ignored the meaning and context of the actual acts prohibited by the statute. Instead, the opinion presumed that the lack of a mental state

requirement for a misdemeanor violation of the MBTA equated to reading the prohibited acts “kill” and “take” as broadly applying to actions not specifically directed at migratory birds, so long as the result is their death or injury. However, the relevant acts prohibited by the MBTA are voluntary acts directed at killing or reducing an animal to human control, such as when a hunter shoots a protected bird causing its death. The key remains that the actor was engaged in an activity the object of which was to kill or render a bird subject to human control.

By contrast, liability fails to attach to actions that are not directed toward rendering an animal subject to human control. Common examples of such actions include driving a car, allowing a pet cat to roam outdoors, or erecting a windowed building. All of these actions could foreseeably result in the deaths of protected birds, and all would be violations of the MBTA under the now-withdrawn M-Opinion if they did in fact result in deaths of protected birds, yet none of these actions have as their object rendering any animal subject to human control. Because no “take” has occurred within the meaning of the MBTA, the strict-liability provisions of the Act would not be triggered.

The prior M-Opinion posited that amendments to the MBTA imposing mental state requirements for specific offenses were only necessary if no mental state is otherwise required. However, the conclusion that the taking and killing of migratory birds is a strict-liability crime does not answer the separate question of what acts are criminalized under the statute. The Fifth Circuit in *CITGO* stated, “we disagree that because misdemeanor MBTA violations are strict liability crimes, a ‘take’ includes acts (or omissions) that indirectly or accidentally kill migratory birds.” The court goes on to note that “[a] person whose car accidentally collided with the bird ... has committed no act ‘taking’ the bird for which he could be held strictly liable. Nor do the owners of electrical lines ‘take’ migratory birds who run into them. These distinctions are inherent in the nature of the word ‘taking’ and reveal the strict liability argument as a non-sequitur.” 801 F.3d at 493. Similarly, in *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559 (S.D.

Ind. 1996), the court described the interplay between activities that are specifically directed at birds and the strict liability standard of the MBTA:

[A comment in the legislative history] in favor of strict liability does not show any intention on the part of Congress to extend the scope of the MBTA beyond hunting, trapping, poaching, and trading in birds and bird parts to reach any and all human activity that might cause the death of a migratory bird. Those who engage in such activity and who accidentally kill a protected migratory bird or who violate the limits on their permits may be charged with misdemeanors without proof of intent to kill a *protected* bird or intent to violate the terms of a permit. That does not mean, however, that Congress intended for “strict liability” to apply to all forms of human activity, such as cutting a tree, mowing a hayfield, or flying a plane. The 1986 amendment and corresponding legislative history reveal only an intention to close a loophole that might prevent felony prosecutions for commercial trafficking in migratory birds and their parts.

Thus, there appears to be no explicit basis in the language or the development of the MBTA for concluding that it was intended to be applied to any and all human activity that causes even unintentional deaths of migratory birds.

927 F. Supp. at 1581 (referencing S. REP. NO. 99-445, at 16 (1986), *reprinted* in 1986 U.S.C.C.A.N. 6113, 6128). Thus, limiting the range of actions prohibited by the MBTA to those that are directed at migratory birds will focus prosecutions on activities like hunting and trapping and exclude more attenuated conduct, such as lawful commercial activity, that unintentionally and indirectly results in the death of migratory birds.

The History of the MBTA

The history of the MBTA and the debate surrounding its adoption illustrate that the Act was part of Congress’s efforts to regulate the hunting of migratory birds in direct response to the extreme over-hunting, largely for commercial purposes, that had occurred over the years. *See United States v. Moon Lake Electric Ass’n*, 45 F. Supp. 2d 1070, 1080 (D. Colo. 1999) (“the MBTA’s legislative history indicates that Congress intended to regulate recreational and commercial hunting”); *Mahler*, 927 F. Supp. at 1574 (“The MBTA was designed to forestall hunting of migratory birds and the sale of their parts”). Testimony concerning the MBTA given by the Solicitor’s Office for the Department of Agriculture underscores this focus:

We people down here hunt [migratory birds]. The Canadians reasonably want some assurances from the United States that if they let those birds rear their young

up there and come down here, we will preserve a sufficient supply to permit them to go back there.

Protection of Migratory Birds: Hearing on H.R. 20080 Before the House Comm. on Foreign Affairs, 64th Cong. 22–23 (1917) (statement of R.W. Williams, Solicitor’s Office, Department of Agriculture). Likewise, the Chief of the Department of Agriculture’s Bureau of Biological Survey noted that he “ha[s] always had the idea that [passenger pigeons] were destroyed by overhunting, being killed for food and for sport.” *Protection of Migratory Birds: Hearing on H.R. 20080 Before the House Comm. on Foreign Affairs*, 64th Cong. 11 (1917) (statement of E. W. Nelson, Chief Bureau of Biological Survey, Department of Agriculture).

Statements from individual Congressmen evince a similar focus on hunting. Senator Smith, “who introduced and championed the Act . . . in the Senate,” *Leaders in Recent Successful Fight for the Migratory Bird Treaty Act*, BULLETIN – THE AMERICAN GAME PROTECTIVE ASSOCIATION, July 1918, at 5, explained:

Nobody is trying to do anything here except to keep pothunters 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 (statement of Sen. Smith) (1917). Likewise, during hearings of the House Foreign Affairs Committee, Congressman Miller, a “vigorous fighter, who distinguished himself in the debate” over the MBTA, *Leaders in Recent Successful Fight for the Migratory Bird Treaty Act*, BULLETIN – THE AMERICAN GAME PROTECTIVE ASSOCIATION, July 1918, at 5, put the MBTA squarely in the context of hunting:

I want to assure you . . . that I am heartily in sympathy with this legislation. I want it to go through, because I am up there every fall, and I know what the trouble is. The trouble is in shooting the ducks in Louisiana, Arkansas, and Texas in the summer time, and also killing them when they are nesting up in Canada.

Protection of Migratory Birds: Hearing on H.R. 20080 Before the House Comm. on Foreign Affairs, 64th Cong. 7 (1917) (statement of Rep. Miller).

In seeking to take a broader view of congressional purpose, the *Moon Lake* court looked to other contemporary statements that cited the destruction of habitat, along with improvements

in firearms, as a cause of the decline in migratory bird populations. The court even suggested that these statements, which “anticipated application of the MBTA to children who act ‘through inadvertence’ or ‘through accident,’” supported a broader reading of the legislative history. *Moon Lake*, 45 F. Supp. 2d at 1080–81. Upon closer examination, these statements are instead consistent with a limited reading of the MBTA.

One such contemporary statement cited by the court is a letter from Secretary of State Robert Lansing to the President attributing the decrease in migratory bird populations to two general issues:

- Habitat destruction, described generally as “the extension of agriculture, and particularly the draining on a large scale of swamps and meadows;” and
- Hunting, described in terms of “improved firearms and a vast increase in the number of sportsmen.”

Representative Baker referenced these statements during the House floor debate over the MBTA, implying that the MBTA was intended to address both issues. *Moon Lake*, 45 F. Supp. 2d at 1080–81 (quoting H. REP. NO. 65-243, at 2 (1918) (letter from Secretary of State Robert Lansing to the President)). However, Congress addressed hunting and habitat destruction in the context of the Migratory Bird Treaty through two separate acts:

- First, in 1918, Congress adopted the MBTA to address the direct and intentional killing of migratory birds;
- Second, in 1929, Congress adopted the Migratory Bird Conservation Act to “more effectively” implement the Migratory Bird Treaty by protecting certain migratory bird habitats.

The Migratory Bird Conservation Act provided the authority to purchase or rent land for the conservation of migratory birds, including for the establishment of inviolate “sanctuaries” wherein migratory bird habitats would be protected from persons “cut[ting], burn[ing], or destroy[ing] any timber, grass, or other natural growth.” Migratory Bird Conservation Act, Sec.

10, 45 Stat. 1222, 1224 (1929) (codified as amended at 16 U.S.C. 715–715s). If the MBTA was originally understood to protect migratory bird habitats from incidental destruction, enactment of the Migratory Bird Conservation Act 11 years later would have been largely superfluous. Instead, the MBTA and the Migratory Bird Conservation Act are complementary: “Together, the Treaty Act in regulating hunting and possession and the Conservation Act by establishing sanctuaries and preserving natural waterfowl habitat help implement our national commitment to the protection of migratory birds.” *United States v. North Dakota*, 650 F.2d 911, 913–14 (8th Cir. 1981), *aff’d on other grounds*, 460 U.S. 300 (1983).

Some courts have attempted to interpret a number of floor statements as supporting the notion that Congress intended the MBTA to regulate more than just hunting and poaching, but those statements reflect an intention to prohibit actions directed at birds—whether accomplished through hunting or some other means intended to kill birds directly. For example, some Members “anticipated application of the MBTA to children who act ‘through inadvertence’ or ‘through accident.’”

What are you going to do in a case like this: A barefoot boy, as barefoot boys sometimes do, largely through inadvertence and without meaning anything wrong, happens to throw a stone at and strikes and injures a robin's nest and breaks one of the eggs, whereupon he is hauled before a court for violation of a solemn treaty entered into between the United States of America and the Provinces of Canada.

Moon Lake, 45 F. Supp. 2d at 1081 (quoting 56 CONG. REC. 7455 (1918) (statement of Rep. Mondell)). “[I]nadvertence” in this statement refers to the boy’s *mens rea*. As the rest of the sentence clarifies, the hypothetical boy acted “without *meaning* anything wrong,” not that he acted unintentionally or accidentally in damaging the robin’s nest. This is reinforced by the rest of the hypothetical, which posits that the boy threw “a stone *at* and strikes and injures a robin’s nest.” The underlying act is directed specifically at the robin’s nest. In other statements, various members of Congress expressed concern about “sportsmen,” people “killing” birds, “shooting” of game birds or “destruction” of insectivorous birds, and whether the purpose of the MBTA was to favor a steady supply of “game animals for the upper classes.” *Moon Lake*, 45 F. Supp. 2d at

1080–81. One Member of Congress even offered a statement that explains why the statute is not redundant in its use of the various terms to explain what activities are regulated: “[T]hey cannot hunt ducks in Indiana in the fall, because they cannot kill them. I have never been able to see why you cannot hunt, whether you kill or not. There is no embargo on hunting, at least down in South Carolina” *Id.* at 1081 (quoting 56 Cong. Rec. 7446 (1918) (statement of Rep. Stevenson)). That Congress was animated regarding potential restrictions on hunting and its impact on individual hunters is evident from even the statements relied upon as support for the conclusion that the statute reaches incidental take.

Finally, in 1918, Federal regulation of the hunting of wild birds was a highly controversial and legally fraught subject. For example, on the floor of the Senate, Senator Reed proclaimed:

I am opposed not only now in reference to this bill [the MBTA], but I am opposed as a general proposition to conferring power of that kind upon an agent of the Government

... Section 3 proposes to turn these powers over to the Secretary of Agriculture ... to make it a crime for a man to shoot game on his own farm or to make it perfectly legal to shoot it on his own farm

When a Secretary of Agriculture does a thing of that kind I have no hesitancy in saying that he is doing a thing that is utterly indefensible, and that the Secretary of Agriculture who does it ought to be driven from office

55 CONG. REC. 4813 (1917) (statement of Sen. Reed).

Federal regulation of hunting was also legally tenuous at that time. Whether the Federal Government had any authority to regulate the killing or taking of any wild animal was an open question in 1918. Just over 20 years earlier, the Supreme Court in *Geer* had ruled that the States exercised the power of ownership over wild game in trust, implicitly precluding Federal regulation. *See Geer v. Connecticut*, 161 U.S. 519 (1896). When Congress did attempt to assert a degree of Federal jurisdiction over wild game with the 1913 Weeks-McLean Law, it was met with mixed results in the courts, leaving the question pending before the Supreme Court at the time of the MBTA’s enactment. *See, e.g., United States v. Shaver*, 214 F. 154, 160 (E.D. Ark. 1914); *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915). It was not until *Missouri v.*

Holland in 1920 that the Court, relying on authority derived from the Migratory Bird Treaty (Canada Convention) under the Treaty Clause of the U.S. Constitution, definitively acknowledged the Federal Government's ability to regulate the taking of wild birds. 252 U.S. 416, 432–33 (1920).

Given the legal uncertainty and political controversy surrounding Federal regulation of intentional hunting in 1918, it is highly unlikely that Congress intended to confer authority upon the executive branch to prohibit all manner of activity that had an incidental impact on migratory birds.

The provisions of the 1916 Canada Convention authorize only certain circumscribed activities specifically directed at migratory birds. Articles II through IV of the Convention create closed periods during which hunting of migratory species covered by the Convention may be authorized only for limited purposes, such as scientific use or propagation. Article VII allows taking to resolve conflicts under extraordinary conditions when birds become seriously injurious to agricultural or other interests, subject to permits issued by the parties under regulations prescribed by them respectively. Additionally, Article V prohibits the taking of eggs or nests of certain protected species, except for scientific and propagating purposes under regulations issued by the parties, and Article VI prohibits transport, import, and export of protected species except for scientific or propagating purposes. *See Canada Convention*, 39 Stat. 1702.

Subsequent legislative history does not undermine a limited interpretation of the MBTA, as enacted in 1918. The “fixed-meaning canon of statutory construction directs that “[w]ords must be given the meaning they had when the text was adopted.” SCALIA & GARNER at 78. The meaning of written instruments “does not alter. That which it meant when adopted, it means now.” *South Carolina v. United States*, 199 U.S. 437, 448 (1905).

The operative language in section 2 of the MBTA has changed little since its adoption in 1918. The current iteration of the relevant language—making it unlawful for persons “at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture,

or kill, possess” specific migratory birds—was adopted in 1935 as part of the Mexico Treaty Act and has remained unchanged since then. *Compare* Mexico Treaty Act, 49 Stat. 1555, Sec. 3 with 16 U.S.C. 703(a). As with the 1916 Canada Convention, the Mexico Convention focused primarily on hunting and establishing protections for birds in the context of take and possession for commercial use. *See* Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, 50 Stat. 1311 (Feb. 7, 1936) (Mexico Convention). Subsequent Protocols amending both these Conventions also did not explicitly address incidental take or otherwise broaden their scope to prohibit anything other than purposeful take of migratory birds. *See* Protocol between the Government of the United States and the Government of Canada Amending the 1916 Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds, Sen. Treaty Doc. 104-28 (Dec. 14, 1995) (outlining conservation principles to ensure long-term conservation of migratory birds, amending closed seasons, and authorizing indigenous groups to harvest migratory birds and eggs throughout the year for subsistence purposes); Protocol between the Government of the United States of America and the Government of the United Mexican States Amending the Convention for Protection of Migratory Birds and Game Mammals, Sen. Treaty Doc. 105-26 (May 5, 1997) (authorizing indigenous groups to harvest migratory birds and eggs throughout the year for subsistence purposes).

It was not until more than 50 years after the initial adoption of the MBTA and 25 years after the Mexico Treaty Act that Federal prosecutors began applying the MBTA to incidental actions. *See* Lilley & Firestone at 1181 (“In the early 1970s, *United States v. Union Texas Petroleum* [No. 73-CR-127 (D. Colo. Jul. 11, 1973)] marked the first case dealing with the issue of incidental take.”). This newfound Federal authority was not accompanied by any corresponding legislative change. The only contemporaneous changes to section 2 of the MBTA were technical updates recognizing the adoption of a treaty with Japan. *See* Act of June 1, 1974, Pub. L. No. 93-300, 88 Stat. 190. Implementing legislation for the treaty with the Soviet Union

also did not amend section 2. *See* Fish and Wildlife Improvement Act of 1978, Pub. L. No. 95-616, sec. 3(h), 92 Stat. 3110. Similar to the earlier Conventions, the provisions of the Japan and Russia Conventions authorized purposeful take for specific activities such as hunting, scientific, educational, and propagation purposes, and protection against injury to persons and property. However, they also outlined mechanisms to protect habitat and prevent damage from pollution and other environmental degradation (domestically implemented by the Migratory Bird Conservation Act and other applicable Federal laws). *See* Convention between the Government of the United States and the Government of Japan for the Protection of Migratory birds and Birds in Danger of Extinction, and their Environment, 25 U.S.T. 3329 (Mar. 4, 1972) (Japan Convention); Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and their Environment, 29 U.S.T. 4647 (Nov. 19, 1976) (Russia Convention).

No changes were made to the section of the MBTA at issue here following the later conventions except that the Act was modified to include references to these later agreements. Certainly, other Federal laws may require consideration of potential impacts to birds and their habitat in a way that furthers the goals of the Conventions' broad statements. *See, e.g., Mahler*, 927 F. Supp. at 1581 ("Many other statutes enacted in the intervening years also counsel against reading the MBTA to prohibit any and all migratory bird deaths resulting from logging activities in national forests. As is apparent from the record in this case, the Forest Service must comply with a myriad of statutory and regulatory requirements to authorize even the very modest type of salvage logging operation of a few acres of dead and dying trees at issue in this case. Those laws require the Forest Service to manage national forests so as to balance many competing goals, including timber production, biodiversity, protection of endangered and threatened species, human recreation, aesthetic concerns, and many others."). Given the overwhelming evidence that the primary purpose of section 2, as amended by the Mexico Treaty Act, was to control

over-hunting, the references to the later agreements do not bear the weight of the conclusion reached by the prior Opinion (M-37041).

Thus, the only legislative enactment concerning incidental activity under the MBTA is the 2003 appropriations bill that explicitly exempted military-readiness activities from liability under the MBTA for incidental takings. *See* Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, Div. A, Title III, Sec. 315, 116 Stat. 2509 (2002), *reprinted in* 16 U.S.C.A. 703, Historical and Statutory Notes. There is nothing in this legislation that authorizes the government to pursue incidental takings charges in other contexts. Rather, some have “argue[d] that Congress expanded the definition of ‘take’ by negative implication” since “[t]he exemption did not extend to the ‘operation of industrial facilities,’ even though the government had previously prosecuted activities that indirectly affect birds.” *CITGO*, 801 F.3d at 490-91.

This argument is contrary to the Supreme Court’s admonition that “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001). As the Fifth Circuit explained, “[a] single carve-out from the law cannot mean that the entire coverage of the MBTA was implicitly and hugely expanded.” *CITGO*, 801 F.3d at 491. Rather, it appears Congress acted in a limited fashion to preempt a specific and immediate impediment to military-readiness activities. “Whether Congress deliberately avoided more broadly changing the MBTA or simply chose to address a discrete problem, the most that can be said is that Congress did no more than the plain text of the amendment means.” *Id.* It did not hide the elephant of incidental takings in the mouse hole of a narrow appropriations provision.

Constitutional Issues

The Supreme Court has recognized that “[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or

required.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). “No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.” *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Accordingly, a “statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” *Fox Television*, 567 U.S. at 253 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). Thus, “[a] conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained ‘fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.’” *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

Assuming, *arguendo*, that the MBTA is ambiguous, the interpretation that limits its application to conduct specifically directed at birds is necessary to avoid potential constitutional concerns. As the Court has advised, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *cf. Natural Res. Defense Council v. U.S. Dep’t of the Interior*, 2020 WL 4605235 (S.D.N.Y. Aug. 11, 2020) (dismissing constitutional concerns, but on the basis that the relevant language is unambiguous). Here, an attempt to impose liability for acts that are not directed at migratory birds raises just such constitutional concerns.

The “scope of liability” under an interpretation of the MBTA that extends criminal liability to all persons who kill or take migratory birds incidental to another activity is “hard to overstate,” *CITGO*, 801 F.3d at 493, and “offers unlimited potential for criminal prosecutions.” *Brigham Oil*, 840 F. Supp. 2d at 1213. “The list of birds now protected as ‘migratory birds’ under the MBTA is a long one, including many of the most numerous and least endangered

species one can imagine.” *Mahler*, 927 F. Supp. at 1576. Currently, over 1,000 species of birds—including “all species native to the United States or its territories”—are protected by the MBTA. 78 FR 65,844, 65,845 (Nov. 1, 2013); *see also* 50 CFR 10.13 (list of protected migratory birds); Migratory Bird Permits; Programmatic Environmental Impact Statement, 80 FR 30032, 30033 (May 26, 2015) (“Of the 1,027 currently protected species, approximately 8% are either listed (in whole or in part) as threatened or endangered under the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*) and 25% are designated (in whole or in part) as Birds of Conservation Concern (BCC).”). Service analysis indicates that the top threats to birds are:

- Cats, which kill an estimated 2.4 billion birds per year;
- Collisions with building glass, which kill an estimated 599 million birds per year;
- Collisions with vehicles, which kill an estimated 214.5 million birds per year;
- Chemical poisoning (e.g., pesticides and other toxins), which kill an estimated 72 million birds per year;
- Collisions with electrical lines, which kill an estimated 25.5 million birds per year;
- Collisions with communications towers, which kill an estimated 6.6 million birds per year;
- Electrocutions, which kill an estimated 5.6 million birds per year;
- Oil pits, which kill an estimated 750 thousand birds per year; and
- Collisions with wind turbines, which kill an estimated 234 thousand birds per year.

U.S. Fish and Wildlife Service, Threats to Birds: Migratory Birds Mortality—Questions and Answers, available at <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php> (last updated September 14, 2018).

Interpreting the MBTA to apply strict criminal liability to any instance where a migratory bird is killed as a result of these threats would certainly be a clear and understandable rule. *See United States v. Apollo Energies, Inc.*, 611 F.3d 679, 689 (10th Cir. 2010) (concluding that under an incidental take interpretation, “[t]he actions criminalized by the MBTA may be legion, but

they are not vague”). However, it would also turn many Americans into potential criminals. *See Mahler*, 927 F. Supp. 1577–78 (listing a litany of scenarios where normal everyday actions could potentially and incidentally lead to the death of a single bird or breaking of an egg in a nest)). Such an interpretation could lead to absurd results, which are to be avoided. *See Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982) (“interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available”); *see also K Mart Corp. v. Cartier*, 486 U.S. 281, 324 n.2 (1988) (Scalia, J. concurring in part and dissenting in part) (“it is a venerable principle that a law will not be interpreted to produce absurd results.”).

These potentially absurd results are not ameliorated by limiting the definition of “incidental take” to “direct and foreseeable” harm as some courts have suggested. *See* U.S. FISH AND WILDLIFE SERVICE MANUAL, part 720, ch. 3, *Incidental Take Prohibited Under the Migratory Bird Treaty Act* (Jan. 11, 2017). The court in *Moon Lake* identified an “important and inherent limiting feature of the MBTA’s misdemeanor provision: to obtain a guilty verdict ..., the government must prove proximate causation.” *Moon Lake*, 45 F. Supp. 2d at 1085. Quoting Black’s Law Dictionary, the court defines proximate cause as “that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened, if the injury be one which might be *reasonably anticipated or foreseen as a natural consequence of the wrongful act.*” *Id.* (quoting BLACK’S LAW DICTIONARY 1225 (6th ed. 1990)) (emphasis in original). The Tenth Circuit in *Apollo Energies* took a similar approach, holding “the MBTA requires a defendant to proximately cause the statute’s violation for the statute to pass constitutional muster” and quoting from Black’s Law Dictionary to define “proximate cause.” *Apollo Energies*, 611 F.3d at 690.

Contrary to the suggestion of the courts in *Moon Lake* and *Apollo Energies* that principles of proximate causation can be read into the statute to define and limit the scope of incidental

take, the death of birds as a result of activities such as driving, flying, or maintaining buildings with large windows is a “direct,” “reasonably anticipated,” and “probable” consequence of those actions. As discussed above, collisions with buildings and cars are the second and third most common human-caused threat to birds, killing an estimated 599 million and 214.5 million birds per year, respectively. It is eminently foreseeable and probable that cars and windows will kill birds. Thus, limiting incidental take to direct and foreseeable results does little to prevent absurd outcomes.

To avoid these absurd results, the government has historically relied on prosecutorial discretion. *See* Ogden at 29 (“Historically, the limiting mechanism on the prosecution of incidental taking under the MBTA by non-federal persons has been the exercise of prosecutorial discretion by the FWS.”); *see generally* *FMC*, 572 F.2d at 905 (situations “such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings . . . properly can be left to the sound discretion of prosecutors and the courts”). Yet, the Supreme Court has declared “[i]t will not do to say that a prosecutor’s sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions.” *Baggett v. Bullitt*, 377 U.S. 360, 373 (1964); *see also* *Mahler*, 927 F. Supp. 1582 (“Such trust in prosecutorial discretion is not really an answer to the issue of statutory construction” in interpreting the MBTA.). For broad statutes that may be applied to seemingly minor or absurd situations, “[i]t is no answer to say that the statute would not be applied in such a case.” *Keyishian v. Bd. of Regents*, 385 U.S. 589, 599 (1967).

Recognizing the challenge posed by relying upon prosecutorial discretion, the *FMC* court sought to avoid absurd results by limiting its holding to “extrahazardous activities.” *FMC*, 572 F.2d at 907. The term “extrahazardous activities” is not found anywhere in the statute and is not defined by either the court or the Service. *See* *Mahler*, 927 F. Supp. at 1583 n.9 (noting that the *FMC* court’s “limiting principle . . . of strict liability for hazardous commercial activity . . . ha[s]

no apparent basis in the statute itself or in the prior history of the MBTA's application since its enactment"); *cf. United States v. Rollins*, 706 F. Supp. 742, 744–45 (D. Idaho 1989) ("The statute itself does not state that poisoning of migratory birds by pesticide constitutes a criminal violation. Such specificity would not have been difficult to draft into the statute"). Thus, it is unclear what activities are "extrahazardous." In *FMC*, the concept was applied to the manufacture of "toxic chemicals," *i.e.*, pesticides. But the court was silent as to how far this rule extends, even in the relatively narrow context of pesticides.

This type of uncertainty is problematic under the Supreme Court's due process jurisprudence. *See Rollins*, 706 F. Supp. at 745 (dismissing charges against a farmer who applied pesticides to his fields that killed a flock of geese, reasoning "[f]armers have a right to know what conduct of theirs is criminal, especially where that conduct consists of common farming practices carried on for many years in the community. While statutes do not have to be drafted with 'mathematical certainty,' they must be drafted with a 'reasonable degree of certainty.' The MBTA fails this test. ... Under the facts of this case, the MBTA does not give 'fair notice as to what constitutes illegal conduct' so that [the farmer] could 'conform his conduct to the requirements of the law.'" (internal citations omitted)).

While the MBTA does contemplate the issuance of permits authorizing the taking of wildlife, it requires such permits to be issued by "regulation." *See* 16 U.S.C. 703(a) ("Unless and except as permitted *by regulations* made as hereinafter provided" (emphasis added)). No regulations have been issued to create a permit scheme to authorize incidental take, so most potential violators have no formal mechanism to ensure that their actions comply with the law. There are voluntary Service guidelines issued for different industries that recommend best practices to avoid incidental take of protected birds; however, these guidelines provide only limited protection to potential violators and do not constitute a regulatory authorization or result in the issuance of permits.

In the absence of a permit issued pursuant to Departmental regulation, it is not clear that the Service has any authority under the MBTA to require minimizing or mitigating actions that balance the environmental harm from the taking of migratory birds with other societal goals, such as the production of wind or solar energy. Accordingly, the guidelines do not provide enforceable legal protections for people and businesses who abide by their terms. To wit, the guidelines themselves state, “it is not possible to absolve individuals or companies” from liability under the MBTA. Rather, the guidelines are explicit that the Service may only consider full compliance in exercising its discretion whether to refer an individual or company to the Department of Justice for prosecution. *See, e.g.*, U.S. FISH AND WILDLIFE SERVICE, LAND-BASED WIND ENERGY GUIDELINES 6 (Mar. 23, 2012).

Under this approach, it is literally impossible for individuals and companies to know exactly what is required of them under the law when otherwise-lawful activities necessarily result in accidental bird deaths. Even if they comply with everything requested of them by the Service, they may still be prosecuted, and still found guilty of criminal conduct. *See generally United States v. FMC Corp.*, 572 F.2d 902, 904 (2d Cir. 1978) (the court instructed the jury not to consider the company’s remediation efforts as a defense: “Therefore, under the law, good will and good intention and measures taken to prevent the killing of the birds are not a defense.”). In sum, due process “requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent ‘arbitrary and discriminatory enforcement.’” *Smith v. Goguen*, 415 U.S. 566, 572–73 (1974).

Reading the MBTA to capture incidental takings could potentially transform average Americans into criminals. The text, history, and purpose of the MBTA demonstrate instead that it is a law limited in relevant part to actions, such as hunting and poaching, that reduce migratory birds and their nests and eggs to human control by killing or capturing. Even assuming that the text could be subject to multiple interpretations, courts and agencies are to avoid interpreting ambiguous laws in ways that raise constitutional doubts if alternative interpretations are

available. Interpreting the MBTA to criminalize incidental takings raises potential due process concerns. Based upon the text, history, and purpose of the MBTA, and consistent with decisions in the Courts of Appeals for the Fifth, Eighth, and Ninth circuits, there is an alternative interpretation that avoids these concerns. Therefore, the Service concludes that the scope of the MBTA does not include incidental take.

Policy Analysis of Incidental Take Under the MBTA

As detailed above, the Service has determined that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to actions directed at migratory birds, their nests, or their eggs is compelled as a matter of law. In addition, even if such a conclusion is not legally compelled, the Service proposes to adopt it as a matter of policy.

The Service's approach to incidental take prior to 2017 was implemented without public input and has resulted in regulatory uncertainty and inconsistency. Prosecutions for incidental take occurred in the 1970s without any accompanying change in either the underlying statute or Service regulations. Accordingly, an interpretation with broad implications for the American public was implicitly adopted without public debate. Subsequently, the Service has sought to limit the potential reach of MBTA liability by pursuing enforcement proceedings only against persons who fail to take what the Service considers "reasonable" precautions against foreseeable risks.

Based upon the Service's analysis of manmade threats to migratory birds and the Service's own enforcement history, common activities such as owning and operating a power line, wind farm, or drilling operation pose an inherent risk of incidental take. An expansive reading of the MBTA that includes an incidental-take prohibition would subject those who engage in these common, and necessary, activities to criminal liability.

This approach effectively leaves otherwise lawful and often necessary businesses to take their chances and hope they avoid prosecution, not because their conduct is or even can be in strict compliance with the law, but because the government has chosen to forgo prosecution.

Otherwise-lawful economic activity should not be functionally dependent upon the *ad hoc* exercise of enforcement discretion.

Further, as a practical matter, inconsistency and uncertainty are built into the MBTA enforcement regime by virtue of a split between Federal Circuit Courts of Appeals. Courts have adopted different views on whether section 2 of the MBTA prohibits incidental take, and, if so, to what extent. Courts of Appeals in the Second and Tenth Circuits, as well as district courts in at least the Ninth and District of Columbia Circuits, have held that the MBTA criminalizes some instances of incidental take, generally with some form of limiting construction. *See United States v. FMC Corporation*, 572 F.2d 902 (2d Cir. 1978); *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal. 1978); *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161 (D.D.C. 2002), *vacated on other grounds sub nom. Ctr. for Biological Diversity v. England*, 2003 App. LEXIS 1110 (D.C. Cir. 2003). By contrast, Courts of Appeals in the Fifth, Eighth, and Ninth Circuits, as well as district courts in the Third and Seventh Circuits, have indicated that it does not. *See United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015); *Newton County Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991); *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559 (S.D. Ind. 1996); *Curry v. U.S. Forest Serv.*, 988 F. Supp. 541, 549 (W.D. Pa. 1997).

As a result of these cases, the Federal Government is clearly prohibited from enforcing an incidental take prohibition in the Fifth Circuit. In the Eighth Circuit, the Federal Government has previously sought to distinguish court of appeals rulings limiting the scope of the MBTA to the habitat-destruction context. *See generally Apollo Energies*, 611 F.3d at 686 (distinguishing the Eighth Circuit decision in *Newton County* on the grounds that it involved logging that modified a bird's habitat in some way). However, that argument was rejected by a subsequent district court. *See United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202 (D.N.D. 2012). Likewise, the Federal Government has sought to distinguish holdings in the habitat-

destruction context in the Ninth Circuit. *See United States v. Moon Lake Electrical Ass'n*, 45 F. Supp. 2d 1070, 1075-76 (D. Colo. 1999) (suggesting that the Ninth Circuit's ruling in *Seattle Audubon* may be limited to habitat modification or destruction). In the Second and Tenth Circuits, the Federal Government can apply the MBTA to incidental take, albeit with differing judicial limitations.

These cases demonstrate the potential for a convoluted patchwork of legal standards; all purporting to apply the same underlying law. The MBTA is a national law. Many of the companies and projects that face potential liability under the MBTA operate across boundary lines for judicial circuits. Yet what is legal in the Fifth and Eighth Circuits may become illegal as soon as an operator crosses State lines into the bordering Tenth Circuit or become a matter of uncertainty in the Ninth Circuit. The Service concludes that it is in its own interest, as well as that of the public, to have and apply a national standard that sets a clear, articulable rule for when an operator crosses the line into criminality. The most effective way to reduce uncertainty and have a truly national standard is for the Service to codify and apply a uniform interpretation of the MBTA that its prohibitions do not apply to incidental take, based upon the Fifth Circuit's ruling in *CITGO Petroleum Corporation*.

Therefore, as a matter of both law and policy, the Service adopts a regulation limiting the scope of the MBTA to actions that are directed at migratory birds, their nests, or their eggs, and clarifying that injury to or mortality of migratory birds that results from, but is not the purpose of, an action (i.e., incidental taking or killing) is not prohibited by the Migratory Bird Treaty Act.

Public Comments

On February 3, 2020, the Service published in the *Federal Register* (85 FR 5915) a proposed rule to define the scope of the MBTA as it applies to conduct resulting in the injury or death of migratory birds protected by the Act. We solicited public comments on the proposed rule for 45 days, ending on March 19, 2020. We received 8,398 comments. Many comments included additional attachments (e.g., scanned letters, photographs, and supporting documents).

These comments represented the views of multiple State and local government agencies, private industries, non-governmental organizations (NGOs), and private citizens. In addition to the individual comments received, 10 organizations submitted attachments representing individuals' comments, form letters, and signatories to petition-like letters representing almost 180,000 signers. The following text presents the substantive comments we received and responses to them.

Comment: Multiple commenters noted that Congress has amended the MBTA in multiple instances (i.e., narrowing scope of strict liability, adding knowledge requirement to felony violation, narrowly exempting certain activities from incidental take, etc.). The commenters noted that Congress could have clarified any objection to the enforcement of incidental take but did not. The commenters suggested that these later congressional interpretations should be given great weight and that failure to include incidental take within the scope of the statute would virtually nullify these amendments. Congress specifically demonstrated its familiarity with the development of take liability in 1998 when it tackled the “unfairness” of strict liability in baiting cases. Rather than strict liability, the MBTA would apply a negligence standard to hunters who used fields with loose grain. In making this change, the Senate Report noted that the amendment was “not intended in any way to reflect upon the general application of strict liability under the MBTA.”

Response: The operative language originally enacted in section 2 of the MBTA has not substantively changed since 1936. The 1936 amendment modified the language to clarify its meaning and application, but there is no indication those changes were intended to broaden the scope of the statute beyond actions directed at migratory birds. The subsequent amendments have instead fine-tuned the *mens rea* required for violations directed at migratory birds, including commercial use, hunting, and baiting. Interpreting the statute to reach only actions directed at migratory birds would not nullify these amendments. The 1960 amendment was enacted prior to the initial prosecutions for take by industrial activities at a time when Congress

had no reason to believe the MBTA could potentially reach beyond hunting and commercial use of birds. The 1988 amendment was, as noted, simply a reaction to a court decision that added a negligence standard for baiting violations. As noted in the M-Opinion, nothing in the referenced amendments disturbs Congress's original intent that section 2 apply only to actions directed at migratory birds. Moreover, the views of one Congress regarding the construction of a statute adopted many years before by another Congress are typically given little to no weight, particularly where, as here, the amendments did not disturb the operative language governing the scope of that statute.

Comment: Several commenters concluded that the Department of Defense Authorization Act for Fiscal Year 2003 demonstrates that Congress intended the MBTA to prohibit incidental take of migratory birds because it directed FWS and the Department of Defense to develop a regulation authorizing incidental take of migratory birds during military readiness activities. Congress enacted the relevant provision in the wake of a case in which the court enjoined specific U.S. Navy live-fire training exercises that incidentally killed migratory birds. The commenters reasoned that Congress could have directed the Service to issue MBTA regulations that achieved the same result as this rulemaking action by limiting the MBTA to direct actions against migratory birds. Alternatively, Congress could have amended the MBTA itself to clarify that it did not apply to incidental takes and kills. However, Congress did not do either of those things; instead, it temporarily exempted incidental taking caused by military-readiness activities from the MBTA prohibition and directed the Service to issue MBTA regulations to create a permanent authorization for military-readiness activities. Thus, Congress spoke clearly to the matter of whether the MBTA scope includes incidental takes and kills.

Response: As explained by the Fifth Circuit in the *CITGO* case, the 2003 Authorization Act does not require the conclusion that Congress interpreted the MBTA to apply broadly to incidental take. Congress was simply acting to preempt application of a judicial decision that specifically and immediately restricted military-readiness activities. Imputing Congressional

intent beyond the plain text of a narrow appropriation provision is not warranted. We do not interpret that action as Congress clearly speaking to the broad issue of the overall scope of the statute as it applies to incidental take. Congress may simply have chosen to address a discrete problem without any intent to interpret more broadly the MBTA outside of that particular context. In any event, the views of the 2003 Congress in a rider to an appropriation act that did not even explicitly amend any of the MBTA's language have little if any significance to interpreting the MBTA.

Comment: The proposed rule contained no information on the consequences of the action on migratory birds and the environment as a whole (through decreased ecosystem services). The commenter went on to note that there is no evidence presented as to the economic burden for implementing voluntary best management practices.

Response: Per the National Environmental Policy Act (NEPA), the Service analyzed the impacts mentioned by the commenter within the draft Environmental Impact Statement (EIS) published June 5, 2020. Within the EIS, the Service analyzed impacts of the no action alternative and two additional alternatives on (1) The overall effect of each alternative on migratory bird populations, (2) the effect of any decrease in migratory bird populations on ecosystem services, (3) the potential effects of climate change in combination of each alternative, and (4) the impacts to industry and small business that may profit from migratory birds. The Service also asked for and provided discussion on what extent industry would continue to implement best practices when there is no incentive to do so. This EIS was open for public comments, and comments focused on these analyses are addressed within the final EIS. We have added additional discussion in the final EIS and Regulatory Impact Analysis regarding the types of practices and types of costs associated with best practices.

Comment: Multiple commenters noted that the process being used for this rulemaking is unconventional. The commenters noted that the proposed rule was published with a notice of intent to prepare an EIS but without any concurrent environmental analysis of alternatives. This

approach compromised the ability of commenters reviewing the proposed rule to understand fully the effects of the rule. Further, the subsequent publication and comment period on the draft EIS was after-the-fact, indicating a decision was already made regardless of the environmental consequences determined in the EIS. In addition, commenters noted that the 45-day comment period was inadequate for a rule that proposes to substantially change decades of conservation policy and hinder bird conservation in the United States, given the current National State of Emergency in response to the novel Covid-19 coronavirus. Many of these commenters requested an extended comment period.

Response: The procedures followed in this rulemaking process were appropriate and lawful. A draft EIS, issued subsequent to the proposed rule, analyzed various alternatives, some of which were discussed in the public webinars conducted as part of the NEPA scoping process. One alternative in the draft EIS covers the expected effects of reverting to the Department's prior interpretation of the statute. There is no requirement under the Administrative Procedure Act (APA) to consider alternatives in the proposed rule itself (Executive Order 12,866 requires consideration of alternatives that would have less economic impact on regulated entities for economically significant rulemakings, as set forth in the regulatory impact analysis made available for review with the proposed rule). The NEPA process provides a broad analysis of the environmental and socioeconomic impacts of reasonable alternatives to the agency's proposal. The 45-day period for commenting on the proposed rule and NEPA scoping process, along with the subsequent 45-day comment period for the draft EIS, provided sufficient time for the public to address this rulemaking. Moreover, the M-Opinion, which provided the original basis for this rulemaking, has been publicly available for more than 2 years.

Comment: Members of the U.S. Senate commented that the Department closed the comment period on the proposed rule in mid-March during the height of a pandemic, ignoring requests from some in Congress to extend the comment deadline, and without even responding to Congress until after the deadline ended. Since then, some of the Nation's governors, State

legislatures, and mayors jointly requested a suspension of public comment periods during this national emergency. The Department should not be putting additional burdens on the public to respond at a time when the public is dealing with a global pandemic. The Department appears to be rushing through this entire process to meet an arbitrary timeline. At the very least, the Department should not be providing the minimum comment period. Rather, it should extend that comment period by 45 days or more.

Response: The procedures followed in this rulemaking process were appropriate and lawful. The Department provided 45-day comment periods on both the NEPA scoping process and the draft EIS and a separate 45-day comment period on the proposed rule. These three separate 45-day periods provided sufficient time for the public to address this rulemaking. Moreover, the M-Opinion, which provided the original basis for this rulemaking, has been publicly available for more than 2 years.

Comment: Multiple commenters noted that NEPA requires that decisions be analyzed in a public process before an agency irretrievably commits its resources. Specifically, an agency “shall commence preparation of an [EIS] as close as possible to the time the agency is developing or is presented with a proposal.” The DOI should suspend M-Opinion 37050 while the Service considers the environmental impacts as required by NEPA.

Response: The Service began the NEPA process at the appropriate time—when it first considered rulemaking regarding the interpretation of the MBTA originally set forth in M-37050. The Service drafted the proposed rule with sufficient flexibility to incorporate the alternatives analyzed in the draft EIS. The NEPA process informed our decision-making process culminating in this final rule.

Comment: The Flyway Councils noted that the proposed rule was brought forth without the proper procedures as outlined by NEPA and the APA. The Flyways noted that there was no advance notice of rulemaking to assess the implications of the proposed rule. In addition, the

Flyways noted that no alternatives were put forth and there was no opportunity to propose other alternatives.

Response: The Service announced the scoping process in a notice of intent (NOI) to complete an EIS in the *Federal Register* on February 3, 2020 (85 FR 5913). An advanced notice of proposed rulemaking is not required. The Service has provided three opportunities to submit comments through the scoping notice, the proposed rulemaking, and the publication of the draft EIS.

Comment: One State expressed concern with the Service's attempt to alter its previous interpretation of the MBTA (M-37041) in the absence of review pursuant to NEPA. Therefore, the State requested that the short- and long-term impacts of the proposed rule change be fully and accurately evaluated in the EIS, and that there be at least a 60-day comment period after the draft EIS is published in order to facilitate a thorough public review. In the Service's evaluation of those impacts, it is critical to compare the proposed rule's impacts with the prior interpretation of the MBTA represented in M-37041, which concluded that the MBTA prohibits incidental take.

Response: The Service has fulfilled the commenter's request through the publication of a draft EIS, which analyzed a no action alternative and two action alternatives. One of the alternatives reverts to the prior interpretation of the MBTA described in Solicitor's Opinion M-37041. In the draft EIS, we compared the impacts of codifying M-37050 with returning to the prior Opinion's interpretation. We established 45 days as an appropriate period for public comment on the draft EIS. We concluded a 45-day comment period was reasonable given the prior opportunity to comment on the scoping notice published on February 3, 2020 (85 FR 5913), and during the associated public hearings, which invited input on the environmental effects of the proposed action and the potential alternatives we should consider.

Comment: Multiple commenters were concerned about the unorthodox approach of simultaneously publishing a draft rule and a NEPA scoping announcement and seeking comments on both at the same time. The commenters felt this approach strongly suggests that the

Service had already reached a conclusion about the outcome of this process and that the NEPA process is nothing more than a formality. Under the normal NEPA EIS process, Federal agencies would conduct scoping of an issue, develop multiple action alternatives, put those alternatives out for public notice and comment, and ultimately select an alternative to advance. In this case, the Service appears at the scoping phase to have already selected the outcome it intended to reach.

Response: The Service began the NEPA process at the appropriate time—when it first considered rulemaking regarding the interpretation of the MBTA originally set forth in M-37050. The Service drafted the proposed rule with sufficient flexibility to incorporate the alternatives analyzed in the draft EIS. The NEPA process informed our decision-making process culminating in this final rule.

Comment: The Service cannot conduct a credible NEPA process based on the timeline and chronology it has presented at this point. Completing the entire NEPA process and reaching a final record of decision (ROD) and final rule by fall of 2020 is an extraordinarily short timeline of less than 10 months to proceed from initial scoping to final rule. It is difficult to imagine any scenario under which the Federal agencies could review and give serious consideration to the comments it will receive on this proposed rule, let alone incorporate them into a final EIS, ROD, and final rule.

Response: The Service has complied with the procedural requirements of NEPA for developing an EIS by publishing a scoping notice and a draft EIS inviting public comment before developing a final EIS and record of decision. The Service provided alternatives to the proposed action and has not predetermined any outcome of the NEPA process. The Service will take a reasonable amount of time to address and incorporate comments as necessary, deliberate on a final determination, and select an alternative presented in the final EIS. We will explain that selection in a record of decision at the appropriate time.

Comment: Multiple commenters felt the manner in which this proposed rulemaking was announced on January 30, 2020, by the Service's Office of Public Affairs was improper and a violation of the APA (Public Law 79-404, 60 Stat. 237). They asserted that the inclusion of 28 statements of support for this proposed rule within the rulemaking announcement establishes a record of pre-decisional collusion with certain interest groups by a regulatory agency that has tainted the entire rulemaking process and clouded the ultimate decision the Service will be called upon to make, once the comment period closes and all public testimony is fairly and impartially evaluated.

Response: The Service did not collude with any stakeholders, industry or otherwise, on the contents of the proposed rule before it was published in the *Federal Register*. No organizations or persons outside of the Federal Government were given an advance copy of the proposed rule to read before it was published in the *Federal Register*. Interagency review limited to Federal agencies occurred prior to issuance of the proposed rule under procedures required by Executive Order 12,866 and implemented by the Office of Management and Budget. The announcement of the proposed rule was primarily a notification to the public and the media summarizing the contents of the proposed rule and its availability for public comment, with the viewpoints of several stakeholders included. It is not part of the official APA rulemaking process or docket and plays no part in the agency's ultimate decision. The announcement was not considered in developing this final rule.

Comment: If the press release accepted quotes from industry and government entities, it should also have included quotes and perspectives from environmental NGOs or ornithologists to comply with APA fairness rules.

Response: The referenced section was contained in a press release issued with the publication of the proposed rule. It is not part of the rulemaking record, and we did not consider the statements included in the press release as official public comments. The Service received many responses during the public comment period for the proposed rule from migratory bird

experts and interested non-governmental organizations. We analyzed those comments, responded to any substantive issues presented, and amended the proposed rule where appropriate based on those comments.

Comment: Multiple commenters noted that the codification of the Solicitor’s M-Opinion 37050 is premature as it has not been fully vetted or withstood legal challenges. These commenters recommended that the Service postpone any rulemaking regarding MBTA prohibitions of incidental take until the legal challenges to the M-Opinion currently pending in the United States District Court for the Southern District of New York are resolved. Given the uncertain future of M-Opinion 37050 and accompanying legal vulnerability of the proposed rule, it would be prudent for the Service to put the proposed rulemaking on hold until the courts have determined whether the M-Opinion on which it is based withstands legal scrutiny.

Response: There is no statutory or other legal requirement to wait for a Departmental legal opinion or any other agency opinion to be vetted in Federal court before it can be codified as a regulation. In fact, agencies may codify interpretations struck down by courts and have subsequent courts defer to and uphold the later rulemaking. *See Natl. Cable & Telecommunications Ass’n v. Brand X Internet Svcs.*, 545 U.S. 967 (2005). We note that on August 11, 2020, a district court vacated M-37050 and held that the plain language of the MBTA prohibits incidental take. *See Natural Res. Defense Council v. U.S. Dep’t of the Interior*, 2020 WL 4605235 (S.D.N.Y.). We respectfully disagree with that court’s opinion and have finalized this rulemaking consistent with the Supreme Court’s holding in *Brand X*.

Comment: The proposed rule incorrectly concludes that the terms “kill” and “take” are ambiguous. Even if the terms were ambiguous, the proposed rule’s attempt to meld all the prohibited conduct into a singular meaning is unsupported by any canon of statutory interpretation. The Service proposes that “kill” and “take” exclude unintentional actions as they are listed among directed actions such as “hunt” or “pursue.” Yet this construction renders the list meaningless, working contrary to established norms of interpretation—if “kill” were limited

to “hunt” and “pursue,” then there would be no need to include “hunt” and “pursue” on the list. The statutory context of the MBTA would make little sense if it merely prohibited directed action such as hunting because its purpose extends beyond conserving game birds. Its provisions protect non-game and insectivorous birds that are not—and have never been—intentionally pursued for game, poaching, or trafficking.

Response: We disagree with the commenter's interpretation of the MBTA. The preamble to the proposed rule and this final rule provides a detailed analysis of the language of the statute and why the scope of the MBTA does not include incidental take, including the best reading of the ambiguous terms “take” and “kill.” We refer the commenter to that analysis, which provides the basis for issuing this regulation.

Comment: The plain language of this statute pertains to conduct directed at species, and nowhere in the operative language does the law suggest an intent on the part of Congress to impose criminal liability for the incidental effects of otherwise lawful activities. The scope of prohibited conduct covers actions, which require intent— “pursue,” “hunt,” and “capture” are all actions directed at wildlife and cannot be performed by accident. The terms “take” and “kill” are informed by the context of the rest of the statute in which they must be read, and by the legislative and historical record of the MBTA and other environmental laws.

Response: We agree with the comment that the language of section 2 of the MBTA pertains to conduct directed at migratory birds and not conduct that incidentally results in the death of migratory birds.

Comment: The original legislative intent of the MBTA was the protection and sustainability of migratory bird populations. The word “protection” occurs in its first sentence. There has been no express delegation of law-making duties or authority to amend the MBTA. The MBTA’s legislative intent is to prevent needless losses, establish closed seasons for hunting, prohibit the taking of nests or eggs of migratory game or insectivorous nongame birds except for scientific or propagating purposes, further establish longer closures for certain species, and

provide for the issuance of permits to address the killing of specified birds. Despite the phrase “incidental take” not appearing in either the MBTA or implementing regulations, its protective statutory intent remains clear, as shown by its common and long-time use in Congressional hearings and correspondence, and in inter- and intra-agency communications. Since its intent has not been amended by an act of Congress, the agency charged by Congress with its administration does not have the authority to restrict its meaning and intent.

Response: This rulemaking is based on the Department’s interpretation of ambiguous language in a statute the Secretary is charged with implementing and does not amend the language of the MBTA. It does not require any delegation from Congress other than the delegations to the Secretary already included in the terms of the statute. The Service disagrees that this rulemaking restricts the meaning and intent of the MBTA. The preamble to this rule explains our interpretation of the MBTA’s statutory language and legislative history and why the interpretation set forth by this rule is consistent with and the best reading of that language and history. Thus, we disagree with the commenter’s assertion that this rule restricts or alters the meaning or intent of the MBTA.

Comment: Although the MBTA was written in large part to address the then-largest threat to migratory birds—hunters and poachers—the proposed rule offers no evidence to show its passage was intended to regulate only the activities that threatened birds in 1918. With “effective protection,” the drafters wanted to be able to revive and sustain completely decimated populations on behalf of the Americans who recognized aesthetic, economic, and recreational value in sustaining migratory bird populations. To impose a limit on the activities it could regulate under the MBTA would be to ossify this broadly written protection into only applying to activities that existed during the decade immediately following its passage. An intention found nowhere in its text, legislative history, or subsequent interpretation and implementation.

Response: Congress’s primary concern when enacting the MBTA in 1918 was hunting, poaching, and commercial overexploitation of migratory birds. It is clear from the legislative

history leading up to the statute's passage that Congress drafted language to address those threats. To be sure, Congress may draft statutory language to include potential future concerns not readily predicted at the time of enactment, but there is no indication that Congress intended the language of section 2 to encompass accidental or incidental deaths of migratory birds. Instead, the balance of the legislative history favors the opposite interpretation as explained in the preamble.

Comment: A letter from some members of the U.S. Senate stated that the stakes of the proposed rule are considerable, and like the legal opinion, it will have a significant detrimental impact on migratory birds. This letter explained that birds provide tremendous value to our communities. Congress and the executive branch understood this fact a century ago when it signed the 1916 treaty and passed the MBTA, even in the midst of World War I. Congress also recognized that birds benefit American agriculture and forestry through the consumption of vast numbers of insect pests. This fact remains true today and takes on new importance with the spread of invasive species and outbreaks. The proposed rule contravenes the text and purpose of the MBTA and fails to align with the purpose of our migratory bird treaties and our international obligations. The rule also presents a false choice between regulatory certainty and implementing the MBTA.

Response: This rulemaking does not present a false choice between regulatory certainty and implementing the MBTA. M-37050 concluded that the MBTA does not prohibit incidental take. This rulemaking codifies that interpretation; thus, the Service has ultimately determined that developing a framework to authorize incidental take is not an action that is consistent with the statute. The Service notes that a Federal regulation applies across all agencies of the Federal Government and provides a more permanent standard that the public and regulated entities can rely on for the foreseeable future, in contrast to continued implementation of the MBTA under a legal opinion. This difference is underscored by the recent Federal district court decision

vacating the M-Opinion. The final EIS and Regulatory Impact Analysis analyze the ecosystem services, such as insect consumption, provided by migratory birds.

Comment: Multiple commenters presented arguments that the Service has misquoted the provisions of the MBTA and that the proposal does not address the statutory authority in section 3 to authorize take of migratory birds that would otherwise violate the statute, which the commenters contend is the source of the Secretary's authority to implement the statute.

Response: This proposal does not authorize the taking of migratory birds; it defines the scope for when authorizations under section 2 are necessary and proper. Thus, it does not rely on the statutory language presented by the commenter. The authority to implement a statute necessarily comes with it the authority either to interpret ambiguous language in that statute or to correct a prior improper interpretation of that statute. The authority in section 3 is also contingent on an understanding of what actions violate the statute in the first place.

Comment: Several commenters suggested that the proposed rule paints a broad brush over incidental takes, treating all equally and absolving even grossly negligent behavior that can result in the large-scale death of birds. The commenters suggested that the Service modify the proposed rule to include a provision where incidental take resulting from reckless negligent behavior is considered a violation (i.e., gross negligence). This approach would include creating a definition of "extra-hazardous activities" and enforcing incidental take when it results from gross negligence. The commenters conclude that the Service should focus enforcement of incidental take on large-scale, high-mortality, and predictable situations where unintentional loss of migratory birds is likely to occur, based on the best scientific information. The language of the act needs to be changed to protect those who injure birds on a purely accidental basis. However, there needs to be language that allows for the prosecution of individuals who are grossly negligent.

Response: During scoping for the associated EIS, we considered an alternative where the Service would promulgate a regulation defining what constitutes incidental take of migratory

birds and develop an enforcement policy requiring gross negligence to establish a misdemeanor violation of the MBTA. The Service eliminated this alternative from further review because the vast majority of Federal courts have concluded the MBTA's misdemeanor provision is a strict liability crime—in other words, it has no minimum *mens rea* requirement. Because the proposed alternative would have established a minimum *mens rea* of gross negligence before the Service could enforce the statute's misdemeanor provision, it would not be legally defensible. Thus, codifying the Service's interpretation of the scope of the MBTA under a gross negligence standard would only serve to reduce legal certainty.

Comment: One commenter recommended that the Service prohibit incidental take that results from an extra-hazardous activity. The commenter felt that providing such a take threshold would allow the Service to address incidental take that occurs because of an entity's negligence.

Response: The proposed rule did not provide a threshold for prohibiting incidental take because it proposed to codify the interpretation set forth in M-37050 that the Act does not prohibit incidental take in the first place. The commenter is essentially proposing adopting an extra-hazardous activity requirement as a proxy for negligence or gross negligence. We decline to adopt that proposal for the same reasons we rejected application of a gross-negligence standard.

Comment: One commenter recommended following a Safe Harbor approach for industry that participates in avoidance, minimization, and mitigation measures.

Response: This approach would be very similar to establishing a policy to decline enforcement except in cases of gross negligence. We decline to adopt this proposal for the same reasons we rejected application of a gross-negligence standard.

Comment: Multiple commenters felt that the MBTA needed to be amended by Congress to make the changes being proposed in this regulation.

Response: The commenters are correct that only Congress can amend the language of the MBTA. The Service is charged with implementing the statute as written. The Department's

Principal Deputy Solicitor, exercising the authority of the Solicitor pursuant to Secretary's Order 3345, determined in M-37050 that the statute as written does not prohibit incidental take. We are codifying that interpretation in this rulemaking. Thus, we are simply interpreting the existing language and not amending the statute or altering statutory language in this regulation.

Comment: One commenter suggested amending the proposed regulatory language by adding: "provided that the person, association, partnership, or corporation takes reasonably practicable precautionary measures to prevent the taking or killing of migratory birds. Owing to the diversity in operations of the various industries affected by this rule, USFW shall develop industry specific guidelines for developing precautionary measures to prevent the taking or killing of migratory birds."

Response: The language proposed by the commenter is not consistent with our interpretation of the MBTA. The proposal would essentially be adding language to the MBTA given our interpretation that it does not prohibit incidental take. We have no authority to amend the statutory language or add provisions that simply are not there. Thus, we respectfully decline to adopt the commenter's proposed language.

Comment: Multiple commenters opposed the proposed action because recent studies have demonstrated that North American bird populations are facing significant population declines. Birds have economic and ecosystem services value, and, if birds continue to decline, the economy and ecosystems will be compromised. The commenters called for more protections and see the proposed rule as weakening actions for the conservation of migratory birds.

Response: The Service is aware of the recent science that demonstrates that North America has lost nearly 3 billion birds over the last 50 years. However, the proposed action is based on a legal interpretation of the MBTA. It is also noteworthy that those losses occurred despite the Department's prior interpretation of the MBTA as prohibiting incidental take. The Service is a conservation organization and will continue to address bird-conservation priorities in a manner that provides for the most effective conservation of protected species, such as working

with domestic and international partners to conserve habitat and habitat connectivity, addressing threats both anthropogenic and natural, developing partnerships with Federal, State, and Tribal agencies, industry and NGOs that address the greatest conservation needs, and effectively implementing the array of Federal statutes that provide protections for migratory birds. For example, the Service will continue to work with any partner that is interested in reducing their impacts on birds by developing voluntary practices to reduce mortality and providing technical assistance for effectively implementing those practices.

Comment: Multiple commenters opposed the proposed rule because it removes the MBTA as the only mechanism that the Service can apply to require actions that avoid or minimize incidental take that is otherwise preventable.

Response: The Service does not agree that the MBTA is the only mechanism to achieve bird conservation. The Service is committed to working with those that voluntarily seek to reduce their project-related impacts to migratory birds. In addition to the MBTA, other Federal and State laws protect birds and require specific actions to reduce project-related impacts.

Comment: Multiple commenters opposed the proposed rule because, as written, the rule does not hold entities accountable for causing the incidental take of migratory birds.

Response: Our interpretation set forth in the proposed rule is that take incidental to the purpose of the action is not prohibited under the MBTA. We will not hold entities accountable for take that does not violate the MBTA. The Service will continue to manage and enforce the provisions of the MBTA as they relate to activities directed at migratory birds, including ensuring those holding take permits are accountable for complying with these permits.

Comment: Some commenters suggested that the interpretation of the MBTA set forth in the proposed rule is flawed and does not account for the mission of the Department and the Service.

Response: The enforcement of the MBTA is just one part of how the Service works with others to conserve migratory birds. We have found that building partnerships domestically and

internationally to build strategies for implementing measures that protect, manage, and conserve migratory birds is a more effective conservation tool than enforcing incidental take under the MBTA on a piecemeal basis with our limited law enforcement resources. A few examples of our partnership work include: (1) managing and implementing grant programs under the Neotropical Migratory Bird Conservation Act and North American Wetlands Conservation Act, (2) using Joint Ventures to build regional partnerships for habitat and species conservation, and (3) working with other Federal, State, and industry partners to develop voluntary solutions for reducing impacts to migratory birds and their habitat.

Comment: Multiple commenters supported the proposed action because a clarification of the scope of the MBTA was needed to avoid unnecessary regulation of industry projects.

Response: The Service appreciates the perspective of the entities that support this rulemaking.

Comment: Multiple commenters supported the proposal because, in their view, criminalizing incidental take does not advance conservation and other mechanisms could be used to protect birds.

Response: The Service agrees with this comment. We will continue to work with any entity that seeks to reduce their impacts to migratory birds to achieve conservation outcomes.

Comment: One commenter asked who would be financially responsible to mitigate and/or reverse the effects of an environmental disaster on a large or small scale, to prevent any further incidental takes of birds or their eggs once the disaster is under way. The commenter noted that under the prior interpretation of the MBTA, the party causing the disaster was clearly held liable and financially responsible. Under the new interpretation, this is no longer the case. The commenter asked whether the Service will be establishing a fund to step in for cleanup and incidental take mitigation when environmental mishaps occur. If not, where does the Service anticipate such needed funds will originate?

Response: The proposed rule does not directly affect Natural Resource Damage assessments for accidents that have environmental impacts because statutory authorities that provide the basis for that program do not rely on the MBTA. Pursuant to the Comprehensive Environmental Response Compensation and Liability Act, the Oil Pollution Act, and the Clean Water Act, the Department is authorized to assess injury to natural resources caused by releases of hazardous substances and discharges of oil to compensate the public for lost natural resources and their services. The Department's assessment of natural resource injuries under the Natural Resource Damage Assessment Program includes any injury to migratory birds, which in many cases could otherwise be classified as incidental take.

Comment: One commenter asked whether any best management practices would be required under any circumstances and how the proposed rule affected both Executive Order 13186: Responsibilities of Federal Agencies to Protect Migratory Birds and the implementation of the Land-based Wind Energy Guidelines.

Response: Best management practices (BMPs) have never been required under the MBTA, other than as part of our occasional application of the special purpose permit provision to authorize incidental take under certain circumstances, as there has never been a specific permit provision for authorizing incidental take that would require their implementation. The Service has worked with project proponents to encourage the voluntary use of BMPs and used enforcement discretion to determine when an enforcement action was appropriate. Under the proposed rule, the Service will continue to work with and encourage the voluntary implementation of BMPs when the entity seeks to reduce their project-related impacts. E.O. 13186 remains in place and is a valuable tool for Federal agencies to work cooperatively to implement bird conservation strategies within their agency missions. The Land-based Wind Energy Guidelines are a voluntary approach to siting wind-energy facilities. This rule may reduce the incentive for affected parties to implement these guidelines.

Comment: Several commenters stated that some estimates of bird mortality used in the rule are more than a decade old and out of date. In one of the comments, they referenced that the proposed rule cites 500,000 to 1,000,000 deaths per year at oil pits as old and high, suggesting that new technological innovation and State regulations have caused a decrease in oil pit mortality.

Response: The summary of mortality from anthropogenic sources was based on the best scientific information currently available. Often, monitoring of industrial projects is not conducted, and when it is, the Service rarely gets reports of the findings. The Service recognizes that these estimates may represent both over- and under-estimates depending on the mortality source. Within our environmental analysis of this rulemaking conducted under NEPA, we acknowledge that other Federal or State regulations may require measures that reduce incidental take of birds. In the proposed rule and the NEPA notice of intent, and during the public scoping webinars, the Service requested that new information and data be provided to update our current information on sources and associated magnitude of incidental take. The Service did not receive any industry-related information for further consideration. If an industry sector has new or different information, we encourage them to submit those data to the Service for review and consideration.

Comment: A few commenters stated that the Department of the Interior's reinterpretation of the MBTA removed a broad layer of protection to birds against industrial harms and requested that the Service explain in the preamble how such action compounds or alleviates the findings of certain reports and other available science and biological data—including but not limited to data from Partners in Flight, the State of the Birds report, Christmas Bird Counts, Breeding Bird Surveys, and project-level nesting and demographic information that the Service has on file.

Response: The Service acknowledges that birds are currently in decline. Numerous technical reports including the 2019 Science paper have highlighted the declines in many habitat groups due to numerous anthropogenic sources (see page 26). However, this rulemaking is not

expected to affect significantly those continuing declines. The Service will continue to work with partners to address migratory bird declines outside of a regulatory context.

Comment: One commenter in support of the proposed rule noted that there are other statutes that protect birds, including NEPA; industry would still have to comply with some of these laws and thus birds would benefit. There are also State and local laws that would prevent the unnecessary killing of birds.

Response: The Service recognizes that there are numerous reasons why an entity would continue to implement best practices, including other Federal or State laws, industry standard practices, public perception, etc. These mechanisms could reduce impacts to birds in some circumstances. We note, however, that NEPA does not provide substantive environmental protections by itself.

Comment: Multiple commenters recommended the Service clarify how the Service will continue to collect project-level data on industrial impacts to birds. There is concern from the commenters that the impact of this proposed rule will be a long-term loss of data and oversight of industrial impacts to avian species.

Response: Project-level information is still recorded when a project proponent engages the Service for technical assistance. It is not required for projects to submit data on incidental take; however, we encourage proponents voluntarily to submit these data so that we are able to track bird mortality. We note that even under the prior interpretation of the MBTA, there was no general mechanism to provide for the collection of project-level data on impacts to avian species. When an intentional take permit is issued, conditions of that permit request any information on incidental mortalities that are discovered. The Service will continue to work to develop partnerships with industry sectors to monitor incidental mortality and the stressors causing this mortality, as well as to develop voluntary best practices that industry sectors can implement when they seek to reduce their project-level impacts on the environment.

Comment: One commenter focused on impacts of wind energy and suggested that the final rule should provide language that terminates wind-energy projects where the migratory bird mortality levels are not remediable. The commenter suggested that, without such thresholds, the MBTA will be rendered meaningless.

Response: Our interpretation of the MBTA concludes that the statute does not prohibit incidental take, including any resulting from wind-energy facilities. However, the Service will continue to work with any industry or entity that is interested in voluntarily reducing their impacts on migratory birds to identify best practices that could reduce impacts. With respect to the wind industry, the Service will continue to encourage developers to follow our Land-based Wind Energy Guidance developed through the collaboration of many different stakeholders, including industrial and environmental interests.

Comment: Multiple commenters recommended that the Service abandon the current proposed action and revert to the previous M-Opinion and the 2015 MBTA proposal for developing and implementing a general permit program that works with industry to identify best practices to avoid or minimize avian mortality. The commenters noted that a well-designed general permit system will also create efficiencies for industry by removing regulatory uncertainty for developers and investors. Permit holders would have no risk of prosecution provided they comply with the terms of the permit. Further, it will discourage actors who fail to avoid, minimize, or mitigate for the impacts of their activities from gaming the system and taking advantage of the Service's limited prosecutorial resources.

Response: In the draft EIS, we considered an alternative under which the Service would promulgate a regulation defining what constitutes incidental take of migratory birds and subsequently establish a regulatory general-permit framework. The Service eliminated that alternative from further consideration because developing a general-permit system would be a complex process and better suited to analysis in a separate, subsequent proposal. Thus, we did not consider developing a general permit program as suggested by the commenters.

Comment: One commenter recommended imposing stricter regulations along main migratory routes where high concentrations of MBTA species are biologically vulnerable (including stopover areas along migration routes, and core breeding/wintering areas), especially for threatened or endangered species or Species of Conservation Concern.

Response: Given our interpretation of the MBTA, the commenter's proposal is not a viable option. This final rule defines the scope of the MBTA to exclude incidental take, thus incidental take that occurs anywhere within the United States and its territories is not an enforceable violation. This rule does not affect the prohibitions under the ESA, and thus species listed under that statute would continue to be covered by all the protections accorded listed species under the ESA. The status of migratory bird populations in the areas described by the commenter may be relevant in our decision to permit take under the Service's current permit system.

Comment: Multiple commenters noted that M-Opinion 37050 and the proposed action will likely result in increased mortality of migratory birds. Thus, in combination with the already significant population declines of many species, the proposed rule will almost certainly result in the need to increase the number of bird species listed under the Endangered Species Act (ESA) and increase the risk of extinction. The commenters noted that such deleterious effects are a more than sufficient basis to withdraw the proposed rule (and the underlying Opinion). Given the Service's recent elimination in the ESA regulations of automatic take protection for threatened species (subject to the adoption of species-specific 4(d) regulations), the proposed rule will have extremely deleterious impacts going forward as the Service increasingly lists species as threatened without affording them any protections for incidental take under the ESA. These entirely foreseeable effects of the action proposed by the Service must be analyzed in formal section 7 consultation under the ESA.

Response: While it is possible that this rule could potentially be a contributing factor in the future ESA listing of a migratory bird species, there is no requirement under section 7 to

address the potential effects of an action on a species that may hypothetically be listed at some undetermined point in the future. Instead, section 7 requires an agency to analyze the effects of an action on currently listed or proposed-to-be-listed species. This rulemaking will have no effect on those species. We also note that several Service programs exist that are designed to conserve species that are candidates for ESA listing, such as Candidate Conservation Agreements and the Prelisting Conservation Policy.

Regarding the future listing of migratory birds as threatened species, as stated in the final rule rescinding the “blanket rules” for threatened species (84 FR 44753, August 27, 2019) and restated here, our intention is to finalize species-specific section 4(d) rules concurrently with final listing or reclassification determinations. Finalizing a species-specific 4(d) rule concurrent with a listing or reclassification determination ensures that the species receives appropriate protections at the time it is added to the list as a threatened species

Comment: Multiple commenters noted that the effects of this rule on ESA-listed species must be seriously scrutinized in an EIS as well as in section 7 consultation under the ESA. The proposed rule will harm species that have already been listed as threatened and subject to broad ESA section 4(d) regulations.

Response: The effects of this rule have been analyzed in the EIS accompanying this rulemaking. Under the ESA, we have determined that this rule regarding the take of migratory birds will have no effect on ESA-listed species. This rule does not alter consultation requirements under the ESA for migratory bird species also listed as endangered or threatened species. Any likely impacts of a Federal action on migratory bird species also listed under the ESA would require consultation whether or not incidental take of that species is prohibited under the MBTA. Thus, this proposed action would not have any effect on those species.

Comment: Commenters claimed that the Service must examine the effect the proposed rule would have on certain ESA-listing decisions, such as a not-warranted determination or 4(d)

rule, which may have been determined with the understanding that the MBTA incidental take protections would still apply.

Response: The Service has not issued any 4(d) rules or not-warranted determinations with the understanding that MBTA protections stemming from an interpretation that it prohibits incidental take would still apply.

Comment: Multiple States commented that the proposed rule would lead to further declines in migratory bird populations. The States voiced concerns that this rule would increase their species-management burden substantially as further declines in migratory bird populations could result in additional management requirements and protections for declining species, including additional listings under State endangered species protection laws implemented by State fish and wildlife agencies. This series of events would lead to further restrictions and require substantial resources to manage and ensure conservation and recovery. This rulemaking may violate federalism rules, as States will be required to use their budgets to implement migratory bird protection actions, including regulation development and permit systems. The limitation of State protections to projects within State borders, coupled with the absence of the Service providing necessary leadership and coordination would severely hinder migratory bird management and recovery efforts nationwide.

Response: This rule would not violate any laws or executive branch policy regarding unfunded mandates. Unfunded mandates occur when Congress enacts Federal law that includes directives that must be carried out by States and does not also provide funding for the States to fulfill those Federal requirements. This rule would alter the Service's interpretation of the MBTA to exclude incidental take from its scope. Thus, it removes what had been a Federal requirement for States to avoid engaging in or authorizing activities that incidentally take migratory birds. This rule effectively removes that directive. State partners are critical to the conservation of migratory birds, and we encourage States to continue to conserve and manage migratory bird species consistent with the MBTA and would be happy to engage with and assist our State

partners in their management and conservation of MBTA species. The Service acknowledged in the EIS that this rule may result in incremental declines in bird populations as companies learn they are not required to implement best management practices to decrease incidental take. Enforcement actions have been few since the 2017 M-Opinion, so it would be speculative to assert that this change in policy will result in further significant population declines. However, States may decide to expend resources for conservation and recovery of these species due to this rulemaking.

Comment: How is the Service going to monitor bird populations to ensure that this proposal does not lead to increased population declines? If significant declines are noted, how will the Service respond if declines are attributed to incidental take? The commenter recommended including a clause to stop the implementation of this proposed rule if populations are negatively impacted by incidental take from anthropogenic sources.

Response: Monitoring bird populations is outside the scope of this action. However, the Service continues to work with the bird conservation community to identify, support, and implement bird-monitoring programs. The Service is partner to multiple efforts to track migratory bird populations (e.g., Partners in Flight Landbird Plan, Avian Conservation Assessment Database, etc.). These efforts and partnerships are not impacted by this rulemaking, and data will continue to drive the actions of the Service to protect migratory birds. The clause proposed by the commenter would be inconsistent with our interpretation of the Act and would essentially add a requirement to the MBTA. Only Congress can amend statutory language.

Comment: Multiple commenters suggested that compliance with the MBTA was not a burden to State and local governments and has straightforward and minimal impacts on capital-improvement projects. The commenters noted there is a successful history of the Federal, State, and local governments along with industry working in coordination to implement measures to reduce impacts to migratory birds and that the proposed rule would dismantle the extraordinary

and successful history of this cooperation. Given the success of the MBTA to date, the commenter felt the proposed action was unnecessary.

Response: This rulemaking codifies our interpretation of the MBTA as prohibiting only conduct directed at migratory birds. It should not be viewed as standing in the way of the successful actions the commenter notes. The Service will continue to work with State and local governments as well as industry to implement voluntary measures to reduce impacts to migratory birds. This rulemaking should increase that cooperation and coordination by removing the specter of a potential criminal prosecution, which has often acted as a deterrent for private parties to share information with the Service on their impact on migratory birds and work with the Service on conserving migratory bird species. Economic effects on government entities are examined for each alternative in the RIA.

Comment: Multiple commenters noted that the proposed action removes all incentives for industry to work with the Service. The commenters noted that through judicious enforcement and by working directly with industries to develop and implement best management practices, the MBTA has provided a key incentive for adopting common-sense practices that protect birds. The commenters suggested that, without any legal obligations, industries no longer need to consider how their activities may harm migratory birds or take action to prevent any harm. Thus, it is unlikely that the Service's implementation of voluntary measures will result in benefits to birds.

Response: There are many other factors that influence an entity's decision to implement measures that may protect migratory birds from incidental take. In some cases, there are other Federal, State, Tribal, or local laws and regulations that directly or indirectly require actions to benefit or otherwise reduce impacts on migratory birds. Federal statutes such as the Endangered Species Act and the Bald and Golden Eagle Protection Act require entities to take steps to reduce incidental take and protect habitat, which may in turn benefit migratory birds and other wildlife. Many other Federal statutes include provisions that require implementing agencies to assess and mitigate potential environmental impacts, including impacts to migratory birds and their habitat.

In addition, Federal agencies are required to evaluate their impacts to the environment under NEPA. NEPA compliance requires Federal entities to identify impacts to the environment affected by a proposal, including impacts to migratory birds and socioeconomic impacts if they are likely to occur. NEPA also requires Federal entities to assess potential mitigation of unavoidable adverse environmental impacts, which may include analysis of project design or mitigation measures that reduce potential impacts to migratory birds.

Some States have statutes with procedural requirements similar to those found in NEPA (e.g., California Environmental Quality Act) and a variety of provisions regulating some form of incidental, indirect, or accidental take, or potentially allowing commissions or agencies to make applicable rules. In 2019, in response to M-Opinion 37050, California passed the Migratory Bird Protection Act, which makes it unlawful to take or possess any migratory nongame bird protected under the MBTA. Additional States may create new regulations to clarify that they have jurisdiction to regulate or otherwise oversee incidental take of migratory birds. Other factors entities consider include public perception, status as a green company, size of company, cost of implementation, perceived risk of killing migratory birds, or availability of standard industry practices. Some entities may continue to implement practices that reduce take for any of these reasons or simply to reduce their perceived legal risk due to short- or long-term uncertainty concerning future application of laws and regulations governing take of migratory birds.

Comment: One commenter stated that the removal of Federal authority to regulate incidental take of migratory birds could strongly affect offshore-wind siting and management decisions. One of the most important ways to minimize avian impacts from wind-energy development and make it “bird-friendly” is to site projects properly and implement measures to avoid impacts. The commenter noted that many stakeholders are engaged in identifying common-sense mitigation measures to minimize remaining impacts from the construction and operation of wind-energy facilities. Without a Federal mechanism for incorporating

consideration of incidental take of migratory birds into decision-making, it will be much more difficult to make informed decisions that benefit bird populations.

Response: The Service works with offshore-wind-energy companies and Federal and State agencies responsible for regulating this industry. The Service will continue to work to provide recommendations for voluntary measures and siting locations based on sound science.

Comment: One commenter noted that the MBTA has not been used against many businesses in court because it has encouraged businesses to self-regulate, to the benefit of people and birds alike, as well as those businesses. This approach has long-term financial benefit as it focuses on prevention rather than reparations in the future.

Response: The Service has provided in the past and will continue to provide in the future technical assistance to interested parties to implement measures to reduce negative effects on migratory birds.

Comment: One commenter suggested that in some cases incidental take by industry should be considered purposeful since some of this mortality is well studied, predictable, and there are easy low-cost mitigation options available to reduce these takes. The commenter contended that entities that choose not to implement known measures are purposefully taking migratory birds.

Response: Incidental take refers to mortality that occurs in the course of an activity that is not directed at birds and often does not relate to birds in any way—for example, the intent of building a wind turbine is generating energy not killing birds. Though knowledge of the likely results of a suspect's conduct may be relevant to determine whether a suspect has the requisite intent to violate a criminal statute, it is not relevant under the MBTA for two reasons: First, because criminal misdemeanor violations under the MBTA are a strict-liability crime, they do not require proof of intent. Second, the MBTA only prohibits actions that are directed at migratory birds. An activity that causes incidental take will never be directed at migratory birds regardless of the actor's knowledge of the potential consequences.

Comment: The analysis under the Regulatory Flexibility Act shows likely minimal economic benefit to all of the affected businesses. If anything, this finding argues that the proposed rule is a solution in search of a problem. In the commenters' experience the expenses of taking measures to minimize incidental take are minor and even the fines are minor to small businesses. This analysis really shows that the benefits of the proposed rule are overblown and targeted to a few companies that just do not want to be regulated.

Response: The purpose of this action is to provide an official regulatory definition of the scope of the statute as it relates to incidental take of migratory birds. This action is necessary to improve consistency in enforcement of the MBTA's prohibitions across the country and inform the public, businesses, government agencies, and other entities what is and is not prohibited under the MBTA.

Comment: Multiple commenters noted that the purpose and need of the rule is to create legal certainty and that this rulemaking removes a patchwork of court decisions that create uncertainty for MBTA compliance. The commenters noted that there is currently a patchwork of legal standards that protect migratory birds in each of the States. In the absence of national protection against incidental take, each State may seek to enforce or embolden existing State rules, thereby creating additional regulatory uncertainty for industry. The inconsistency among States in State code may complicate industry understanding of expectations across the many States in which they operate, potentially requiring multiple State permits to conduct business.

Response: It is appropriate for individual States to determine whether and how to regulate incidental take of migratory birds, given that the MBTA does not prohibit incidental take. Although we conclude on balance that this correct interpretation of the MBTA will reduce regulatory uncertainty created by the prior agency practice of reliance on enforcement discretion, we acknowledged in our draft EIS that different State laws may create difficulties for national companies that must navigate those differences. We also note that this problem already exists in large part and do not expect this rulemaking to significantly contribute to inconsistencies in State

laws. We will continue to cooperate with States that request our assistance in developing best management practices for various industries that minimize incidental take of migratory birds. In fact, such partnerships will likely become increasingly important to promote conservation of migratory birds and lead to greater consistency in both conservation and regulation nationwide.

Comment: One commenter stated that in an international forum the United States agreed that the MBTA is a strict-liability statute covering incidental take. The commenter noted that in 1999, several environmental groups from Mexico, Canada, and the United States filed a submission under the North American Agreement on Environmental Cooperation asserting that the United States was failing to enforce environmental laws, including the MBTA. The United States disputed the allegations, but acknowledged that the MBTA is a strict-liability statute covering incidental take, writing: “Under the MBTA, it is unlawful by any means or manner, to pursue, hunt, take, capture [or] kill any migratory birds except as permitted by regulation 16 U.S.C. §§ 703-704. Except for the baiting of game birds, the MBTA is a strict liability statute that allows for the imposition of criminal penalties.” This is clear evidence of the longstanding U.S. position under international law, and in agreement with its treaty partners, that the MBTA is a strict-liability statute covering incidental take. The United States must honor its obligations under international law or change them through an act of Congress.

Response: The language cited by the commenter simply refers to the language of the MBTA and asserts that it is a strict-liability statute. As described in the preamble to this rulemaking, the Service continues to view the misdemeanor provision as a strict-liability crime consistent with the majority of Federal courts that have ruled on the issue. Any statements made by the United States in prior international meetings regarding whether the MBTA prohibits incidental take would have been consistent with the Department’s interpretation of the MBTA at that time, but we have since changed our position as reflected by this rulemaking.

Comment: Multiple commenters stated that the rule sends a message to industry that companies do not need to implement even modest measures to prevent entirely foreseeable bird

mortality. The commenters claimed that the rule communicates that for even the most egregious and demonstrably deliberate violations, violators' real-world liability will still be limited by Service funding, investigatory resources and expertise, and political will with respect to enforcement. In all three categories, the Service is presently ill suited to fulfill the role envisioned by the proposed rule. To pretend otherwise ignores the agency's own established practices and guidance and constitutes another failure of the Federal Government's trust responsibilities.

Response: We disagree with the commenters' assertion that this rule signals that industry should not implement best management practices. The Service continues to be willing and able to work with any entity that is interested in developing and implementing voluntary measures that will avoid or minimize impacts to migratory birds. For example, the Service is working proactively with both the communication tower industry and with Federal agencies, cities, and other municipalities to address tower and glass collisions. The Service will continue to investigate instances of unauthorized taking or killing directed at migratory birds. This rulemaking will not affect those investigations.

Comment: A commenter noted that deaths of birds that are preventable and foreseeable are, in the context of the MBTA, negligent. Deliberate implies an intentional act, where foreseeable means consequences that may be reasonably anticipated. Nevertheless, the proposed rule attempts to parse the difference between definitions of the terms "deliberate" and "foreseeable." Regardless of the scale and scope of destruction, the rule proposes to make deliberateness in the form of passive negligence consequence-free. By specifying that entities should be held liable only if they can be proven to have set out to purposefully kill birds, the proposed rule flips the burden from regulated entities to the government. If promulgated, the rule would force Service employees to act as private detectives with the nearly (and from all appearances, deliberately) impossible task of proving what was in the hearts and minds of violators.

Response: The rule does not attempt to parse the difference between “deliberate” and “foreseeable.” Those terms are not relevant to our interpretation of the MBTA. We currently authorize, and will continue to authorize, various activities that directly take migratory birds through our permit regulations at 50 CFR part 21. The Service’s Office of Law Enforcement will continue to investigate unauthorized taking and killing of migratory birds resulting from actions directed at migratory birds. The rulemaking will not change those investigations in any way or require our officers to prove anything in addition to what they already would have to prove. In some sense, actions directed at migratory birds are deliberate in nature, but the concept of foreseeability is not relevant. Regarding the commenter’s statements on enforcing a negligence standard, the misdemeanor provision of the MBTA contains no mental state requirement and is a strict-liability crime. For this reason, we cannot introduce a mental-state requirement such as negligence to the MBTA’s misdemeanor provision.

Comment: Multiple commenters noted issues with how the proposed rule and associated NEPA document define a “Federal action.” The commenters noted that fundamental to this rulemaking effort is to identify properly the major Federal action. Major Federal actions include policy changes like M-Opinion 37050. The commenters stated that the rule ignores the real major Federal action and agency decision of greatest consequence: The Service’s reliance on Interior’s M-Opinion 37050 to reverse course on decades of protections for migratory birds against incidental take. The environmental consequences of the underlying sweeping policy change, which occurred in M-Opinion 37050, have yet to be held up to the mandates of NEPA. The commenters stated that, to proceed in any defensible fashion, the agency must reckon with the consequence of adopting M-Opinion 37050 in the first place.

Response: The EIS associated with this rulemaking analyzes the difference between adopting an interpretation of the MBTA that excludes incidental take and the prior interpretation that the MBTA prohibits incidental take. Thus, in our view, the M-Opinion was neither final agency action nor major Federal action. It was simply the initial stage of a process to alter

agency practice to conform to the correct reading of the MBTA regarding incidental take. We conducted the NEPA analysis at the appropriate time to analyze the environmental effects of this rulemaking to codify that interpretation. That analysis includes comparing the effects of both interpretations.

Comment: A comment stated that an agency charged with administering a statute cannot restrict, amend, repeal or expand it without congressional approval. An agency has no authority to remove statutory protections without congressional approval. A rulemaking cannot violate a statute or make it inoperable and must be consistent with the legislative intent of the law. The proposed rule impermissibly excludes requirements of foreseeability and negligence by arguing that the statute only prohibits actions directed at birds to exempt industries whose projects kill birds incidentally. The proposed rule would largely make the statute inoperable, thus violating its congressional intent by removing its purpose.

Response: The preamble to this rulemaking explains in detail our interpretation of the language of the MBTA, including applicable legislative history and why our interpretation is consistent with that history. Nothing in this rulemaking changes the language or purpose of the MBTA. Only Congress can enact or amend statutory language. The proposed rule uses the commonly understood definition of “incidental” and does not purport to redefine that term in any way. As stated on numerous occasions throughout this rule, the MBTA’s criminal misdemeanor provision is a strict-liability crime and we have no authority to insert a mental state such as negligence into that provision. That approach would require congressional action. The MBTA will continue to operate as Congress intended it to operate. The Service will continue to implement the full suite of regulations authorizing conduct directed at migratory birds.

Comment: Multiple commenters suggest that the Service’s choice to release a proposed rule based on a policy change it is already implementing, and conduct a NEPA analysis after-the-fact, turns NEPA on its head. This confused order of events also hampers a fair public understanding of the agency’s proposed action, alternatives, and likely impacts. The agency in

essence has already been implementing the underlying policy change that is reflected in the rulemaking without the benefit of public review and comment at the time it made that policy change.

Response: The procedures followed in this rulemaking process were appropriate and lawful. The Service engaged the NEPA process at the time it began to consider rulemaking to codify the M-Opinion (the reasonable alternatives include potential outcomes of the proposed rulemaking), and that process will be complete before any final formal agency decision is made. A draft EIS, issued subsequent to the proposed rule on June 5, 2020, analyzed various alternatives, some of which were discussed in the public webinars conducted as part of the NEPA scoping process. Those alternatives analyze the environmental effects of both prohibiting incidental take under the MBTA and excluding incidental take under the MBTA and gave the public opportunity to comment on those effects.

Comment: Multiple Tribes stated that this proposed action violates multiple Tribal-specific treaties, dating back to the mid-1800s. These treaties established the Federal Government's trust responsibility to Federally Recognized Tribes. The Federal Indian trust responsibility is a continuing fiduciary duty and legal obligation owed by the Federal Government to Tribes as beneficiaries. Under the trust responsibility, the United States is legally responsible for the protection of Tribal lands, assets, resources, and treaty rights for the benefit of Tribes. Government-to-government consultation is one facet of effectuation of the trust responsibility. Several Tribes stated that they have no record of receiving any communication or outreach from the Service or DOI regarding the proposed regulation revisions or associated draft EIS, much less an invitation to consult on either. The Tribes recommended that the rulemaking process be paused so that intelligent and respectful consultation with any Tribe that expresses interest in response to the invitation to consult can proceed.

Response: The Service takes its Tribal trust responsibilities seriously and completed government-to-government consultation when requested. Prior to the publication of the proposed

rule, the Service held six public scoping webinars in March 2019, which were open to any members of the public, including members of Federal and State agencies, Tribes, non-governmental organizations, private industries, and American citizens. On March 16, 2020, the Service held a webinar that was restricted in attendance to allow only Tribal members to attend, with the sole purpose of informing Tribes of the proposed action. Tribal representatives were allowed to ask questions and seek clarifications. In addition, a letter was sent through our regional offices to invite Tribes to engage in this proposed action via the government-to-government consultation process. Nine Tribes requested government-to-government consultation. The Service completed these consultations prior to publication of this final rule.

Comment: Contrary to the Service’s position, the proposed definition of incidental take would not improve the implementation of the MBTA. This definition still requires law enforcement to prove intent, which can be just as difficult to prove, just as legally uncertain, and equally burdensome to law enforcement.

Response: This rulemaking has no effect on investigations into conduct directed at migratory birds or the MBTA’s criminal felony and baiting provisions that require a specific mental state. We will continue to interpret the misdemeanor provision of the MBTA as a strict-liability provision with no mental-state requirement, including intent.

Comment: One commenter noted that the recent Supreme Court ruling in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), does not support this rulemaking. In *Bostock v. Clayton County*, the Supreme Court relied on the “ordinary” meaning of title VII of the Civil Rights Act of 1964, to hold that it is unlawful to discriminate in employment decisions based on individuals’ sexual orientation. *Id.* at 1754. In reaching this result, the Court squarely rejected the argument that the Court’s reading of the statute’s expansive terms “ignore[d] the legislature’s purpose in enacting Title VII” and that “few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons.” *Id.* at 1745. The Court reaffirmed the longstanding principle that “the fact that [a statute] has been applied in situations not

expressly anticipated by Congress’ does not demonstrate ambiguity, instead, it simply ‘demonstrates [the] breadth’ of a legislative command.” *Id.* at 1749 (citation omitted). The Supreme Court’s result and reasoning are impossible to square with a central justification for the proposed rule and M-Opinion 37050 on which it is based. According to the proposed rule, Congress’s purpose in enacting the MBTA was to “regulate the hunting of migratory birds,” and thus the broad prohibitions on any taking or killing of migratory birds without authorization from the Service should be construed so as not to encompass any taking or killing other than that specifically directed at migratory birds. 85 FR at 5918, February 3, 2020. This, however, is exactly the mode of statutory construction rebuffed by the Supreme Court in *Bostock*.

Response: The Supreme Court’s decision in *Bostock* is not applicable to our interpretation of the MBTA. Justice Gorsuch in *Bostock* was quite clear that legislative intent is only irrelevant if the language of the statute is plain, as he found the applicable language of the Civil Rights Act to be. He noted that a statute’s application may reach “‘beyond the principle evil’ legislators may have intended or expected to address,” *Bostock*, 140 S. Ct. 1731, 1749, but only where no ambiguity exists in the broadness of that statutory language. We do not rely on an argument that section 2’s application to incidental take would demonstrate ambiguity simply because Congress could not have foreseen that application in 1918. Instead, the language of MBTA’s section 2 is inherently ambiguous in nature as it relates to incidental take for the reasons stated in the preamble to this rulemaking and as evidenced by the split in Federal appellate courts that have addressed the issue. Therefore, the Supreme Court’s holding in *Bostock* does not apply here.

Comment: The same commenter also noted that the recent Supreme Court ruling in *Dep’t of Homeland Security v. Regents of the University of California*, 207 L. Ed. 2d 353 (2020), similarly does not support moving forward with this rulemaking. In *Homeland Security*, the Supreme Court rejected the Trump Administration’s effort to rescind the Deferred Action for Childhood Arrivals (“DACA”) program, partly because the Department of Homeland Security

(“DHS”) had sought to justify its rescission of the entire program on the basis that certain affirmative benefits should not be extended to DACA recipients while failing to consider the policy alternative of decoupling the extension of benefits from the deferral of deportation action. *Id.* at 375. The Court held that “when an agency rescinds a prior policy its reasoned analysis must consider the ‘alternative[s]’ that are ‘within the ambit of the existing [policy].’” *Id.* at 374, 375 (citation omitted). The Court held that this “omission alone renders [the agency’s] decision arbitrary and capricious.” *Id.* at 375.

The commenter stated that this ruling and analysis further undermine the Service’s justification for reversing course on many decades of prior policy and practice in implementing the MBTA. The Service has sought to justify the reversal on the grounds that, “[w]hile the MBTA does contemplate the issuance of permits authorizing the taking of wildlife . . . [n]o regulations have been issued to create a permit scheme to authorize incidental take, so most potential violators have no formal mechanism to ensure that their actions comply with the law.” 85 FR at 5922. According to the Service, this absence of regulations designed to address incidental take, and the reliance instead on discretionary enforcement, “has resulted in regulatory uncertainty and inconsistency,” thus necessitating a “truly national standard” and a “uniform” approach to implementation of the MBTA. *Id.* at 5922-23; see also draft EIS at 3 (stating that the “purpose and need” for the action is to “improve consistency in enforcement of the MBTA’s prohibitions”). This refusal to scrutinize an otherwise viable alternative that would further the agency’s own purported objective—i.e., increasing certainty and consistency in enforcement—while also promoting the conservation of migratory birds, constitutes precisely the kind of arbitrary and capricious conduct that the Supreme Court denounced in its ruling on the DACA rescission.

Response: The Court’s holding in *Homeland Security* does not apply to this rulemaking because the Service has considered the prior Departmental interpretation and agency practice in developing this rulemaking. Both the underlying M-Opinion and the preamble to this rule

analyzed the prior interpretation and explained both why it is incorrect and why it does not provide the same level of certainty or consistency in enforcement. The EIS examined the impacts of this rulemaking and specifically compared the environmental impacts of adopting each interpretation of the MBTA to inform the decisionmaker of the consequences of adopting either alternative. Thus, the Service scrutinized alternatives to the preferred action of codifying our interpretation that the MBTA does not prohibit incidental take.

Comment: A commenter stated that the prosecution of incidental take under the MBTA does not violate due process. The Solicitor's M-Opinion and the proposed rule cite due process concerns as one justification for rolling back critical protections for migratory birds under the MBTA. The commenter noted that as the Courts have advised, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." The commenter claimed the Service appears concerned that strict liability for incidental takes of migratory birds does not provide adequate notice of what constitutes a violation and would lead to absurd results. However, the interpretation of the MBTA applying strict liability to the law's criminal misdemeanor provision covering incidental take raises no constitutional problems, nor is it contrary to the intent of Congress. Rather, it is the only possible reading of the MBTA that accomplishes its intended purpose.

Response: The commenter misconstrues our interpretation of the MBTA's criminal misdemeanor provision in section 6. We agree that strict liability applies to misdemeanor violations of the MBTA. The due process concerns we raise in the preamble to this regulation apply to the Department's prior interpretation of section 2 of the MBTA, rather than the criminal provisions of section 6. The Service determines the relevant language in section 2 to be ambiguous, which is consistent with the views of most Federal courts. Potential due process concerns are relevant when the language of a statute is ambiguous and assist in divining its proper meaning. We do not base our current interpretation solely on those due process concerns;

instead, they reinforce our current interpretation as the correct construction of section 2's ambiguous language.

Comment: Multiple commenters claimed that because the new Solicitor's Opinion rests on but does not resolve the Circuit court split indicates that courts are not obligated to adhere to its interpretation. The fact that no permit program has ever existed for incidental take demonstrates established precedent. The Department and the Service cannot ethically, legally, or morally make enforcement of Federal law a moving target for the convenience of the regulated industry.

Response: The commenters are correct that whether the Service interprets the MBTA to prohibit or exclude incidental take, that interpretation will not by itself resolve the current split in the circuit courts. However, Federal courts are obliged to defer to an agency's reasonable interpretation of ambiguous statutory language if that interpretation is codified in a regulation that undergoes public notice and comment under the Administrative Procedure Act. *See Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Application of judicial *Chevron* deference to this rulemaking would provide more certainty than any prior position of the Department by increasing the likelihood that Federal courts will defer to the Service's interpretation. We do not understand the point of the commenter's statement that the absence of a prior permit program established precedent on whether or not the MBTA prohibits incidental take. The opposite would seem to be true. Regarding enforcement of Federal law, the Department and the Service are obliged to interpret and follow the law established by Congress. This rulemaking will establish a firm position on enforcement of the MBTA as it applies to incidental take and will not provide a moving target. The commenter's assertion would be better applied to the Service's prior exercise of enforcement discretion under the former interpretation, which left many regulated entities uncertain whether their conduct violated the MBTA and would be investigated by the Service. A primary reason for engaging in this

rulemaking is to remove any uncertainty in application of the statute to alleviate precisely the concern voiced by this comment.

Comment: Multiple Tribes stated that the United Nations "Declaration on the Rights of Indigenous Peoples" (2007) ("UNDRIP"), endorsed by the United States in 2010, recognizes that indigenous people must give Free, Prior and Informed Consent for projects affecting their interests, prior to approval of any project affecting their land or territories. Multiple federally recognized Tribes expect DOI to honor this policy in order to ensure no unilateral actions are taken that affect Tribal land, territories or people without Tribal consent.

Response: The UNDRIP—while not legally binding or a statement of current international law—has both moral and political force. The United States Government announced its support of the UNDRIP in 2010. In its announcement, the United States explained that it recognizes the significance of the Declaration's provisions on free, prior-and-informed consent, which the United States understands to call for a process of meaningful consultation with Tribal leaders—but not necessarily the agreement of those leaders—before the actions addressed in those consultations are taken.

To this end, the United States supports these aspirations of the UNDRIP through the government-to-government consultation process when agency actions may affect the interests of federally recognized Tribes. The Service has sought to involve and consult with Tribes regarding this rulemaking. Prior to the publication of the proposed rule, the Service held a NEPA scoping webinar on March 16, 2020, that we allowed only Tribal members to attend, with the sole purpose of informing Tribes of the proposed action. The Service sought feedback from Tribal representatives to inform the rulemaking process and address Tribal concerns. We also sent a letter through our regional offices inviting Tribes to engage in this proposed action via the government-to-government consultation process. Nine Tribes and two Tribal councils requested government-to-government consultation. The Service has completed these consultations with all interested parties.

Comment: One commenter suggested that the proposed rule should be abandoned because the meanings of “take” and “kill” need to be given broad interpretations to achieve the remedial purpose of protecting wildlife and remain consistent with the common law definitions of these terms. The commenter stated that the Department and the Service misinterprets the Fifth Circuit’s narrow decision in *CITGO*, 801 F.3d 477 (5th Cir. 2015), which only holds that the MBTA does not impose strict liability for nonculpable omissions. Further, the commenter noted that the notice of the proposed rule acknowledges that Congress intended to adopt the common law definition of statutory terms such as “take.”

Response: The preamble to this rulemaking exhaustively explains our interpretation of the terms “kill” and “take” in MBTA section 2. We disagree with the commenter’s conclusions and refer readers to our analysis in the preamble.

Comment: One commenter stated that the proposed rule does not address the Service’s statutory authority to change the interpretation of the MBTA. The commenter stated that the proposed rule does not facilitate the Service’s only authorized action under the statute, which is the authority "to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow" hunting, etc., of such birds, or any part, nest, or egg thereof. The Service’s proposal does not even address its actual statutory authority.

Response: This proposal does not authorize the taking of migratory birds; it defines the scope for when authorizations under section 703 are necessary and appropriate. Thus, it does not rely on the statutory language quoted by the commenter. The authority to implement a statute necessarily comes with it the authority both to interpret ambiguous language in that statute and to correct a prior improper interpretation of that language.

Comment: Multiple commenters stated that Solicitor’s M-Opinion 37050 stands in direct conflict with Executive Order 13186 executed by President Clinton in 2001. The commenters noted that the Executive Order defines “take” consistent with the Service’s general definition applicable to all wildlife statutes in 50 CFR 10.12. The Executive Order further states without

any uncertainty that the MBTA and its implementing regulations apply to both intentional and unintentional takings of migratory birds. Because E.O. 13186 has not to date been revoked, M-Opinion 37050 and this rulemaking directly conflict with that standing presidential directive. The Service must explain how the proposed rule meets and affects its own responsibilities and those of other Federal agencies under this Executive Order.

Response: We do not agree with the commenters that this rulemaking conflicts with Executive Order 13186. This rulemaking does not directly affect how Federal agencies manage incidental take as set forth in memoranda of understanding (MOUs) developed under the Executive Order. E.O. 13186 was not designed to implement the MBTA per se, but rather was intended to govern Federal efforts to conserve migratory birds more broadly. In any case, each Federal agency should continue to comply with the Executive Order, and each agency with an MOU should continue to carry out that MOU, including any conservation measures that reduce incidental take, even though that take does not violate the MBTA.

Comment: The Service must complete a full analysis of the impacts of the Solicitor's M-Opinion itself, not just the incremental impacts of codifying the M-Opinion.

Response: The EIS analyzes the incremental impact of codifying M-37050 and the alternative of returning to the interpretation of the MBTA espoused by the prior Opinion, M-37041, which concluded the MBTA does prohibit incidental take. The EIS compares the environmental effects of both alternatives. Thus, the Service has analyzed the environmental impacts of adopting either opposing interpretation of the MBTA.

Comment: The Service must reconcile how this action aligns with other legal statutes that protect birds and demonstrate how the rule aligns with other statutory obligations such as the Fish and Wildlife Conservation Act, which obligates monitoring for bird populations.

Response: The Service's implementation of the Fish and Wildlife Conservation Act is not directly relevant to this rulemaking. The Service will continue to monitor migratory bird species, particularly species of concern and candidates for listing under the ESA. This rulemaking will

not significantly affect the Service's obligations under other legal statutes that protect migratory birds.

Comment: Only a few years ago, the United States exchanged formal diplomatic notes with Canada reaffirming our countries' common interpretation that the treaty prohibited the incidental killing of birds. The Service must consider how its proposed interpretation is consistent with that diplomatic exchange and seek Canada's views on the Service's new interpretation in light of that exchange.

Response: The exchange of diplomatic notes the commenter references occurred in 2008 and did not amount to an agreement that prohibiting incidental take was required by the Convention. Therefore, we do not regard our current approach to be inconsistent with the 2008 diplomatic exchange.

Comment: Numerous commenters requested that the Service return to the previous interpretation of the MBTA and publish a proposed rule that codifies the former interpretation that the MBTA prohibits incidental take.

Response: We have chosen to codify the interpretation set forth in Solicitor's Opinion M-37050 and interpret the scope of the MBTA to exclude incidental take. Thus, we decline the commenter's request to codify the prior interpretation as set forth in M-37041, which would achieve the opposite effect.

Comment: One commenter stated that it is notable that no additional alternatives were in the proposed rule. The commenter further noted that the Service failed to disclose the thought process followed in the selection of the proposed course of action in the proposed rule. Therefore, the commenter requested that the proposed rule be revised to include the three alternatives described in NEPA scoping and detailed information about the implementation of each, ensuring all affected parties are aware of the alternatives, through proper notice of rulemaking, as well as how the Service made its choice. The rule should be reissued in proposed form, allowing the public to weigh in on the alternatives and on the Service's choice.

Response: An analysis of reasonable alternatives to a proposed action is a requirement of the NEPA process. There is no requirement under the APA to consider alternatives in a proposed rule. The Service proposed to codify the interpretation set forth in Solicitor's Opinion M-37050 and presented reasonable alternatives to that proposal in the associated draft EIS. The public comment period for the scoping notice and the draft EIS provided opportunities to weigh in on the alternatives to the proposed action. Both the M-Opinion and the preamble to the proposed rule provide detailed background and analysis that explain why the Solicitor concluded the MBTA does not prohibit incidental take and why the Service adopted that analysis and conclusion. The Service has provided a Regulatory Impact Analysis with the proposed rule, which provides a cost-benefit analysis of the rule along with reasonable alternatives, to comply with Executive Order 12866 and certifies that the rule will not have a significant economic impact on a substantial number of small entities to comply with the Regulatory Flexibility Act.

Comment: A commenter stated that the proposed rule will result in a dangerous slippery slope, making intent difficult to prove because if there is no regulation for "unintentional" take, then anything could be classified as "incidental take." The proposed rule change puts the burden of proof on the Service of determining "intent," which can be difficult or impossible to truly establish. Without retaining the legal responsibility by individuals and/or companies under the existing MBTA, there would be far less money available for mitigation of preventable environmental damage.

Response: The proposed rule does not alter the burden of proof for intentional take under the MBTA. Over 100 years of case law and amendments to the statute have provided extensive guidance on the requirements to prove intent under the criminal provisions of the MBTA. This rulemaking will not disturb that case law or change our enforcement of the statute in that context. An analysis of the amount of funding available for mitigation of environmental damage, including incidental take of migratory birds, would be largely speculative at this point and not directly relevant to this rulemaking. To the extent there are economic impacts associated with

this rulemaking or the alternatives considered in the associated NEPA analysis, those are described in the EIS and the regulatory impact analysis conducted to comply with Executive Orders 12866, 13563, and 13771.

Comment: Some commenters noted that the application of the MBTA as restricting anything other than intentional take of covered species offends canons of American criminal law and is perhaps most absurd when viewed in this light. The U.S. Supreme Court has held: “Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.... This venerable rule not only 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. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead.” *United States v. Santos*, 553 U.S. 507, 514 (2008) (internal citations omitted).

Response: We agree with this comment.

Comment: Some commenters noted that the prosecution of individual citizens or companies for the incidental take of migratory birds does not benefit conservation efforts. A few commenters noted that their industry sectors will continue to work with Federal and State agencies and help them fulfill their mission to conserve, protect, and enhance wildlife and their habitat for the continuing benefit of all people. The commenters noted that despite efforts to prevent incidental take, such take is not one-hundred-percent preventable and criminalizing incidental take does not advance conservation efforts. Removing the threat of unwarranted legal attacks under the MBTA will allow businesses to continue operating under good faith efforts to limit impacts to migratory birds.

Response: We appreciate that the commenters have engaged with the Service to advance conservation efforts that protect and enhance wildlife, including migratory birds, and that commenters advocate continued use of good faith efforts to limit impacts to migratory birds.

Comment: One commenter noted that the proposed codification differentiates between wanton acts of destruction and criminal negligence, on the one hand, and the accidental or incidental take of a protected bird, however regrettable, on the other. U.S. law has long differentiated between harm caused by intent and harm caused by accident. The proposed rulemaking extends that practice to the MBTA.

Response: We agree with the commenter that this rulemaking will continue to authorize criminal enforcement of intentional take while codifying that the MBTA does not prohibit incidental take.

Comment: One industry commenter claimed that an extreme application of the MBTA imposes criminal liability any time a migratory bird is killed incidental to another activity and would create an absurd and likely disastrous scenario in which the majority of Americans could be considered potential criminals. The commenter notes that enforcement of the MBTA under such an extreme interpretation would have devastating consequences for American businesses and communities, particularly in rural communities in close proximity to migratory bird habitat. As described in the proposed rule, millions of birds are killed every year from accidents such as collisions with glass windows, power lines, and vehicles. These are unfortunately realities of modern life and beyond the scope of the MBTA. The U.S. Supreme Court has ruled that the interpretation of a statute that would lead to absurd results must be avoided in favor of other interpretations "consistent with the legislative purpose."

Response: We agree with the commenter that interpreting the MBTA to prohibit incidental take could potentially lead to some of the cited absurd results. We refer the commenter to the analysis of the economic impacts of interpreting the scope of the statute to prohibit incidental take in the EIS and regulatory impact analysis conducted to comply with Executive Orders 12866, 13563, and 13771.

Comment: One commenter stated that as a result of the Federal Circuit Court split and dueling Solicitor's opinions, and without MBTA regulations addressing what activities are

prohibited under the MBTA, the same activities that are entirely lawful in some parts of the country could give rise to strict criminal liability in parts of the country in which Federal Circuit Courts have held that unintentional take is prohibited under the MBTA. The commenter noted that the MBTA should be given a uniform interpretation across all regions of the country and is appreciative that the Service is engaging in a rulemaking process to achieve this result.

Response: We agree with this comment.

Comment: One commenter questioned the evidence suggesting that this rule change is warranted. The commenter questions what economic progress has been halted due to the protections of the MBTA and how this action is in the best interest of the American people.

Response: We refer the commenter to the EIS and the regulatory impact analysis for our conclusions regarding the environmental and economic impacts of this rulemaking and its reasonable alternatives on migratory birds and regulated entities.

Comment: A commenter stated that the Service has done little to demonstrate how this proposed rule actually benefits birds, instead focusing almost exclusively on economic interests of previously regulated industries. The commenter notes there is little mention in either notice of biological impacts or assessment of bird species protected by the Act. Interior and the Service fail to recognize that the MBTA's singular statutory purpose is to protect and conserve migratory birds. The U.S. Supreme Court described this purpose as "a national interest of very nearly the first magnitude," and the origin of the statute to implement the international treaties signed for migratory bird conservation must not be overlooked. This environmental review should focus on the biological impacts and benefits to birds of the proposed rule and any authorization program that the Service is considering. It is misleading and simply false to suggest, as Interior does, that any regulation of incidental take under the MBTA is unduly burdensome.

Response: We constructed the purpose and need in the draft EIS to reflect our proposal to codify the correct interpretation of the MBTA as it relates to incidental take. Developing an authorization program was not within the scope of our proposal. We disagree with the

commenter's interpretation of the MBTA and our nondiscretionary and discretionary duties to implement the MBTA. We refer the commenter to the EIS for analysis and discussion of the environmental impacts of the proposal and reasonable alternatives. The Service will continue to ensure that migratory birds are protected from direct take. We will also continue to work with other Federal agencies and stakeholders to promote conservation measures that reduce incidental take and protect migratory bird habitat, consistent with the Federal statutes we implement to manage, conserve, and protect migratory birds and other wildlife.

Comment: As a policy matter, the Service has not justified its departure from its prior interpretation of the Act, which was effective in protecting migratory birds without undue regulatory burden.

Response: We respectfully disagree that the Service has not justified its current interpretation of the MBTA. M-37050 and the preamble to the proposed rule explained the basis for the interpretation of the MBTA we are codifying in this rulemaking in great detail referencing the language of the statute itself, the international Conventions underlying the MBTA, its legislative history, and subsequent case law. As part of our duty as the agency responsible for implementing the MBTA, we are obliged to present to the public our interpretation of any ambiguous language that affects public rights or obligations.

Comment: One commenter noted that the Service should not rely on other statutes or regulations to absolve itself from addressing incidental take. The commenter noted that the current administration is relaxing a number of regulations such as the Clean Water Act and the Endangered Species Act. Collectively, the change in interpretation of these foundational laws and rules will undoubtedly remove any motivation for regulated entities to mitigate the harm caused by their actions on birds and their eggs and will increase incidental take.

Response: A wide array of statutory mandates provide protections to wildlife, including migratory birds. In this rulemaking, the Service describes these various protections, but does not rely on them to address incidental take of migratory birds in the absence of MBTA protection.

Our interpretation of the MBTA is primarily governed by the language of the statute, its legislative history, and subsequent case law. Whether other statutes provide protection to migratory birds is not directly relevant to codifying our current interpretation. The Service also notes that the motivation to implement conservation measures to mitigate harm to migratory birds is not simply driven by the threat of enforcement. Many other factors are often at play for companies engaged in actions that may affect migratory birds, including public perception, green business credentials, economic factors, State law, and pressure from investors and lenders.

Comment: One commenter requested that the Service remember their treaty obligation to protect birds that are shared with other countries that as independent nations could not ensure the protection of species that migrate across borders.

Response: We acknowledge this comment and submit that we will continue to implement relevant domestic laws and regulations and provide technical advice and assistance to our treaty partners and encourage continued conservation and protection of migratory birds to the extent authorized by their domestic laws.

Comment: Multiple commenters stated that the proposed rule is likely to facilitate a substantial increase in the number of migratory birds killed, in direct conflict with the amended treaty with Canada. The commenters noted that the proposed rule change is extremely limited in scope as it fails to address the evolution of threats to migratory birds or to ensure the sustainability of healthy bird populations. While unregulated harvesting is no longer a primary threat to migratory birds, declines in bird populations continue to remain a serious international issue. The commenters noted that international partners would suffer the loss of the many benefits of migratory birds as the United States rolls back its protective policies.

Response: We disagree that this rulemaking will result in a substantial increase in the number of migratory birds killed. The EIS notes that it may result in a measurable increase, but we do not expect it to be substantial. In other words, there may be a measurable difference but we do not expect it to substantially affect the existing trajectory of the number of migratory birds

killed. It is important to note that the MBTA should not be relied upon by itself to reduce large-scale impacts on migratory bird populations, whether or not it is interpreted to prohibit incidental take. It is simply one tool in what must be a multifaceted approach. Voluntary efforts and development of industry best practices are an indispensable part of this approach, particularly given that the substantial decreases in migratory bird populations over the last 50 years have occurred despite the prior agency practice of enforcing the MBTA with respect to incidental take. We will continue to work with our domestic and international partners, the regulated community, and the public at large to uphold our commitment to ensure the long-term conservation of migratory birds under the migratory bird Conventions.

Comment: The proposed rule ignores article IV of the amended Canada treaty that the United States is to “seek means to prevent damage to such birds and their environments, including damage resulting from pollution.” Under the new interpretation of the MBTA, pollution is no longer a considered factor as pollution is almost never a direct, purposeful act. This failure to address threats beyond harvesting undermines the United States’ commitment under the amended Canada treaty to ensure the long-term conservation of shared migratory bird species.

Response: Our commitment to our treaty partners to prevent and mitigate damage to migratory birds from pollution is implemented by several domestic laws. For example, pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the Oil Pollution Act, and the Clean Water Act, the Department is authorized to assess injury to natural resources caused by releases of hazardous substances and discharges of oil to compensate the public for lost natural resources and their services. The Department’s assessment of natural resource injuries under the Natural Resource Damage Assessment Program includes any injury to migratory birds, which in many cases could otherwise be classified as incidental take. We will continue to implement these programs consistent with our treaty obligations.

Comment: One commenter stated that the proposed rule is not consistent with section 2(a) of the Migratory Bird Treaty Act, which states that “it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill ... any migratory bird.” The key words regarding the prohibition of incidental take are “at any time, by any means or in any manner.” The words “in any manner” means regardless of whether it is purposeful or not.

Response: We disagree with the commenter on the import and context of the language "at any time, by any means or in any manner" in section 2 of the MBTA. The preamble to this regulation explains the correct context for that language and its relevance to whether the MBTA prohibits incidental take.

Comment: Multiple commenters suggested that reinterpretation of the MBTA will cause tension with Canada, whose migratory bird populations will also be affected by rules that are more lenient.

Response: The Service has met with its counterparts in Canada regarding the proposed rule. The Government of Canada submitted comments on the draft EIS associated with this rulemaking. We summarized and addressed substantive comments received from the Government of Canada in Appendix C of the final EIS. Any impacts to migratory birds that we share with Canada are also discussed in the EIS.

Additionally, after publication of the final EIS, the Government of Canada submitted a further comment expressing concern regarding this rule. Regarding the comments from the Government of Canada, the Service identified the impacts to migratory birds to the extent it was able in the final EIS, based on the information available.

Comment: Multiple comments stated that this proposed major shift in policy and regulation in the MBTA will have international implications. The commenters note that migratory birds are a shared hemispheric resource, for which we are only custodians and stewards while they are within the borders of the United States. Any attempt to permanently weaken the MBTA, which will perpetuate, and almost certainly increase, the level of injury and

death of migratory birds, needs concurrence by Canada, Mexico, Japan, and Russia if our treaty obligations are to have any true meaning. The Service has not addressed this international aspect in its planning and has not worked with the State Department on the issue. With this proposed change, the Service is making a unilateral change that will later be deemed an abrogation of our international agreements with these other sovereign nations.

Response: The MBTA, along with several other statutes, implements the migratory bird Conventions. The parties to those Conventions may meet to amend and update the provisions of the Conventions, but enactment, amendment, and implementation of domestic laws that implement those Conventions do not require concurrence by the other parties. We have undergone interagency review of this rulemaking at the proposed and final stages facilitated by the Office of Management and Budget, which included input from the State Department. We will not speculate on the views of our Convention partners beyond the public comments reflected here.

Comment: One commenter stated that this rule represents a fundamental abdication of the Service's mission to protect native wild birds. There is simply no question that the Service's history of interpretation (until 2017) of the MBTA as applying to incidental take has been the bulwark protecting tens of millions of birds from unnecessary deaths.

Response: We do not agree with the commenter's assessment of this rulemaking or that available data supports the commenter's analysis of the Service's prior interpretation.

Comment: One commenter recommended that the Service consider to what extent the proposed rule may increase regulatory uncertainty for industrial entities and other stakeholders. This administration's sudden policy change has thrown decades of practice and policy into upheaval for all entities, including industry, Federal, State, local, and international agencies, conservation groups, and more. Legal observers have also suggested that this policy may not be permanent, and one analysis noted that entities "would be wise to keep a long-term perspective of MBTA-related risk." The commenters noted that rather than providing certainty into the

enforcement of the law, the M-Opinion and this rulemaking may have increased uncertainty about what will be expected for industries, especially as many development decisions need to be made considering many years and decades into the future. Additionally, the M-Opinion and the proposed rule may inject more uncertainty about what is considered “take” compared to the previous decades of enforcement. For example, the removal of active nests when the purpose of the underlying activity is not to harm birds but related to another activity, such as construction or cleaning, has created confusion and a major loophole. Documents released under the Freedom of Information Act reveal numerous questions from entities since publication of the M-Opinion about what constitutes prohibited take. This legal uncertainty also leads to scientific uncertainty about future impacts on birds. This additional uncertainty should be considered by the Service going forward.

Response: We note that a primary purpose of codifying the interpretation presented in M-37050 is to provide more certainty and permanence regarding the Department's position on the scope of the MBTA as it relates to incidental take. Adopting the prior interpretation through regulation would not provide any more long-term certainty in this regard. Codification in the Code of Federal Regulations provides the maximum certainty and permanence possible absent new legislation, over which we have no control. To a certain extent, some degree of short-term uncertainty is to be expected when a change in agency practice occurs. We continue to provide technical advice when requested regarding application of the MBTA in specific situations. The example provided by the commenter regarding active nest removal is a clear case of incidental take that is not prohibited by the MBTA, although it may violate other Federal, State, Tribal, or local laws and regulations. If the purpose of the referenced activity were specifically to remove active bird nests, then that activity would still be a violation of the MBTA and a permit would be required before any removal could lawfully proceed. We will also continue to monitor bird populations in partnership with State wildlife agencies and other stakeholders.

Comment: The proposed rule would harm States by depriving them of the MBTA's protections for migratory birds that nest in, winter in, or pass through their territories. The States own and hold migratory birds in trust for their citizenry. Moreover, the States and their citizens benefit from the role that migratory birds play in maintaining ecological balance and the valuable ecological services that they provide. The critically important ecological services these species provide include insect and rodent control, pollination, and seed dispersal. As the U.S. Supreme Court recognized 100 years ago, State-level protections are insufficient to protect transient species that travel outside of a State's territorial bounds. In a landmark decision upholding the constitutionality of the MBTA, Justice Holmes wrote that migratory birds, which "yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away" can be "protected only by national action." *Missouri v. Holland*, 252 U.S. 416, 434-35 (1920). If left to the States, the result would be a patchwork of legal approaches, reducing consistency nationwide. Individual States therefore rely on Federal law (and the international treaties implemented by Federal law) to protect their own bird populations when individual birds migrate beyond their boundaries. Interior's elimination of longstanding Federal protection harms State interests.

Response: The intent of this rulemaking is not to harm States, but to interpret the MBTA in the manner Congress intended when it drafted and enacted the statute. States remain free to prohibit, manage, or regulate incidental take of migratory birds as they see fit under State law, and nothing in this regulation or the MBTA prevents them from doing so. The EIS associated with this rulemaking analyzes the broader effects of codifying our interpretation. Though we conclude that this rule will have some negative effects on populations of some species, we do not find that those effects will be substantial.

Comment: A commenter noted that the proposed rule fails to provide adequate justification under Executive Orders 12866 and 13563 with regard to providing flexible approaches consistent with scientific integrity and protecting the environment. Simply stating

that the Service has used the best available science is not sufficient. The commenter recommends the Service review its own webpages and the scientific literature to show that incidental take of birds is a significant problem. Adopting this regulation ignores that science and fails to protect the environment. It also fails the intent of the treaties. Providing a regulatory approach such as a permitting program or a program based upon a gross negligence approach would fulfill the Treaty obligations while also satisfying the intent of E.O.s 12866 and 13563. The commenter called for the Office of Information and Regulatory Affairs to review the justification for consistency with these Executive Orders.

Response: The regulatory impact analysis developed for the proposed rule documents compliance with Executive Orders 12866 and 13563 and was reviewed and approved by OMB's Office of Information and Regulatory Affairs. We acknowledge that incidental take of migratory birds has a negative impact on many migratory bird populations and have assessed any incremental impact caused by this rulemaking and its reasonable alternatives in the EIS. We disagree that this rulemaking will have a substantial impact on migratory bird populations when compared to prior agency practice.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that

regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Codifying our interpretation that the MBTA does not prohibit incidental take into Federal regulations would provide the public, businesses, government agencies, and other entities legal clarity and certainty regarding what is and is not prohibited under the MBTA. It is anticipated that some entities that currently employ mitigation measures to reduce or eliminate incidental migratory bird take would reduce or curtail these activities given the legal certainty provided by this regulation. Others may continue to employ these measures voluntarily for various reasons or to comply with other Federal, State, and local laws and regulations. The Service has conducted a cost-benefit analysis which can be viewed online at <https://beta.regulations.gov/docket/FWS-HQ-MB-2018-0090/document> and <https://www.fws.gov/regulations/mbta/>.

Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104-121)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small businesses, small organizations, and small government jurisdictions. However, in lieu of an initial or final regulatory flexibility analysis (IRFA or FRFA) the head of an agency may certify on a factual basis that the rule would not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities. Thus, for an initial/final regulatory flexibility analysis to be required, impacts must exceed a threshold for “significant impact” and a threshold

for a “substantial number of small entities.” *See* 5 U.S.C. 605(b). This analysis first estimates the number of businesses impacted and then estimates the economic impact of the rule.

Table 1 lists the industry sectors likely impacted by the rule. These are the industries that typically incidentally take substantial numbers of birds and that the Service has worked with to reduce those effects. In some cases, these industries have been subject to enforcement actions and prosecutions under the MBTA prior to the issuance of M-37050. The vast majority of entities in these sectors are small entities, based on the U.S. Small Business Administration (SBA) small business size standards. Not all small businesses will be impacted by this rule. Only those businesses choosing to reduce best management practices will accrue benefits.

TABLE 1—DISTRIBUTION OF BUSINESSES WITHIN AFFECTED INDUSTRIES

NAICS Industry Description	NAICS Code	Number of Businesses	Small Business Size Standard	Number of Small Businesses
Finfish Fishing	114111	1,210	20 employees ^(a)	1,185
Crude Petroleum and Natural Gas Extraction	211111	6,878	1,250 employees	6868
Drilling Oil and Gas Wells	213111	2,097	1,000 employees	2092
Solar Electric Power Generation	221114	153	250 employees	153
Wind Electric Power Generation	221115	264	250 employees	263
Electric Bulk Power Transmission	221121	261	500 employees	214
Electric Power Distribution	221122	7,557	1,000 employees	7520
Wireless Telecommunications Carriers (except Satellite)	517312	15,845	1,500 employees	15831

Source: U.S. Census Bureau, 2012 County Business Patterns.

^aNote: The Small Business Administration size standard for finfish fishing is \$22 million. Neither Economic Census, Agriculture Census, nor the National Marine Fisheries Service collect business data by revenue size for the finfish industry. Therefore, we employ other data to approximate the number of small businesses. Source: U.S. Census Bureau, 2017 Economic Annual Survey

Since the Service does not have a permitting system authorizing incidental take of migratory birds, the Service does not have specific information regarding how many businesses

in each sector implement measures to reduce incidental take of birds. Not all businesses in each sector incidentally take birds. In addition, a variety of factors would influence whether, under the previous interpretation of the MBTA, businesses would implement such measures. It is also unknown how many businesses continued or reduced practices to reduce the incidental take of birds since publication of the Solicitor's M-Opinion. We did not receive any information on that issue during the public comment period for this rule.

This rule is deregulatory in nature and is thus likely to have a positive economic impact on all regulated entities, and many of these entities likely qualify as small businesses under the Small Business Administration's threshold standards (see Table 1). By codifying the Service's interpretation, first outlined in Solicitor's Opinion, M-37050, this rulemaking would remove legal uncertainty for any individual, government entity, or business entity that undertakes any activity that may kill or take migratory birds incidental to otherwise lawful activity. Such small entities would benefit from this rule because it would remove uncertainty about the potential impacts of proposed projects. Therefore, these entities will have better information for planning projects and achieving goals.

However, the economic impact of the rule on small entities is likely not significant. As shown in Table 6, the costs of actions businesses typically implement to reduce effects on birds are small compared to the economic output of business, including small businesses, in these sectors. In addition, many businesses will continue to take actions to reduce effects on birds because these actions are best management practices for their industry or are required by other Federal or State regulations, there is a public desire to continue them, or the businesses simply desire to reduce their effects on migratory birds. For example, 13 States have oil pit covering requirements.

This analysis examines the potential effect of the rule on small businesses in selected industries. Following this discussion is a summary of mitigation measures and costs (Table 6)

and a summary of the economic effects of the rule on the business sectors identified in Table 1 (Table 7).

Finfish (NAICS 114111)

Although longline fishing is regulated under the Magnuson–Stevens Act, seabirds are not afforded protection as they do not fall under that statute’s definition of bycatch. *See* 16 U.S.C. 1802. Therefore, it is probable these finfish businesses may reduce bird mitigation measures such as changes in design of longline fishing hooks, change in offal management practices, and flagging or streamers on fishing lines. Table 6 shows example costs of some of the mitigation measures.

Data are unavailable regarding fleet size and how many measures are employed on each vessel. Because data are unavailable about the distribution of possible range of measures and costs, we do not extrapolate cost data to small businesses. Table 2 shows the distribution of businesses by employment size and average annual payroll.

TABLE 2—FINFISH NAICS 14111: EMPLOYMENT SIZES AND PAYROLL¹

Employment Size	Number of Businesses	Average Annual Payroll per Business²
Less than 5 employees	1,134	\$62,000
5 to 9 employees	45	\$372,000
10 to 19 employees	23	\$639,000
20 to 49 employees	20	\$2,837,000
50 to 99 employees	5	\$4,333,000
100 to 249 employees	4	\$13,941,000

¹ 2017 Economic Census

² Sales data are not available by employment size.

Crude Petroleum and Natural Gas Extraction (NAICS 211111)

The degree to which these small businesses may be impacted by the rule is variable and is dependent on location and choice. Thirteen States (Illinois, Arkansas, Oklahoma, Texas, North Dakota, South Dakota, Nebraska, Montana, Wyoming, Colorado, Utah, New Mexico, and

California) have regulations governing the treatment of oil pits such as netting or screening of reserve pits, including measures beneficial to birds. The remaining States represent approximately 24 percent of businesses in the crude petroleum and natural gas extraction industry. Since the Small Business Size Standard is less than 1,250 employees, we assume all businesses are small. Table 3 shows the distribution of businesses by employment size and sales.

Businesses located in the States that do not have existing regulations would have the option to reduce or eliminate best management practices without potential litigation. As Table 6 shows, oil pit nets range in cost from about \$131,000 to \$174,000 per acre, where most netted pits are about ¼ to ½ acre. The distribution and number of oil pits across the United States or across the remaining States is unknown. Furthermore, the average number of oil pits per business is unknown. An estimate for the number of pits is unknown because some are ephemeral, present only while a well is being drilled, and others last for the life of the well. The replacement timeline for netting is also variable because hurricanes, strong winds, and strong sun all have deleterious impacts on nets. Because data are unavailable about the distribution or possible range of oil pits per business, we do not extrapolate netting cost data to small businesses.

TABLE 3—CRUDE PETROLEUM AND NATURAL GAS EXTRACTION NAICS 21111:

EMPLOYMENT SIZES AND SALES¹

Employment Size	Number of Businesses	Number of Impacted Businesses (37 States)	Average Sales per Business
Less than 5 employees	3,957	966	\$1,473,000
5 to 9 employees	723	177	\$9,291,000
10 to 19 employees	632	154	\$22,386,000
20 to 49 employees	552	135	\$72,510,000
50 to 99 employees	203	50	\$180,065,000

100 to 249 employees	156	38	\$344,694,000
250 employees or more	84	21	\$839,456,000

¹ 2017 Economic Census

Drilling Oil and Gas Wells (NAICS 213111)

The degree to which these small business in NAICS 213111 may be impacted by the rule is variable and is dependent on location and choice. Thirteen States (Illinois, Arkansas, Oklahoma, Texas, North Dakota, South Dakota, Nebraska, Montana, Wyoming, Colorado, Utah, New Mexico, and California) have regulations governing the treatment of oil pits such as netting or screening of reserve pits, including measures beneficial to birds. The remaining States represent approximately 32 percent of businesses in the crude petroleum and natural gas extraction industry. Since the Small Business Size Standard is less than 1,000 employees, we assume all businesses are small. Table 4 shows the distribution of businesses by employment size and sales.

Businesses located in the States that do not have existing regulations would have the option to reduce or eliminate best management practices without potential litigation. As Table 6 shows, oil pit nets range in cost from about \$131,000 to \$174,000 per acre, where most netted pits are about $\frac{1}{4}$ to $\frac{1}{2}$ acre. The distribution and number of oil pits across the United States or across the remaining States is unknown. Furthermore, the average number of oil pits per business is unknown. An estimate for the number of pits is unknown because some are ephemeral, present only while a well is being drilled, and others last for the life of the well. The replacement timeline for netting is also variable because hurricanes, strong winds, and strong sun all have deleterious impacts on nets. Because data are unavailable about the distribution or possible range of oil pits per business, we do not extrapolate netting cost data to small businesses.

TABLE 4—DRILLING OIL AND GAS WELLS NAICS 213111: EMPLOYMENT SIZES AND SALES¹

Employment Size	Number of Businesses	Number of Impacted Businesses (37 States)	Average Sales per Business
Less than 5 employees	1,217	393	\$312,000
5 to 9 employees	289	93	\$1,674,000
10 to 19 employees	299	97	\$3,300,000
20 to 49 employees	330	107	\$11,791,000
50 to 99 employees	150	48	\$17,454,000
100 to 249 employees	85	27	\$38,874,000
250 employees or more	52	17	\$140,769,000

¹ Economic Census 2017.

Solar Electric Power Generation (NAICS 221114)

The degree to which these small businesses may be impacted by the rule is variable and is dependent on location and choice. Some States may have regulations that require monitoring bird use and mortality at facilities; however, the number of States with regulations is unknown.

Table 5 shows the distribution of businesses by employment size and sales.

Businesses located in States that do not have existing regulations would have the option to reduce or eliminate best management practices without potential litigation. As Table 6 shows, the cost of pre- and post-construction bird surveys is unknown because data are not publicly available and public comments were not received to estimate costs. Due to these unknowns, we do not extrapolate cost data to small businesses.

TABLE 5—SOLAR ELECTRIC POWER GENERATION NAICS 221114: EMPLOYMENT SIZES AND SALES¹

Employment Size	Number of Businesses	Average Sales per Business
Less than 5 employees	91	\$6,792,000
5 to 9 employees	28	\$4,518,000
10 to 19 employees	21	\$5,806,000
20 to 49 employees	14	\$19,754,000
50 to 99 employees	6	\$64,296,000
100 to 249 employees	5	\$51,170,000

¹ 2017 Economic Census

Other Industries (NAICS 221115, 221121, 221122, and 517312)

For the selected industries, we do not provide further analysis because minimal effects are expected on small businesses relative to an environmental baseline based on current regulations and voluntary conservation measures, due to the fact that mitigation costs are small relative to the cost of projects (see Table 7). Because there is not now, nor has there previously been a large-scale permit program for incidental take, the baseline does not include the potential costs of complying with such a program, including the regulatory uncertainty associated with permit approval, compliance with other statutes (e.g., the National Environmental Policy Act), and potential litigation.

Summary

Table 6 identifies examples of bird mitigation measures and their associated cost. Table 7 summarizes likely economic effects of the rule on the business sectors identified in Table 1.

TABLE 6—BEST MANAGEMENT PRACTICES COSTS BY INDUSTRY¹

NAICS Industry	Example of Bird Mitigation Measure	Estimated Cost	Why data are not extrapolated to entire industry or small businesses
Finfish Fishing (NAICS 11411)	Changes in design of longline fishing hooks, change in offal management practices, flagging or streamers on fishing lines	<ul style="list-style-type: none"> • Costs are per vessel per year • \$1,400 for thawed blue-dyed bait • \$150 for strategic offal discards • \$4,600 for Tori line • \$4,000 one-time cost for underwater setting chute • \$4,000 initial and \$50 annual for side setting 	<ul style="list-style-type: none"> • No data available on fleet size • No data available on how many measures are employed on each vessel
Crude Petroleum and Natural Gas Extraction NAICS (211111)	<ul style="list-style-type: none"> • Netting of oil pits and ponds • Closed wastewater systems 	<ul style="list-style-type: none"> • \$130,680 to \$174,240 per acre to net ponds • Most netted pits are ¼ to ½ acre 	<ul style="list-style-type: none"> • Infeasible to net pits larger than 1 acre due to sagging

		<ul style="list-style-type: none"> • Cost not available for wastewater systems 	<ul style="list-style-type: none"> • Size distribution of oil pits is unknown • Average number of pits per business is unknown • Closed wastewater systems typically used for reasons other than bird mitigation
Drilling Oil and Gas Wells (NAICS 213111)	<ul style="list-style-type: none"> • Netting of oil pits and ponds • Closed loop drilling fluid systems 	<ul style="list-style-type: none"> • \$130,680 to \$174,240 per acre to net ponds • Cost not available for closed loop drilling fluid systems, but may be a net cost savings in arid areas with water conservation requirements 	<ul style="list-style-type: none"> • Infeasible to net pits larger than 1 acre due to sagging • Size distribution of oil pits is unknown • Average number of pits per business is unknown • Closed loop drilling fluid systems typically used for reasons other than bird mitigation • High variability in number of wells drilled per year (21,200 in 2019)
Solar Electric Power Generation (NAICS 221114)	Pre- and post-construction bird surveys	No public comments received to estimate costs	New projects can vary from 100 to 5,000 acres in size, and mortality surveys may not scale linearly
Wind Electric Power Generation (NAICS 221115)	<ul style="list-style-type: none"> • Pre-construction adjustment of turbine locations to minimize bird mortality during operations • Pre- and post-construction bird surveys • Retrofit power poles to minimize eagle mortality 	<ul style="list-style-type: none"> • Cost not available for adjustment of turbine construction locations • \$100,000 to \$500,000 per facility per year for pre-construction site use and post-construction bird mortality surveys • \$7,500 per power pole with high variability of cost • Annual nationwide labor cost to implement wind 	<ul style="list-style-type: none"> • Data not available for adjustment of turbine construction locations • High variability in survey costs and high variability in need to conduct surveys • High variability in cost and need to retrofit power poles

		energy guidelines: \$17.6M <ul style="list-style-type: none"> Annual nationwide non-labor cost to implement wind energy guidelines: \$36.9M 	
Electric Bulk Power Transmission (NAICS 221121)	Retrofit power poles to minimize eagle mortality	\$7,500 per power pole with high variability of cost	High variability in cost and need to retrofit power poles
Electric Power Distribution (NAICS 221122)	Retrofit power poles to minimize eagle mortality	\$7,500 per power pole with high variability of cost	High variability in cost and need to retrofit power poles
Wireless Telecommunications Carriers (except Satellite) (NAICS 517312)	<ul style="list-style-type: none"> Extinguish non-flashing lights on towers taller than 350' Retrofit towers shorter than 350' with LED flashing lights 	<ul style="list-style-type: none"> Industry saves hundreds of dollars per year in electricity costs by extinguishing lights Retrofitting with LED lights requires initial cost outlay, which is recouped over time due to lower energy costs and reduced maintenance 	Data not available for number of operators who have implemented these practices

¹Sources: FWS personnel, National Oceanic and Atmospheric Administration Revised Seabird Regulations Amendment, ecnetting.com, statista.com, aerion.com, FWS Wind Energy Guidelines, FWS Public Records Act data, FWS Eagle Conservation Plan Guidance.

TABLE 7—SUMMARY OF ECONOMIC EFFECTS ON SMALL BUSINESSES

NAICS Industry Description	NAICS Code	Bird mitigation measures with no action	Economic effects on small businesses	Rationale
Finfish Fishing	11411	Changes in design of longline fishing hooks, change in offal management practices, and flagging/streamers on fishing lines	Likely minimal effects	Seabirds are specifically excluded from the definition of bycatch under the Magnuson-Stevens Fishery Conservation and Management Act, and therefore seabirds not listed under the Endangered Species Act may not be covered by any mitigation measures. The impact

				of this on small entities is unknown.
Crude Petroleum and Natural Gas Extraction	211111	Using closed waste-water systems or netting of oil pits and ponds	Likely minimal effects	Thirteen States have regulations governing the treatment of oil pits such as netting or screening of reserve pits, including measures beneficial to birds. In addition, much of the industry is increasingly using closed systems, which do not pose a risk to birds. For these reasons, this rule is unlikely to affect a significant number of small entities.
Drilling Oil and Gas Wells	213111	Using closed waste-water systems or netting of oil pits and ponds	Likely minimal effects	Thirteen States have regulations governing the treatment of oil pits, such as netting or screening of reserve pits, including measures beneficial to birds. In addition, much of the industry is increasingly using closed systems, which do not pose a risk to birds. For these reasons, this rule is unlikely to affect a significant number of small entities.
Solar Electric Power Generation	221114	Monitoring bird use and mortality at facilities, limited use of deterrent systems such as streamers and reflectors	Likely minimal effects	Bird monitoring in some States may continue to be required under State policies. The number of States and the policy details are unknown.
Wind Electric Power Generation	221115	Following Wind Energy Guidelines, which involve conducting risk assessments for siting facilities	Likely minimal effects	Following the Wind Energy Guidelines has become industry best practice and would likely continue. In addition, the industry uses these guidelines to aid in reducing effects on other regulated species like eagles and

				threatened and endangered bats.
Electric Bulk Power Transmission	221121	Following Avian Power Line Interaction Committee (APLIC) guidelines	Likely minimal effects	Industry would likely continue to use APLIC guidelines to reduce outages caused by birds and to reduce the take of eagles, regulated under the Bald and Golden Eagle Protection Act.
Electric Power Distribution	221122	Following Avian Power Line Interaction Committee (APLIC) guidelines	Likely minimal effects	Industry would likely continue to use APLIC guidelines to reduce outages caused by birds and to reduce the take of eagles, regulated under the Bald and Golden Eagle Protection Act.
Wireless Telecommunications Carriers (except Satellite)	517312	Installation of flashing obstruction lighting	Likely minimal effects	Industry will likely continue to install flashing obstruction lighting to save energy costs and to comply with recent Federal Aviation Administration Lighting Circular and Federal Communication Commission regulations.

As explained above and in the rationale set forth in *Regulatory Planning and Review*, the economic effects on most or all regulated entities will be positive and this rule is not a major rule under SBREFA (5 U.S.C. 804(2)). The head of the agency therefore certifies that the rule would not have a significant economic impact on a substantial number of small entities.

Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs

This rule is an E.O. 13771 (82 FR 9339, February 3, 2017) deregulatory action.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we have determined the following:

a. This rule would not “significantly or uniquely” affect small government activities. A small government agency plan is not required.

b. This rule would not produce a Federal mandate on local or State government or private entities. Therefore, this action is not a “significant regulatory action” under the Unfunded Mandates Reform Act.

Takings

In accordance with E.O. 12630, this rule does not contain a provision for taking of private property, and would not have significant takings implications. A takings implication assessment is not required.

Federalism

This rule will not create substantial direct effects or compliance costs on State and local governments or preempt State law. Some States may choose to enact changes in their management efforts and regulatory processes and staffing to develop and or implement State laws governing birds, likely increasing costs for States. These efforts would require increased expenditure of funds, but would not constitute direct compliance costs. Therefore, this rule would not have sufficient federalism effects to warrant preparation of a federalism summary impact statement under E.O. 13132.

Civil Justice Reform

In accordance with E.O. 12988, we determined that this rule will not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We evaluated this regulation in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), and the Department of the Interior Manual (516 DM 8). We completed an environmental impact statement (EIS) analyzing the potential impacts of a reasonable range of alternatives for this action. Based on the analysis contained within the final EIS, the Service selected Alternative A—*Promulgate regulations that define the scope of the MBTA to exclude incidental take*. Under Alternative A, the Service hereby promulgates a regulation that defines the scope of the MBTA take prohibitions to include only actions directed at migratory birds. This regulatory change is not expected to change current implementation or enforcement of the MBTA. The Service selected this alternative because it clarifies our interpretation of the MBTA and reduces the regulatory burden on the public without significantly affecting the conservation of migratory bird species protected by the MBTA. The Service’s selection of this alternative and the basis for that selection are provided in the Record of Decision signed by the Director of the U.S. Fish and Wildlife Service.

Compliance with Endangered Species Act Requirements

Section 7 of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531–44), requires that “The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act.” 16 U.S.C. 1536(a)(1). It further states “[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.” 16 U.S.C. 1536(a)(2). We have determined that this rule regarding the take of migratory birds will have no effect on species listed under the provisions of the ESA. This rule does not lessen the requirements under the ESA and thus, species listed under the ESA continue to be afforded the full protection of the ESA. Therefore, this action will not have any effect on these species.

Government-to-Government Relationship with Tribes

In accordance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” and the Department of the Interior's manual at 512 DM 2, we considered the possible effects of this rule on federally recognized Indian Tribes. The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the criteria in Executive Order 13175 and under the Department's Tribal consultation policy and have determined that this rule may have a substantial direct effect on federally recognized Indian Tribes. We received requests from nine federally recognized Tribes and two Tribal councils for government-to-government consultation. Accordingly, the Service initiated government-to-government consultation via letters signed by Regional Directors and completed the consultations before issuing this final rule. The results of these consultations are summarized in the NEPA Record of Decision associated with this rulemaking, published at <http://www.regulations.gov> in Docket No. FWS–HQ–MB–2018–0090.

Energy Supply, Distribution, or Use (E.O. 13211)

E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. As noted above, this rule is a significant regulatory action under E.O. 12866, but the rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The action has not been otherwise designated by the Administrator of OIRA as a significant energy action. No Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 10

Exports, Fish, Imports, Law enforcement, Plants, Transportation, Wildlife.

Regulation Promulgation

For the reasons described in the preamble, we amend subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 10—GENERAL PROVISIONS

1. The authority citation for part 10 continues to read as follows:

AUTHORITY: 16 U.S.C. 668a–d, 703–712, 742a–j–l, 1361–1384, 1401–1407, 1531–1543, 3371–3378; 18 U.S.C. 42; 19 U.S.C. 1202.

2. Add § 10.14 to subpart B to read as follows:

§ 10.14 Scope of the Migratory Bird Treaty Act.

The prohibitions of the Migratory Bird Treaty Act (16 U.S.C. 703) that make it unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, or kill migratory birds, or attempt to engage in any of those actions, apply only to actions directed at migratory birds, their nests, or their eggs. Injury to or mortality of migratory birds that results from, but is not the purpose of, an action (i.e., incidental taking or killing) is not prohibited by the Migratory Bird Treaty Act.

George Wallace,

Assistant Secretary for Fish and Wildlife and Parks.