

**REGULATORY CERTAINTY: A FLIGHT OF FANCY
FOR THE MIGRATORY BIRD TREATY ACT**

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Garrett Kral*

*The MBTA's statutory provisions "have been the subject of repeated litigation and diametrically opposed opinions of the Solicitors of the Department of the Interior."*¹

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1. Introduction

The United States Department of the Interior's interpretation of the Migratory Bird Treaty Act (MBTA, or the Act)² has varied during the Obama, Trump, and now Biden administrations.³ Central to this variance is a dispute over statutory interpretation; specifically, the definition of "incidental take," *i.e.*, unintentional migratory bird mortality, which can be a *strict liability crime*.⁴ This article provides a brief history of the MBTA and the important role it has played in migratory bird conservation.⁵ However, the focus of this article is on recent MBTA policy and judicial decisions and what these decisions could mean for the regulated community.⁶

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¹ Regulations Governing Take of Migratory Birds; Revocation of Provisions, 86 Fed. Reg. 54,642 (Oct. 4, 2021) (to be codified at 50 C.F.R. 10).

² 16 U.S.C. §§ 703–712.

³ See discussion *infra* Section 3.

⁴ 16 U.S.C. § 707(a). There are due process concerns with Section 707 of the MBTA because misdemeanor and felony penalties exist. DOI states it can mitigate these concerns with prosecutorial discretion. See *infra*, Section 3(a); MARTHA WILLIAMS, U.S. FISH & WILDLIFE SERV., DIR.'S ORD. NO. 225, INCIDENTAL TAKE OF MIGRATORY BIRDS (2021) [hereinafter Director's Order 225].

⁵ See discussion *infra* Section 2.

⁶ See discussion *infra* Section 3(b)(i)–(ii).

But before we begin, it is important to consider the United States' successful conservation of migratory bird species.⁷ Industry, from oil pits to wind-based turbines, is not the leading cause of domestic migratory bird mortality.⁸ In fact, data from recent years show the top three causes of domestic migratory bird mortality are: (1) cats; (2) buildings; and (3) automobiles.⁹ Thus as we consider the topic of migratory bird conservation, it is important to contextualize the leading causes of migratory bird mortality.

2. A Brief History of the MBTA

This article does not attempt to summarize the full depth and breadth of bird law,¹⁰ detailed treatment of which can be found elsewhere.¹¹ What this section does provide is a quick overview of the Act's history. In 1913, the United States Senate adopted a resolution requesting that the President "propose to the Governments of other countries the negotiation of a convention for the protection and preservation of birds."¹² Acting on this Senate resolution, the United States and

⁷ 50 C.F.R. § 10.13 (Listing the total number of species protected by the MBTA as 1,093. This list was last updated on April 16, 2020, when 75 migratory birds were added and 8 were removed.) (U.S. Fish & Wildlife Service, MANAGED SPECIES, *Migratory Bird Treaty Act Protected Species*, <https://www.fws.gov/birds/management/managed-species/migratory-bird-treaty-act-protected-species.php>).

⁸ See U.S. Fish & Wildlife Service, *Threats to Migratory Birds*, MIGRATORY BIRD MORTALITY QUESTIONS AND ANSWERS, <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php>, (Note the data set used by FWS is from 2017, but this webpage was last updated in December of 2021, after DOI published its final rule, advanced notice of proposed rulemaking, and Director's Order 225).

⁹ See *id.* (Note there are a range of numbers experts use, and the federal government adopts, when setting MBTA policy. The data suggest average annual bird mortality is 3.3 billion, and the most common causes of bird mortality are: (1) cats (2.4 billion per annum); (2) buildings (599 million per annum); and (3) vehicles (214 million per annum). All industrial activity accounts for 709 million migratory bird deaths per annum.). *Id.*

¹⁰ The MBTA has historical roots, but also enjoys its place in popular culture. See, e.g., *It's Always Sunny in Philadelphia*, *The Gang Exploits the Mortgage Crisis* (FX Network television broadcast Sept. 17, 2009) (Dennis: "I can absolutely keep a hummingbird as a pet . . . it's no different than having a parrot or a parakeet." Charlie: "You really can't, and I'm not saying I agree with it. It's just that bird law in this country is not governed by reason." Dennis: "There's no such thing as 'bird law.'" Charlie: "Yes, there is.").

¹¹ See, e.g., Robert Percival & Garrett Kral, *Global Trends in Protection of Migratory Birds*, 33 A.B.A. NAT. RES. & ENV'T MAG. 16 (2018) (exploring global trends in the protection of migratory birds); Brittany E. Barbee, *To Kill a Migratory Bird: How Incidental Takes by Commercial Industry Activity Should be Regulated by a New Civil Penalty Regime, Not the Current MBTA*, 25 BUFF. ENV'T. L. J. 91 (2018) (proposing the replacement of MBTA's criminal liability); Jessica Scott & Andrea Folds, *From Friend to Foe: The Complex and Evolving Relationship of the Federal Government and the Migratory Birds it is Bound to Protect*, 49 ENV'T. L. 187 (2019) (advocating for the prosecution of incidental take).

¹² SENATE JOURNAL, 63rd Cong. 1st Sess. 108 (Apr. 7, 1913).

Great Britain (signing on behalf of Canada) entered into the first treaty for the protection of migratory birds in 1916.¹³

To fulfill the United States' treaty obligations, in 1918, Congress enacted the MBTA.¹⁴ This treaty was the first of four entered into by the United States between 1916 and 1976 for the protection of migratory birds.¹⁵ Since 1976, the MBTA has taken a rather circuitous flight path through each branch of the federal government in this administrative law dispute.

3. The Current State of the Law

a. The MBTA Under the Last Two Presidential Administrations

Because much of the disagreement over the MBTA's proper scope and purpose centers around the statutory interpretation of "incidental take," it is important to define that term upfront. In plain English, incidental take is the harming or killing of migratory birds that results from—but is not the purpose of—otherwise lawful activity. Congress defines incidental take as "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 Examples of lawful activity that can result in incidental take, and thus open oneself up to enforcement and prosecution include: (1) personal activity (*e.g.*, an unsuspecting landowner fells a tree with a migratory bird's nest in its branches); (2) industrial activity (*e.g.*, operation of an oil field waste pit that a migratory bird descends into); and (3) renewable energy activity (*e.g.*, a land-based wind turbine that a migratory bird flies into).¹⁷

¹³ Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.K.-U.S., Aug. 16, 1916, 39 Stat. 1702 (ratified Dec. 7, 1916).

¹⁴ U.S. Fish & Wildlife Service, *Laws & Legislation*, MIGRATORY BIRD TREATY ACT, <https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php>.

¹⁵ See generally, Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.K.-U.S., Aug. 16, 1916, 39 Stat. 1702 (ratified Dec. 7, 1916); Convention Between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, Mex.-U.S., Feb. 7, 1936, 50 Stat. 1311 (ratified Mar. 15, 1937); Convention Between the Governments 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, Japan-U.S., Mar. 4, 1972, 25 U.S.T. 3329 (ratified Sep. 19, 1974); and Convention Between the United States of America and the Union of the 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 (ratified Oct. 13, 1978). (Note that there have been amendments to at least some of these treaties; for example, the United States and Mexico treaty was amended in 1976, and the United States and Canada treaty was amended in 1995.). U.S. Fish & Wildlife Service, *Laws & Legislation*, MIGRATORY BIRD TREATY ACT, <https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php>.

¹⁶ 16 U.S.C. § 703(a).

¹⁷ See U.S. Fish & Wildlife Service, *Threats to Migratory Birds*, MIGRATORY BIRD MORTALITY QUESTIONS AND ANSWERS, <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php>; see

While the MBTA's incidental take provision has been around since the 1970's, this article focuses on the Act's recent history.¹⁸ On January 10, 2017, the Department of the Interior (DOI) under the Obama administration issued a Solicitor's opinion stating the MBTA prohibits "incidental take."¹⁹ A Solicitor's opinion is a policy memorandum from DOI's Solicitor, the Senate confirmed principle legal adviser to the Secretary of the Interior—the Cabinet Secretary leading DOI's 70,000 employees across 2,400 locations. This Solicitor's opinion from the Obama administration concluded "the MBTA's broad prohibition on taking and killing migratory birds by any means and in any manner includes incidental taking and killing."²⁰

Stated differently, under Section 707 of the MBTA the killing of a migratory bird can be a strict liability crime—at least under Section 707(a)'s misdemeanor provision where no *mens rea* is required to be convicted of violating the Act.²¹ Individuals or companies who commit a Section 707(a) violation are "**deemed guilty** of a misdemeanor and upon conviction thereof shall be fined not more than \$15,000 or be imprisoned not more than six months, or both."²²

On the other hand the MBTA's felony provision, Section 707(b)(1)-(2), states that those who "**knowingly**" violate the Act "shall be guilty of a felony and shall be fined not more than \$2,000 or imprisoned not more than two years, or both."²³ Fortunately, Section 707(b)'s felony provision has a knowledge requirement, meaning that a violation of this part of the Act is not a strict liability crime.²⁴ Even so, there are due process concerns with Sections 707(a)-(b) of the

also UNITED STATES DEP'T OF THE INTERIOR, SOLICITOR'S OPINION M-37050, THE MIGRATORY BIRD TREATY ACT DOES NOT PROHIBIT INCIDENTAL TAKE 18 (Dec. 22, 2017).

¹⁸ *Compare Nat. Res. Def. Council v. U.S. Dep't of the Interior*, 478 F. Supp. 3d 469, 473 (S.D.N.Y. 2020) (stating "[f]rom the early 1970s until 2017, Interior interpreted the MBTA to prohibit incidental takes and kills."); *with*, Press Release, U.S. Fish and Wildlife Service, U.S. Fish and Wildlife Service Solicits Public Input on Proposed Rule and Environmental Impact Statement for Migratory Bird Treaty Act (Jan. 30, 2021) (concluding "[w]ith five federal circuit courts of appeals divided on this question, it is important to bring regulatory certainty to the public by clarifying that the criminal scope of the MBTA only reaches to conduct intentionally injuring birds") (on file with author).

¹⁹ UNITED STATES DEP'T OF THE INTERIOR, SOLICITOR'S OPINION M-37041, INCIDENTAL TAKE PROHIBITED UNDER THE MIGRATORY BIRD TREATY ACT (Jan. 10, 2017).

²⁰ *Id.*

²¹ 16 U.S.C. § 707(a) ("[A]ny person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$15,000 or be imprisoned not more than six months, or both.").

²² 16 U.S.C. § 707(a).

²³ 16 U.S.C. §§ 707(b)(1)-(2).

²⁴ 16 U.S.C. § 707(b)(2) ("Whoever, in violation of this subchapter, shall knowingly . . . sell, offer for sale, barter or offer to barter any migratory bird shall be guilty of a felony and shall be fined not more than \$2,000 or imprisoned not more than two years, or both.").

MBTA because they allow for criminal penalties.²⁵ Nevertheless, DOI has recently stated that through prosecutorial discretion it may mitigate such concerns.²⁶

Under the Trump administration, DOI did not agree with the prior Solicitor's interpretation of the MBTA. As such, less than a year after taking office, the Trump administration issued its own Solicitor's opinion that found the MBTA only criminalizes "direct and affirmative purposeful actions that reduce migratory birds, their eggs, or their nests, by killing or capturing, to human control."²⁷ The most notable example of such conduct is illegally hunting or poaching protected migratory bird species.²⁸ This opinion remained the legal position of the United States for the duration of the prior administration and was supported by a final rule published by the United States Fish and Wildlife Service (FWS, or the Service) on January 7, 2021.²⁹

The Solicitor's opinion for the Trump administration began with the text of the Act, citing to the ancient maxim *a verbis legis non est recedendum* (do not depart from the words of the law).³⁰ Here, the Solicitor turned to Section 703(a) of the MBTA which defines "incidental take" and relied upon the canon *noscitur a sociis* (a word is known by its associates) to find that "pursue," "hunt," and "capture," unambiguously require an affirmative and purposeful action.³¹ While the two remaining verbs, "kill," and "take," may refer to either active or passive conduct. These tools of statutory interpretation, along with other legal analysis, led that Solicitor's opinion to conclude Section 703(a)'s definition of incidental take is limited to affirmative actions that have as their stated purpose the taking or killing of migratory birds.³² This brings us to the current administration's approach to interpreting the MBTA, which is "diametrically opposed" to that of the Trump administration, and which builds upon that of the Obama administration.³³

b. The Current Administration's MBTA Approach

i. Policy Preferences

On October 4, 2021, the Biden administration concurrently published three important documents: (1) the MBTA final rule; (2) the Advanced Notice of Proposed Rulemaking (ANPR); and (3) Director's Order 225.³⁴ The publication of the MBTA final rule withdrew the Trump administration's MBTA final rule, while a recent district court ruling vacated the Solicitor's

²⁵ See Director's Order 225, *supra* note 4, at 2.

²⁶ See *Id.*

²⁷ UNITED STATES DEP'T OF THE INTERIOR, SOLICITOR'S OPINION M-37050, THE MIGRATORY BIRD TREATY ACT DOES NOT PROHIBIT INCIDENTAL TAKE 41 (Dec. 22, 2017).

²⁸ *Id.*

²⁹ See 50 C.F.R. § 10.14 (2021).

³⁰ UNITED STATES DEP'T OF THE INTERIOR, SOLICITOR'S OPINION M-37050, THE MIGRATORY BIRD TREATY ACT DOES NOT PROHIBIT INCIDENTAL TAKE 18–19 (Dec. 22, 2017).

³¹ *Id.* at 19.

³² *Id.*

³³ Regulations Governing Take of Migratory Birds; Revocation of Provisions, 86 Fed. Reg. 54,642, 54,642 (Dec. 3, 2021) (to be codified at 50 C.F.R. pt. 10).

³⁴ *Id.*; see also Director's Order 225, *supra* note 4, at 1.

opinion from the prior administration.³⁵ DOI, under the current administration, has not yet issued a Solicitor’s opinion discussing “incidental take,” most likely because the position of DOI’s Solicitor remained vacant for a majority of the first year of the current administration.³⁶ However, based on a review of the prior two administration’s actions—and with the recent confirmation of DOI’s newest Solicitor—the current administration has almost certainly begun drafting and is looking to publish a new Solicitor’s opinion that returns to the position that incidental take is prohibited by the MBTA.³⁷

The current administration’s final rule does not propose replacement language for the prior administration’s final rule.³⁸ Instead, it removes the prior administration’s regulatory text altogether, stating DOI will: “return to implementing the MBTA as prohibiting incidental take and applying enforcement discretion.” The current administration’s final rule went into effect on December 3, 2021.³⁹

Also, the current administration’s publication of the ANPR in the Federal Register opened a 60-day notice and comment period that expired on the final rule’s effective date: December 3, 2021.⁴⁰ Briefly, the ANPR discusses the option of a MBTA incidental take permitting program.⁴¹ This approach is similar to that initiated by the Obama administration in 2015,⁴² but disregarded by the Trump administration in 2017, when that Solicitor concluded the MBTA does not prohibit incidental take.⁴³ As such, under the Trump administration’s reading of the MBTA, because lawful actions resulting in the taking of migratory bird species are not subject to enforcement or prosecution, a permitting program would be superfluous.⁴⁴ However, under the current

³⁵ Regulations Governing Take of Migratory Birds, 86 Fed. Reg. at 54,642; *see also Nat. Res. Def. Council v. U.S. Dep’t of the Interior*, 478 F. Supp. 3d 469, 469 (S.D.N.Y. 2020).

³⁶ U.S. Department of the Interior, *Office of the Solicitor*, ORGANIZATION STRUCTURE, <https://www.doi.gov/solicitor/organization-structure>.

³⁷ The current administration issued a brief memorandum in which the then-Principal Deputy Solicitor, who has since been confirmed as DOI’s current Solicitor, revoked and withdrew the Trump administration’s Solicitor opinion, which was also vacated by a recent decision in the Southern District of New York. U.S. DEP’T. OF THE INTERIOR, Memorandum 37065, <https://www.doi.gov/sites/doi.gov/files/permanent-withdrawl-of-sol-m-37050-mbta-3.8.2021.pdf> (March 8, 2021).

³⁸ Regulations Governing Take of Migratory Birds, 86 Fed. Reg. at 54,642.

³⁹ *Id.*

⁴⁰ Migratory Bird Permits: Authorizing the Incidental Take of Migratory Birds, 86 Fed. Reg. 54,667 (October 4, 2021) (to be codified at 50 C.F.R. pt. 21).

⁴¹ Migratory Bird Permits, 86 Fed. Reg. at 54,669.

⁴² Migratory Bird Permits; Programmatic Environmental Impact Statement, 80 Fed. Reg. 30,032, 30,034 (May 26, 2015) (to be codified at 50 C.F.R. pt. 21).

⁴³ UNITED STATES DEP’T OF THE INTERIOR, SOLICITOR’S OPINION M-37050, THE MIGRATORY BIRD TREATY ACT DOES NOT PROHIBIT INCIDENTAL TAKE 18 (Dec. 22, 2017).

⁴⁴ *Id.* at 37 (While the MBTA contemplates the issuance of permits authorizing wildlife take, it requires any such permit to be issued by “regulation.”) (citing 16 U.S.C. § 703(a) (“Unless and except as permitted by *regulations* made as hereinafter provided” (emphasis added))).

administration's reading of the MBTA, a permitting program is perhaps necessary "to provide both meaningful bird conservation and regulatory clarity."⁴⁵

Also on October 4, 2021, the Service published Director's Order 225.⁴⁶ This policy document comes from the Director of the FWS, a politically appointed position that remains vacant in the current administration; and thus, this order was almost certainly written by lower-level DOI staff.⁴⁷ To protect against the inherent overbreadth of incidental take, Director's Order 225 allows for enforcement discretion.⁴⁸ This approach was disfavored in the prior administration which cautioned that such discretion would likely result in the application of "arbitrary and discriminatory" power.⁴⁹ Nevertheless, Director's Order 225 states that "the Service will focus our enforcement efforts on specific types of activities that both foreseeably cause incidental take and where the proponent fails to implement known beneficial practices to avoid or minimize incidental take."⁵⁰

Director's Order 225 describes "beneficial practices" broadly, to include any action implemented in an effort to avoid and minimize the incidental taking of protected migratory birds.⁵¹ The FWS maintains a website that provides applicable best practices and conservation measures; for example, best practices for land-based wind energy facilities include following the Service's Land-Based Wind Energy Guidelines, which industry operators may find reduces exposure to MBTA enforcement and prosecution.⁵² In practice, however, it is likely too soon to

⁴⁵ Migratory Bird Permits, 86 Fed. Reg. at 54,669.

⁴⁶ *Id.* ("Concurrent with this final rule, we have also published an advance notice of proposed rulemaking requesting public input on potential alternatives for authorizing incidental take of migratory birds and a Director's Order clarifying our current enforcement position.").

⁴⁷ See U.S. Fish & Wildlife Serv., *National Org. Chart*, OFFICE OF EXTERNAL AFFAIRS, <https://fws.gov/offices/org-chart.html>; see also Press Release, Center for Biological Diversity, Biden Urged to Nominate U.S. Fish and Wildlife Service Director, (Sept. 8, 2021) (on file with author); PN1295, Nomination of Martha Williams for Department of the Interior, 117th Congress (2021-2022), PN1295, 117th Cong. (2022), <https://www.congress.gov/nomination/117th-congress/1295> (Martha Williams, the current Principle Deputy Director of FWS has been nominated by the Biden administration to lead FWS as its Director; and while Ms. Williams was voted out of the Senate Committee on Environment and Public Works, she has yet to receive a floor vote and thus her confirmation is pending).

⁴⁸ Director's Order 225, *supra* note 4, at 2 (The Service "recognizes that a wide range of activities may result in incidental take of migratory birds" and "[p]ursuing enforcement for all these activities would not be an effective or judicious use of our law enforcement resources.").

⁴⁹ UNITED STATES DEP'T OF THE INTERIOR, SOLICITOR'S OPINION M-37050, THE MIGRATORY BIRD TREATY ACT DOES NOT PROHIBIT INCIDENTAL TAKE 41 (Dec. 22, 2017).

⁵⁰ Director's Order 225, *supra* note 4, at 2 (emphasis in original).

⁵¹ *Id.* at 1 ("Beneficial practice means an action implemented in an effort to avoid and minimize the incidental take of migratory birds. We also refer to beneficial practices as best management practices, conservation measures, best practices, mitigation measures, etc.").

⁵² U.S. Fish and Wildlife Serv., MANAGEMENT, *Project Assessment Tools & Guidance*, <https://www.fws.gov/birds/management/project-assessment-tools-and-guidance.php>.

tell how Director’s Order 225 will be enforced. Thus, like the sword of Damocles, Interior’s MBTA policy preferences loom over a host of otherwise lawful and productive activities.⁵³

ii. Judicial Decisions

The MBTA has been litigated over in a bevy of federal district⁵⁴ and appellate courts.⁵⁵ Indeed, there is a circuit split on the issue of incidental take.⁵⁶ Generally, the Second and Tenth Circuits have extended the MBTA to include incidental take; while the Fifth, Eighth, and Ninth Circuits have limited the MBTA to exclude incidental take.⁵⁷ As such, there is no shortage of interesting MBTA case law to discuss. However, for brevity and clarity, this article focuses on the case law considered by DOI in its final rule.⁵⁸

It may be said, however, that just as much scrutiny should be provided to the current administration’s final rule because of the judicial decisions it fails to discuss.⁵⁹ Namely, *United*

⁵³ UNITED STATES DEP’T OF THE INTERIOR, SOLICITOR’S OPINION M-37050, THE MIGRATORY BIRD TREATY ACT DOES NOT PROHIBIT INCIDENTAL TAKE 1 (Dec. 22, 2017) (citing *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting) (“The value of a sword of Damocles is that it hangs—not that it drops.”)).

⁵⁴ See, e.g., *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 529 (E.D. Cal. 1978), *aff’d*, 578 F.2d 259 (9th Cir. 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 U.S. App. Lexis 1110 (D.C. Cir. Jan. 23, 2003); *Nat’l Audubon Soc’y v. U.S. Fish & Wildlife Serv.*, 1:21-cv-00448 (S.D.N.Y. filed Jan. 19, 2021).

⁵⁵ See, e.g., *United States v. FMC Corp.*, 572 F.2d 902, 903 (2nd Cir. 1978); *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 680 (10th Cir. 2010); *United States v. CITGO Petro. Corp.*, 801 F.3d 477, 478 (5th Cir. 2015); *Newton County Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 111 (8th Cir. 1997); *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 298 (9th Cir. 1991).

⁵⁶ See *supra* note 19, Press Release, U.S. Fish and Wildlife Service, U.S. Fish and Wildlife Service Solicits Public Input on Proposed Rule and Environmental Impact Statement for Migratory Bird Treaty Act (Jan. 30, 2021) (on file with author); Corinne Snow & Patrick Traylor, et. al., *Biden Administration Looks To Recriminalize Accidental Bird Deaths In Traditional And Renewable Energy Sectors*, JD SUPRA (March 18, 2021) (finding that “[t]here is no one-size-fits-all answer on MBTA risk exposure, at least until the Supreme Court resolves the circuit split over the proper reach of the MBTA.”), <https://www.jdsupra.com/legalnews/biden-administration-looks-to-2642339/>.

⁵⁷ Compare *FMC Corp.* 572 F.2d at 903, and *Apollo Energies, Inc.*, 611 F.3d at 680, with *CITGO Petro. Corp.*, 801 F.3d at 478, *Newton County Wildlife Ass’n*, 113 F.3d at 111, and *Seattle Audubon Soc’y*, 952 F.2d at 298 .

⁵⁸ 86 Fed. Reg. 50,644 ([comparing](#) *Nat. Res. Def. Council v. U.S. Dep’t of the Interior*, 478 F. Supp. 3d 469 (S.D.N.Y. 2020), with *CITGO*, 801 F.3d at 478 and 50 C.F.R. § 10.14 (2021)).

⁵⁹ See, e.g., *FMC Corp.*, 572 F.2d at 903; *Newton*, 113 F.3d at 111; *Seattle Audubon Soc’y*, 952 F.2d at 298.

States v. FMC Corporation (not discussed); but also, *United States v. Apollo Energies* (mentioned only once).⁶⁰

In *FMC Corp.*, the Second Circuit extended the MBTA to include incidental take, upholding the conviction of a corporation whose operations were found to have resulted in the incidental take of migratory birds after those birds were exposed to pesticide tainted water.⁶¹ While in *Apollo Energies* the Tenth Circuit also extended the MBTA to include incidental take, finding that “[a]s a matter of statutory construction, the ‘take’ provision of the Act does not contain a scienter requirement.”⁶² Thus it would seem that from DOI’s perspective *FMC Corp.* and *Apollo Energies* merit detailed discussion because they provide some legal justification for the position that the MBTA prohibits incidental take.

DOI’s absence of discussion on *FMC Corp.* is particularly interesting.⁶³ Instead of discussing this case, DOI focuses its revocation of the prior administration’s final rule on *Natural Resources Defense Council v. United States Department of the Interior (NRDC)*.⁶⁴ *NRDC* is a published opinion from the Southern District of New York (SDNY), but this opinion cannot be said to supersede a published opinion from the Second Circuit—which is binding on the SDNY.

Thus, it is curious indeed that the United States filed a notice of appeal in the Second Circuit on the *NRDC* decision before the change in administration.⁶⁵ However, after the change in administration, the United States filed a stipulation to dismiss its appeal of *NRDC*.⁶⁶ Perhaps because the current administration does not want to disturb the decision reached by the Second Circuit in *FMC Corp.*, or the decision reached by the SDNY in *NRDC*, the latter of which vacated the Solicitor’s opinion from the prior administration, and both of which took the position that the MBTA prohibits incidental take. But if that is the current administration’s reasoning, then why not cite to *FMC Corp.* as the legal justification for its final rule? If the goal is regulatory certainty, why rely so heavily on a single published opinion from the SDNY while ignoring a published opinion from the Second Circuit (and mentioning a favorable decision from the Tenth Circuit only once)?

⁶⁰ See generally Regulations Governing Take of Migratory Birds; Revocation of Provisions, 86 Fed. Reg. 54,642 (Dec. 3, 2021) (to be codified at 50 C.F.R. pt. 10).

⁶¹ *FMC Corp.*, 572 F.2d at 903.

⁶² *Apollo Energies*, 611 F.3d at 686.

⁶³ Maxine Joselow, *Biden Officials Finalize a Rule Making it Harder to Kill Migratory Birds*, WASH. POST, Sept. 20, 2021, available at <https://www.washingtonpost.com/climate-environment/2021/09/29/migratory-bird-treaty-act-biden/> (quoting Kathleen Sgamma, the President of the Western Energy Alliance which represents oil and gas drillers in Western states, arguing that “[b]y ignoring all but one circuit court ruling in this rule and hanging its hat on a district court ruling that hasn’t gone through appeal, the Biden administration is not clearing up the legal issues addressed by various circuit courts and will be legally vulnerable.”).

⁶⁴ 478 F. Supp. 3d 469 (S.D.N.Y. 2020).

⁶⁵ Regulations Governing Take of Migratory Birds; Revocation of Provisions, 86 Fed. Reg. 54,642, 54,643 (Oct. 4, 2021) (to be codified at 50 C.F.R. pt. 10).

⁶⁶ *Id.*

But this is what the final rule does. In the final rule, DOI states “after further review of the January 7 [Trump administration] rule and the *CITGO* and *NRDC* decisions, along with the language of the statute” DOI has determined that the Trump administration’s final rule and its Solicitor’s opinion are not in “accord[] with the text, purposes, and history of the MBTA.”⁶⁷ However, the current administration’s final rule also states:

Reference to case law in general or legislative history can be interpreted to bolster either interpretation [of the MBTA] as demonstrated by the relevant analysis in the January 7 rule versus that of the initial Solicitor’s Opinion, M–37041 In any case, the Service certainly has discretion to revoke the January 7 rule given the legal infirmities raised by the *NRDC* court and the [January 7] rule’s reliance on the *CITGO* decision.⁶⁸

As such, the core of the current administration’s final rule compares, contrasts, and ultimately distinguishes *NRDC* from the Fifth Circuit’s decision in *CITGO* and the prior administration’s final rule.⁶⁹ It is interesting that DOI puts so much weight into distinguishing *CITGO* from *NRDC* because these decisions rest in different circuits and at different levels of the federal judiciary. This tactic could make more sense if DOI provided deeper treatment to the current circuit split. However, to focus DOI’s legal analysis on these two judicial decisions and a couple of non-binding policy documents is a puzzling tactic for administrative policymakers in 2022.

In its final rule, the current administration states *CITGO* relies on “two questionable premises.”⁷⁰ First, DOI states that the Fifth Circuit read the term “kill” out of the MBTA, “render[ing] ‘kill’ superfluous to the other terms mentioned, thus violating the rule against surplusage.”⁷¹ Second, DOI states the Fifth Circuit erred when applying *noscitur a sociis* because “upon closer inspection . . . the only terms that clearly and unambiguously refer to deliberate acts are ‘hunt’ and ‘pursue.’”⁷² Thus, DOI states “[t]he fact that most of the prohibited terms can be read to encompass actions that are not deliberate in nature is a strong indication that Congress did not intend those terms to narrowly apply only to direct actions.”⁷³ Ultimately, DOI concludes

⁶⁷ *Id.* at 54,644.

⁶⁸ *Id.* (emphasis added).

⁶⁹ See *NRDC*, 478 F. Supp. 3d at 469; *United States v. CITGO Petro. Corp.*, 801 F.3d 477 (5th Cir. 2015). (Note that FWS also points to the Stump Act, which among other things carved out an incidental take exemption for military activities that result in the death of protected migratory birds. FWS argues the inclusion of this exemption in the Stump Act demonstrates that Congress intended the MBTA to prohibit incidental take. FWS also cites to concerns raised by the Canadian government that the prior administration’s final rule did not comply with the spirit of the treaty that the United States entered into with Canada in 1916.)

⁷⁰ Regulations Governing Take of Migratory Birds; Revocation of Provisions, 86 Fed. Reg. 54,642, 54,643 (Oct. 4, 2021) (to be codified at 50 C.F.R. pt. 10).

⁷¹ *Id.* (citing *Corley v. United States*, 556 U.S. 303, 314 (2009)).

⁷² *Id.*

⁷³ *Id.*

“[a]fter closely examining the court’s holding [in *NRDC*], we are persuaded that it advances the better reading of the statute,” one prohibiting incidental take.⁷⁴

Lastly, it is curious and perhaps not coincidental that DOI fails to provide any meaningful treatment to the other circuit court decisions which cut against its current interpretation of the MBTA. Namely, *Newton* (Eighth Circuit) and *Seattle Audubon Society* (Ninth Circuit).⁷⁵ In *Newton*, the Eighth Circuit stated, “we agree with the Ninth Circuit [in *Seattle Audubon Society*] that the ambiguous terms ‘take’ and ‘kill’ in 16 U.S.C. § 703 mean ‘physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute’s enactment in 1918.’”⁷⁶ While in *Seattle Audubon Society*, the Ninth Circuit found that “the[] cases do not suggest that habitat destruction, leading indirectly to bird deaths, amounts to the ‘taking’ of migratory birds within the meaning of the Migratory Bird Treaty Act. We are not free to give words a different meaning than that which Congress and the Agencies charged with implementing congressional directives have historically given them under the Migratory Bird Treaty Act.”⁷⁷ Thus, both *Newton* and *Seattle Audubon Society* (along with *CITGO*) find that the MBTA does not prohibit incidental take while the current administration believes that it does, and in making this argument the current administration relies nearly in whole but at least in heavy part on a single district court decision: *NRDC*.⁷⁸

If the Supreme Court were to hear a case on the current circuit split over the MBTA’s “incidental take” provision, the Court would almost certainly address not only *Newton* and *Seattle Audubon Society*, but each of the decisions discussed above.⁷⁹ And while the MBTA has been to the Court once before, that flight was taken over 100 years ago.⁸⁰ Thus, the current circuit split appears ripe for the Court’s review.

4. Conclusion

Regulatory uncertainty is disfavored. Indeed, the law (and the regulated community) demand certainty. Nevertheless, regulatory uncertainty surrounding the MBTA’s implementation is likely—and perhaps expected—in the short term. Thus, with varying presidential administrations having “diametrically opposed”⁸¹ interpretations of the MBTA, one is left wondering what the next administration will do.

⁷⁴ *Id.*

⁷⁵ *Newton County Wildlife Assn.*, 113 F.3d at 110; *Seattle Audubon Soc’y*, 952 F.2d at 297.

⁷⁶ *Newton*, 113 F.3d at 111 (citing *Seattle Audubon Soc’y*, 952 F.2d at 302).

⁷⁷ *Seattle Audubon Soc’y*, 952 F.2d at 303.

⁷⁸ Regulations Governing Take of Migratory Birds; Revocation of Provisions, 86 Fed. Reg. 54,642, 54,643 (Oct. 4, 2021) (to be codified at 50 C.F.R. pt. 10).

⁷⁹ *See supra* note 55.

⁸⁰ *See Missouri v. Holland*, 252 U.S. 416 (1920) (finding that the MBTA was constitutional under the treaty power.).

⁸¹ 86 Fed. Reg. 54,642.