

## C O M M E N T S

# A Pendulum Seldom Stops in the Middle: Shifting Views on “Take” of Raptors and Other Migratory Birds

by David Freudenthal, Steven P. Quarles, and Rebecca Barho

David Freudenthal is a former Governor of Wyoming and U.S. Attorney for the District of Wyoming. Steven P. Quarles is a Partner in Nossaman, LLP, in Washington, D.C. Rebecca Barho is an Associate in Nossaman LLP, in Austin, Texas.

The Migratory Bird Treaty Act (MBTA)<sup>1</sup> makes it unlawful to, among other things, “take” and “kill” migratory birds.<sup>2</sup> Current MBTA discussions focus on the split among five federal circuit courts of appeals<sup>3</sup> and between two U.S. Department of the Interior (DOI) Solicitor’s Opinions<sup>4</sup> as to whether the MBTA prohibits indirect or unintentional take or killing of migratory birds that occurs in connection with otherwise lawful activities. This is due, in part, because little notice has historically been given to the efforts of DOI’s U.S. Fish and Wildlife Service (FWS) to expand the terms “take” and “kill” found within the MBTA to include the concepts of “harass,” “harm,” “molest,” and “disturb,” which exist only in the Endangered Species Act (ESA)<sup>5</sup> and the Bald and Golden Eagle Protection Act (BGEPA),<sup>6</sup> and are not present in the MBTA or its implementing regulations.<sup>7</sup> FWS’ expansion of the activities that constitute “take” or “kill” under the MBTA has been accomplished principally through issuance of policy and guidance documents without rulemaking or opportunities for public comment. Yet, it may have a significant impact on the regulated community because it potentially creates new grounds for criminal prosecution.

This redefining of MBTA “take” might not be resolved by litigation or additional administrative actions. Judicial resolution is unlikely or distant without a U.S. Supreme Court decision tackling the split in circuits. However, first, no litigation is pending in any circuit court that could be a vehicle for Supreme Court review and, second, the filing of new litigation that might ultimately wend its way to the Supreme Court has been rendered difficult by the lack

of a citizen suit provision in the MBTA and the expected absence of enforcement under the Donald Trump Administration occasioned by the most recent solicitor’s opinion. Moreover, much of the FWS’ activities with respect to the MBTA occur pursuant to internal agency guidance that may be unreviewable and is likely to change with succeeding presidential elections.<sup>8</sup>

The most immediate and practical impacts of this expansion are felt by industries operating on lands controlled or managed by DOI’s Bureau of Land Management (BLM) (i.e., public lands). Certain of the FWS Ecological Services field offices have released guidance<sup>9</sup> that creates buffer or no-occupancy zones of one-quarter to one mile around occupied and unoccupied raptor nests during time periods of up to eight months (these buffer zones and timing stipulations established by FWS are collectively referred to as the FWS Buffer Zone Policy). Following FWS’ lead, BLM now imposes buffers and timing stipulations relating to raptors (BLM Raptor Policies)<sup>10</sup> on regulated entities that seek permits, leases, or other approvals on public lands.

Failure of a regulated entity to follow these recommendations not only may freeze negotiation of the relevant BLM approvals, but also may expose that entity to potential criminal prosecution under the MBTA, which is a strict liability statute and, unlike the ESA and the BGEPA,

1. 16 U.S.C. §§703-711.

2. *Id.* §703.

3. The split in the circuits is described in greater detail in Part IV below.

4. As described in Part II.D. below, DOI Solicitor’s Opinions concerning migratory birds issued a year apart under the Barack Obama and Donald Trump Administrations adopt conflicting views of the extent of take under the MBTA.

5. 16 U.S.C. §§1531-1544; ELR STAT. ESA §§2-18.

6. 16 U.S.C. §§668-668d.

7. See 50 C.F.R. §10.12 (2018).

8. However, we can be sure litigants will seek creative ways to design litigation that would pass muster in federal courts. Indeed, two lawsuits have already been filed that challenge the most recent Solicitor’s Opinion on Administrative Procedure Act and National Environmental Policy Act grounds, as discussed in Part VIII.C. below.

9. LAURA A. ROMIN & JAMES A. MUCK, FWS, UTAH FIELD OFFICE GUIDELINES FOR RAPTOR PROTECTION FROM HUMAN AND LAND DISTURBANCES (2002) [hereinafter UTAH ES GUIDANCE], available at [https://www.fws.gov/utahfieldoffice/Documents/MigBirds/Raptor%20Guidelines%20\(v%20March%202020,%202002\).pdf](https://www.fws.gov/utahfieldoffice/Documents/MigBirds/Raptor%20Guidelines%20(v%20March%202020,%202002).pdf); FWS, Wyoming Ecological Services Office, *Species of Concern—Raptors in Wyoming* [hereinafter *Wyoming ES Guidance*] (scroll down to “Recommended Seasonal and Spatial Buffers to Protect Nesting Raptors”), <https://www.fws.gov/wyominges/Species/Raptors.php> (last modified Jan. 25, 2018).

10. See UTAH ES GUIDANCE, *supra* note 9, and *Wyoming ES Guidance*, *supra* note 9.

provides only for criminal, and not also civil, enforcement. On the other hand, following the guidance may assist in pushing negotiations with BLM forward, and may afford the regulated entity the exercise of FWS' prosecutorial discretion, which offers some protection, but which certainly is not assured. In addition to the threat of criminal prosecution, regulated entities can expect the FWS Buffer Zone Policy to be reflected in the National Environmental Policy Act (NEPA)<sup>11</sup> analyses of federal actions even where public lands are not involved, as well as in private actions that may need authorization from FWS, such as applications for incidental take permits under §10 of the ESA.

The purpose of this Comment is to provide background on the evolution of the expanded reach of the MBTA take prohibition as interpreted in multiple FWS policies, and the contradictions inherent in those policies. To illustrate the problems with FWS' mutating interpretation of the MBTA, the Comment focuses on oil and gas development on public lands. While the discussion here primarily addresses protections afforded to raptors, it is important to keep in mind that the MBTA covers nearly every bird species in the United States.<sup>12</sup> Worth noting as well is that, while raptors are among the more than 1,000 bird species protected under the MBTA,<sup>13</sup> certain raptor species are also protected pursuant to the ESA or the BGEPA. Finally, the Comment includes a brief discussion of the issues of prosecutorial and/or enforcement discretion,<sup>14</sup> the potential for litigation by third parties, relevance of the Federal Land Policy and Management Act (FLPMA),<sup>15</sup> and application of the FWS Buffer Zone Policy and expansive interpretation of the term "take" under the MBTA to private lands and private actions.

## I. FWS Buffer Zone Policy Reaches Nonfederal Actions

### A. BLM Application of Buffer Zones and Timing Stipulations

BLM has apparently adopted FWS' expansive interpretation of the MBTA, as is evidenced by BLM's imposition

of its own Raptor Policies on oil and gas operators<sup>16</sup> (the FWS Buffer Zone Policy and BLM Raptor Policies are collectively referred to as the Combined Raptor Policies). The BLM Raptor Policies adopt the measures found in the FWS Buffer Zone Policy and place an onerous burden on operators. For example, the BLM Raptor Policies actually presume that an initial buffer of one mile from any raptor nest should apply to any oil or gas activity and assign to the operator the task of providing additional characterization of the raptor nest if the operator desires to construct and operate within that buffer. Like BLM's imposition of buffers, the timing stipulations imposed by the BLM Raptor Policies are onerous, starting with a broad definition of "nesting season" (i.e., from January 15 to August 15) and requiring operators to provide convincing evidence demonstrating that implementing the BLM Raptor Policies for the duration of the nesting season is not necessary for raptor conservation.

The raptor nests in the buffer zones may or may not be actively hosting birds or eggs and, in fact, many of the nests may not have been active for a number of years. Operators, and others applying for federal permits, are often compelled to prepare some version of a voluntary avian protection plan (APP). APPs include various commitments to observe buffer zones and timing stipulations, to conduct monitoring and data-gathering, and sometimes also to include compensatory mitigation. The BLM Raptor Policies and APP commitments are integrated into BLM's resource management plans, most BLM records of decision, and other approval documents for federal permits for large and small projects on public lands, including individual applications for permits to drill.<sup>17</sup> By applying the BLM Raptor Policies in its approval processes, BLM has rendered thousands of acres of public lands off-limits to oil and gas exploration and development.

### B. Threat of Criminal Enforcement

While BLM enforces these "voluntary" actions in its approval processes, until quite recently, and as discussed further below, the real hammer has been FWS' threat of criminal enforcement under the MBTA, which is a strict liability statute providing only for criminal penalties. The MBTA makes it unlawful, at any time or by any means or manner, to "pursue, hunt, *take*, capture, *kill*, attempt to *take*, capture, or *kill*, [or] possess . . . any migratory bird, any part, nest, or egg of any such bird" protected by that statute.<sup>18</sup> With respect to the terms "take" or "kill" (in this Comment, "take" and "kill" are collectively referred to as "take") under the MBTA, for years FWS has insisted that the MBTA prohibits not only intentional take, but also

11. 42 U.S.C. §§4321-4370h; ELR STAT. NEPA §§2-209.

12. 50 C.F.R. §10.13 (2018).

13. *Id.* See also *id.* §17.11; *id.* pt. 22.

14. While it is common parlance to describe FWS' decision as a decision not to prosecute and the exercise of prosecutorial discretion, this is erroneous. In fact, non-prosecution under the MBTA may be attributed to one or a combination of occurrences. First, FWS' Office of Law Enforcement (OLE) may determine not to refer a particular instance of alleged take under the MBTA to the Environmental Crimes Section of the Environment and Natural Resources Division of the U.S. Department of Justice (DOJ) (this would constitute "enforcement discretion"). Second, even if the OLE refers an alleged MBTA violation to DOJ, DOJ may elect not to act on that information (this is "prosecutorial discretion"). However, in this Comment, the term "prosecutorial discretion" will include both or either enforcement discretion or prosecutorial discretion.

15. 43 U.S.C. §§1701-1736, 1737-1782; ELR STAT. FLPMA §§102-603.

16. See UTAH ES GUIDANCE, *supra* note 9, and Wyoming ES Guidance, *supra* note 9.

17. See, e.g., 43 C.F.R. §3162.5-1 (2018).

18. 16 U.S.C. §703(a) (emphasis added).

take that is unintentional and incidental to otherwise lawful activities or that is an indirect result of such activities.<sup>19</sup>

As a result, FWS employs implementation of the FWS Buffer Zone Policy as a precautionary measure against possible incidental or indirect take. The statutory definition of “take” found within the MBTA has not been changed despite the fact that the U.S. Congress has amended the MBTA on a number of occasions, and FWS has not modified the long-standing definition of “take” in its own regulations to include take that is incidental to, but not the purpose of, otherwise lawful activities.<sup>20</sup> Nevertheless, enforcement has moved beyond the traditional areas of possession of a nest or destruction of eggs, chicks, or birds. By guidance and in practice, FWS has expanded the definition of “take” to include the possible failure of birds to mate and reproduce in an existing nest within a given area analyzed under a NEPA or other document. The effect is to administratively create a new criminal act.

By establishing and implementing the Combined Raptor Policies, FWS and BLM have created a tortured scheme in which companies that adopt the voluntary practices contained within the Combined Raptor Policies are given “assurances” that favorable prosecutorial discretion will be exercised to preclude prosecution in the event of a raptor death arguably related to the companies’ activities. These assurances, of course, are not black and white—FWS and the U.S. Department of Justice (DOJ) are not actually barred from prosecuting an operator despite the assurances, and, all the while, FWS insists that its exercise of prosecutorial discretion is neither authorizing take nor granting immunity from take.

While the BLM Raptor Policies technically apply to public lands only, application of the Combined Raptor Policies and the strong preference of the agencies that operators develop and implement APPs have effectively caused portions of state and private lands to be off-limits for oil and gas production as well. Limitation on state and private resources occurs because it is often impossible to develop private and state resources without touching the federal estate, given the long drilling laterals currently in play. The broad, generically applied restrictions of the Combined Raptor Policies create both environmental and energy production problems.

19. As discussed in greater detail in Part II.D. below, on December 22, 2017, the DOI solicitor issued Solicitor’s Opinion M-37050, which opined that incidental take of migratory birds is not prohibited by the MBTA and reversed an earlier opinion to the contrary. At this time, it is not clear precisely to what extent Opinion M-37050 will alter the current practice of FWS and BLM. Accordingly, this Comment reports on the long-standing and current practices of those agencies. Should FWS and BLM ultimately conform their policies to Opinion M-37050, the Comment becomes a cautionary tale on how those agencies were able to expand the scope of the MBTA take prohibitions to mirror much more stringent prohibitions found in the BGEPA and the ESA without license from the MBTA or its regulations. Of course, in the event a new administration produces its own Solicitor’s Opinion again finding incidental take under the MBTA is prohibited, the policies discussed herein will be buttressed, and the pendulum will swing once again.

20. 50 C.F.R. §10.12 (2018).

As a matter of environmental protection, the regulators and the public have, for more than a decade, sought a reduced footprint from oil and gas development. Operators, where possible, have moved to single pads and directional drilling. The evolution of hydraulic fracturing and horizontal drilling has also encouraged operators to focus on single pads and drilling multiple laterals often a mile or two in length. Despite the advances in drilling technology, the Combined Raptor Policies nevertheless limit the location of drill pads. Even when locations are approved by BLM, the timing stipulations found within the Combined Raptor Policies remove three or more months from the annual drilling schedule. Application of the Combined Raptor Policies often results in one or more of the following: essential, logical drilling locations are simply precluded; operators look to create multiple pads rather than one; and/or development is abandoned.

## II. Evolution of the MBTA Expansion

Without amending the MBTA or its implementing regulations, FWS essentially has over the years grafted into the MBTA’s take prohibition provision by administrative fiat the more expansive and stringent language from the take prohibition provisions of the two other major federal statutes protecting birds. The contrast between the language of the MBTA and that of the ESA and the BGEPA illustrates the problem.

### A. “Take” Defined Under the MBTA, the BGEPA, and the ESA

#### I. MBTA Prohibitions

As noted above, the operative provision of the MBTA provides:

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, 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, [or] possess, . . . any migratory bird, or any part, nest, or egg of any such bird . . .<sup>21</sup>

Within this statutory language, the relevant term related to nests is “possess.”

While there is no statutory definition of “take” in the MBTA, the FWS’ regulations do provide a definition of MBTA “take” that parallels the narrow statutory language: “‘Take’ means to pursue, hunt, shoot, wound, kill, trap, capture or collect.”<sup>22</sup> Within the regulatory definition of “take,” the relevant language related to nests is “collect.”

21. 16 U.S.C. §703(a).

22. 50 C.F.R. §10.12 (2018).

## 2. BGEPA Prohibitions

With respect to bald and golden eagles, the BGEPA provides: “No person shall take, possess, sell, purchase, barter, offer for sale, purchase or barter, transport, export, or import any bald or golden eagle alive or dead, or any part, nest or egg without a valid permit to do so.”<sup>23</sup> “Take” is defined in the BGEPA as: “To pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest, or disturb.”<sup>24</sup>

The statutory string of prohibitions set forth in the MBTA and the BGEPA are essentially the same, except for one critical difference; the BGEPA also prohibits “molest[ing]” or “disturb[ing]” bald and golden eagles. These additional terms make the BGEPA far more restrictive than the MBTA. FWS, through its regulatory definition of “disturb,” amplifies the meaning of these terms as

To agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity by substantially interfering with normal breeding, feeding or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior . . . .<sup>25</sup>

## 3. ESA Prohibitions

“Take” is defined by the ESA as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.”<sup>26</sup> While ESA §9<sup>27</sup> and a rule promulgated under ESA §4<sup>28</sup> broadly prohibit “take” of endangered and threatened species of fish and wildlife (listed species), ESA §§7 and 10 establish mechanisms for FWS to authorize “take” of such species. Section 7 provides for issuance by the FWS of statements for federal agency actions, including issuance of permits or licenses to private parties, that authorize “taking . . . of . . . endangered . . . or threatened species incidental to the agency action.”<sup>29</sup> Section 10 provides for FWS issuance of permits to nonfederal parties for any “taking [that] is incidental to, and not the purpose of the carrying out of an otherwise lawful activity.”<sup>30</sup> FWS regulations convert the statutory language into a formal definition of “incidental taking”—“any taking [that is] otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”<sup>31</sup>

The statutory string of prohibitions in the ESA is similar to the MBTA’s, again with one significant difference: Congress’ inclusion of the terms “harass” and “harm.” By

regulation, FWS has defined “harass” under the ESA to mean “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such extent as to significantly disrupt normal behavioral patterns, which includes breeding, feeding, or sheltering.”<sup>32</sup> “Harm” is defined in the FWS’ regulations to apply to activities that affect habitat if the impacts to habitat are accompanied by death of or injury to a member of a listed species: “an act that actually kills or injures wildlife including significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding feeding, or sheltering.”<sup>33</sup>

## 4. The MBTA Does Not Include Terms Indicating That Unintentional or Indirect Take Is Prohibited

The statutory and regulatory prohibitions of the MBTA do not include the terms “molest,” “disturb,” “harass,” “harm,” or “incidental” take as found in the ESA or the BGEPA. The plain language of the BGEPA and the ESA, particularly when combined with FWS’ implementing regulations, suggests that Congress intended to prohibit activities that affect the relevant species indirectly, unintentionally, and/or incidentally (e.g., certain habitat modification undertaken for the purpose of development) as well as those activities directed at the species. By contrast, the MBTA contains none of the terms that would imply that indirect or unintentional take is prohibited.

In sum, were the MBTA or its implementing regulations to define “take” to include terms like “molest,” “disturb,” “harass,” or “harm,” the Combined Raptor Policies might be supportable. This is not the case, however. The MBTA does not include terms indicating Congress intended to prohibit unintentional or indirect take, and FWS has promulgated no regulation indicating indirect or unintentional take is prohibited. Therefore, neither the MBTA nor its implementing regulations support the Combined Raptor Policies.

In fact, the FWS Buffer Zone Policy contradicts another policy of FWS indicating that a depredation permit is not necessary to harass or scare birds or to destroy an inactive nest, as discussed in Part II.C.1. below.

### B. Executive Order No. 13186

In 2001, President William Clinton issued Executive Order No. 13186, “Responsibilities of Federal Agencies to Protect Migratory Birds,” in which the president reiterated the nation’s interest in conserving birds and adhering to the various international treaties that form the basis for the MBTA. Critically, the Clinton Executive Order states: “For purposes of this order . . . [t]ake . . . includes both ‘inten-

23. 16 U.S.C. §668.

24. *Id.* §668c.

25. 50 C.F.R. §22.3 (2018).

26. 16 U.S.C. §1532(19).

27. *Id.* at §1538(a)(1)(B).

28. *Id.* at §1533(d), 50 C.F.R. §17.31(a).

29. 16 U.S.C. §1536(b)(4).

30. *Id.* at §1539(a)(1)(B).

31. 50 C.F.R. §17.3 (2018).

32. *Id.*

33. *Id.*

tional' and 'unintentional' take,"<sup>34</sup> and the order directs federal agencies whose actions have or are likely to have a "measurable negative effect" on migratory birds to develop and implement memoranda of understanding (MOUs) with FWS that promote conservation of migratory birds.<sup>35</sup> The Clinton Executive Order further directs the signatory agencies to undertake specific measures to promote conservation of migratory birds, including by "integrating bird conservation principles, measures, and practices into agency activities and by avoiding and minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions . . . ." <sup>36</sup> Thus, the Clinton Executive Order expands the focus of conservation from birds and nests to "migratory bird resources," which are defined as "migratory birds and the resources upon which they depend."<sup>37</sup>

In sum, the Clinton Executive Order broadens the MBTA to require federal agencies to lessen the detrimental effects of their actions on migratory bird populations, habitat, and resources even when effects are caused unintentionally and in the course of otherwise lawful activities. As of this writing, the Clinton Executive Order and MOUs based thereon have not been withdrawn despite the issuance of the Trump Administration's DOI Solicitor's Opinion M-37050,<sup>38</sup> discussed in Part II.D.2. below, that finds that incidental or indirect take of migratory birds is, in fact, not prohibited by the MBTA.<sup>39</sup> Further, it is unclear whether DOI's current interpretation of migratory bird take—and FWS' position concerning prosecutorial discretion as set forth in its April 11, 2018, "Guidance on the Recent M-Opinion Affecting the Migratory Bird Treaty Act," described in Part VII.B.—ultimately will prevail over the long term.

## C. FWS Policies

### I. Migratory Bird Permit Memorandum

The application of the MBTA to nests was addressed by FWS Director Steve Williams in an April 15, 2003, Migratory Bird Permit Memorandum.<sup>40</sup> The Permit Memo-

randum explains that the only word within the MBTA's regulatory definition of "take" that applies to nests is the term "collect," and that the MBTA "does not contain any prohibition that applies to the destruction of a migratory bird nest alone (without birds or eggs), provided that no possession occurs during the destruction."<sup>41</sup> FWS' policy toward nests is explained further in a form published on its website titled "What You Should Know About a Federal Migratory Bird Depredation Permit"<sup>42</sup>:

3. What activities can I do without a depredation permit? You do not need a federal depredation permit to harass or scare birds (except eagles and threatened or endangered species), provided (a) birds are not killed or injured and (b) birds sitting on active nests (nests with eggs or chicks present) are not disturbed to the point it causes the eggs to not hatch or the chicks to die or be injured.

4. Do I need a federal permit to destroy [a] bird nest?

A permit is not needed to destroy inactive bird nests, provided the nest is destroyed and not kept. An inactive bird nest is one without eggs or chicks present. The Nest Destruction Migratory Bird Permit Memorandum (MBPM-2; April 15, 2003) provides additional guidance on nest destruction.

A permit is required to destroy an active bird nest (one with eggs or chicks present) . . .<sup>43</sup>

FWS' position concerning depredation permits is reinforced by judicial and administrative determinations that the MBTA creates no habitat protection obligation, even if nests may be destroyed or birds may be lost.<sup>44</sup> This position was confirmed in the Barack Obama-era DOI Solicitor's Opinion M-37041, which was withdrawn and replaced by Opinion M-37050, both of which are discussed in Part II.D. below.

The Permit Memorandum cited above states the undisputed law of the MBTA—nests in which no birds or eggs are present can be destroyed but not collected or possessed. The next sentence of the Permit Memorandum, however, provides the first step toward the notion of protecting all nests and limiting activities during breeding and nesting periods: "To minimize MBTA violations, Service employees should make every effort to inform the public of how to minimize the risk of taking migratory bird species whose nesting behaviors make it difficult to determine occupancy status or continuing nest dependency."<sup>45</sup> The concepts of

34. Exec. Order No. 13186, 66 Fed. Reg. 3853 (Jan. 10, 2001). The Clinton Executive Order defines "take" to mean "take as defined in 50 C.F.R. §10.12, and includes 'intentional' and 'unintentional' take." *Id.* "Intentional take" is defined as "take that is the purpose of the activity in question," while "unintentional take" is defined as "take that results from, but is not the purpose of, the activity in question." *Id.* The definition of "unintentional take" set forth in the Clinton Executive Order parallels the definition of "incidental take" set forth in ESA implementing regulations.

35. *Id.* at 3854.

36. *Id.*

37. *Id.* at 3853.

38. Memorandum From Principal Deputy Solicitor Exercising the Authority of the Solicitor Pursuant to Secretary's Order 3345, DOI, to Secretary et al., DOI (Dec. 22, 2017) (The Migratory Bird Treaty Act Does Not Prohibit Incidental Take) [hereinafter Opinion M-37050], available at <https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf>.

39. *Id.*

40. Migratory Bird Permit Memorandum From FWS (Apr. 15, 2003) (MBPM-2) [hereinafter Permit Memorandum], available at <https://www.fws.gov/policy/m0208.pdf>.

policy/m0208.pdf.

41. *Id.*

42. FWS, DOI, WHAT YOU SHOULD KNOW ABOUT A FEDERAL MIGRATORY BIRD DEPREDAATION PERMIT, available at <https://www.fws.gov/forms/3-200-13.pdf>. A federal depredation permit authorizes the holder to capture or kill birds to reduce damage caused by birds or to protect other interests such as human health and safety or personal property.

43. *Id.* at 1.

44. See, e.g., *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1225, 34 ELR 20121 (9th Cir. 2004); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 22 ELR 20372 (9th Cir. 1991); *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1574, 26 ELR 21529 (S.D. Ind. 1996).

45. Permit Memorandum, *supra* note 40, at 1.

“continuing nest dependency” and “nesting behaviors” are neither found nor implied in the language of the MBTA or its implementing regulations.

The Permit Memorandum fails to distinguish between active nests with eggs or chicks and inactive nests. The movement away from “active nests” and insertion of “continuing nest dependency” constitute the first of three steps leading to de facto insertion of take provisions of the ESA and the BGEPA into the MBTA.

The second step away from the otherwise clear statement that nests without birds or eggs can be destroyed is the Permit Memorandum’s creation of a link between the destruction of any nest and a take prosecutable under the MBTA, by referencing “nest” destruction as opposed to “active nest” destruction. “However, the public should be made aware that, while destruction of a nest by itself is not prohibited under the MBTA, nest destruction that results in the unpermitted take of migratory birds or their eggs, is illegal and fully prosecutable under the MBTA.”<sup>46</sup>

The third step expands “take” to include disturbing birds through destruction of unoccupied nests, near or during nesting season. The Permit Memorandum states that “disturbance” during “nesting season” creates take potential even before the nest becomes active or even if the nest remains inactive.

Due to the biological and behavioral characteristics of some migratory bird species, destruction of their nests entails elevated risk of violating the MBTA. For example, colonial nesting birds are highly vulnerable to disturbance; the destruction of unoccupied nests during or near the nesting season could result in a significant level of take.<sup>47</sup>

The reference to nesting season is the basis for the timing stipulations in the FWS Buffer Zone Policy.

As demonstrated above, the concepts of take borrowed from the ESA and the BGEPA (i.e., harass, harm, molest, and disturb) were integrated into policy affecting the MBTA without actual foundation in the MBTA itself. This occurred notwithstanding the depredation permit guidance stating “[y]ou do not need a permit to harass or scare birds” or destroy inactive nests.

Thus, the Permit Memorandum, which begins by saying the destruction of inactive nests can occur without a permit, ends by potentially precluding destruction of all nests and suggesting that disturbing birds during certain times of the year is prosecutable under the MBTA. The MBTA now may protect all nests, not just nests containing eggs or birds. The risk of prosecution may now exist for those who engage in activities potentially disturbing the birds because such disturbance “could result in a significant level of take.”

Nothing in the language of the MBTA or in the implementing regulation’s definition of “take” implies that disturbance of a bird (even during nesting season) is pro-

hibited. This initial integration of the ESA and the BGEPA take concepts into the prohibitions set forth in the MBTA by the Permit Memorandum is fully embraced in the Combined Raptor Policies.

## D. *The DOI Solicitor’s M-Opinions*

### I. *Opinion M-37041*

On January 10, 2017, 10 days before the inauguration of President Trump, DOI’s solicitor issued Opinion M-37041, “Incidental Take Prohibited Under the Migratory Bird Treaty Act,”<sup>48</sup> which purported to solidify and support the long-standing position of FWS in administrative policy and guidance and DOJ in prosecutorial decisions, that incidental take of migratory birds is prohibited under the MBTA. Opinion M-37041 made the bold assertion that courts generally agree the MBTA prohibits unintentional take, even though, as discussed in Part IV below, courts taking that view are in the minority (with three circuits finding incidental take is not prohibited under the MBTA, and two that it is), and it includes a lengthy discussion on why prohibiting unintentional take under the MBTA is appropriate.

### 2. *Opinion M-37041 Withdrawn and New Opinion M-37050 Issued*

In a February 6, 2017, memorandum to the acting DOI solicitor titled, “Temporary Suspension of Certain Solicitor M Opinions Pending Review” (Suspension and Temporary Withdrawal Memorandum),<sup>49</sup> acting Secretary of the Interior K. Jack Haugrud suspended and temporarily withdrew four Solicitor’s M-Opinions, including Opinion M-37041, in order to facilitate the regulatory review process required by the “Presidential Memorandum for the Heads of Executive Departments and Agencies,” issued by the White House on January 20, 2017,<sup>50</sup> and the review directed by a presidential memorandum, “Presidential Memorandum Regarding Construction of the Keystone XL Pipeline.”<sup>51</sup>

On December 22, 2017, DOI’s solicitor officially withdrew Opinion M-37041 and issued Opinion M-37050, “The Migratory Bird Treaty Act Does Not Prohibit Inci-

48. Memorandum From Hilary C. Tompkins, Solicitor, DOI, to FWS Director (Jan. 10, 2017) (Incidental Take Prohibited Under the Migratory Bird Treaty Act), *available at* [https://www.eenews.net/assets/2017/02/21/document\\_ew\\_01.pdf](https://www.eenews.net/assets/2017/02/21/document_ew_01.pdf).

49. Memorandum From K. Jack Haugrud, Acting Secretary, DOI, to Acting Solicitor, DOI (Feb. 6, 2017) (Temporary Suspension of Certain Solicitor M-Opinions Pending Review), *available at* [https://www.doi.gov/sites/doi.gov/files/uploads/temp\\_suspension\\_20170206.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/temp_suspension_20170206.pdf).

50. Memorandum From Reince Priebus, Assistant to the President and Chief of Staff, to Heads of Executive Departments and Agencies (Jan. 20, 2017) (Regulatory Freeze Pending Review), <https://www.whitehouse.gov/presidential-actions/memorandum-heads-executive-departments-agencies/>.

51. Presidential Memorandum Regarding Construction of the Keystone XL Pipeline, to Secretary of State et al. (Jan. 24, 2017), *available at* <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-construction-keystone-xl-pipeline/>.

46. *Id.*

47. *Id.*

dental Take,” which reversed the previous position of DOI that incidental or indirect take was prohibited by the MBTA, and stated explicitly that “this memorandum concludes that the MBTA’s prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same only criminalize affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs.”<sup>52</sup>

In sum, Opinion M-37050 expresses the stance of the Trump Administration that incidental or indirect take of migratory birds is not prohibited by the MBTA.<sup>53</sup> Of course, within the jurisdiction of circuits that have held that the MBTA does prohibit incidental take, Opinion M-37050 does not take precedence over the interpretation of those circuits.<sup>54</sup> Further, it is likely that courts in the future will accord nothing more than *Skidmore*<sup>55</sup> deference to the interpretation set forth in Opinion M-37050, particularly given the changes in FWS’ policies over time (including dueling Solicitor’s Opinions issued a scant year apart) and the existence of the circuits’ split as to whether the MBTA prohibits unintentional take.<sup>56</sup> Finally, to point out the obvious: Solicitor’s Opinions are not always honored by future administrations. As noted above, Opinion M-37041 (opining that incidental take of migratory birds is prohibited under the MBTA), was issued 10 days before the end of the Obama Administration, was suspended fewer than 30 days later by the Trump Administration, and was superseded by Opinion M-37050 less than one year after its issuance.

### E. Solicitor’s M-Opinions and MOUs With Other Agencies Incorporate Prohibition on Unintentional Take and Impose Mitigation Requirements

On December 21, 2016, DOI’s solicitor issued Opinion M-37039, “The Bureau of Land Management’s Authority to Address Impacts of Its Land Use Authorizations Through

Mitigation,” which opined that FLPMA<sup>57</sup> provided authority to DOI and BLM to “identify and require appropriate mitigation, including, in certain circumstances, mitigation that results in a net conservation benefit.” Opinion M-37039 was among the four Solicitor’s Opinions affected under the Suspension and Temporary Withdrawal Memorandum issued on February 6, 2017.<sup>58</sup> On June 30, 2017, the principal deputy solicitor serving as acting solicitor revoked and withdrew Opinion M-37039 and issued Opinion M-37046, “Withdrawal of Opinion 37039, ‘The Bureau of Land Management’s Authority to Address Impacts of Its Land Use Authorizations Through Mitigation.’”<sup>59</sup>

Opinion M-37046 explained that the underlying reason for Opinion M-37039 was Secretary of the Interior Order No. 3300, dated October 31, 2013, and titled “Improving Mitigation Policies and Practices of the Department of the Interior,”<sup>60</sup> which was ultimately revoked by the March 29, 2017, Secretary of the Interior Order No. 3349, “American Energy Independence.”<sup>61</sup> Opinion M-37046 concluded that because the underlying basis for Opinion M-37039 (i.e., Order No. 3300) had been revoked, withdrawal of Opinion M-37039 was appropriate. The solicitor did not indicate with certainty whether a new M-Opinion would be issued on the topic of mitigation in connection with BLM approvals; rather, Opinion M-37046 stated that the Solicitor’s Office would determine whether a new M-Opinion is needed to assist BLM in implementing any revised policies.<sup>62</sup>

In April 2010, BLM and FWS had entered into an MOU (BLM MOU), the stated purpose of which was to outline a “collaborative approach to promote the conservation of migratory bird populations” pursuant to the Clinton Executive Order referenced in Part II.B. above.<sup>63</sup> Among the measures to which BLM committed in the BLM MOU was to “evaluate the effects of BLM’s actions on migratory birds during the NEPA process . . . and identify where ‘take’ reasonably attributable to agency actions may have a measurable negative effect on migratory bird populations . . . In such situations, the BLM will implement approaches to lessening such take.”<sup>64</sup> The BLM MOU provides 10 examples of the ways BLM may lessen take, including

52. Opinion M-37050, *supra* note 38, at 18.

53. As of the date of this writing, there is no indication that Congress will succeed in enacting legislation to amend the MBTA, or that FWS will promulgate regulations, to formally cement the interpretation of “take” as laid out by Opinion M-37050. H.R. 4239, the SECURE American Energy Act, was reported from the House Natural Resources Committee on November 8, 2017, with an MBTA amendment that would exempt from the MBTA’s take prohibition a take that is accidental or is incidental to otherwise lawful activity. But no U.S. House of Representatives floor action has been scheduled, and the MBTA amendment would not likely survive in the U.S. Senate were the SECURE American Energy Act to pass the House. As a result, the next administration may continue the game of musical Solicitor’s Opinions, withdraw Opinion M-37050, and issue a new, third opinion of its own.

54. See *United States v. FMC Corp.*, 572 F.2d 902, 8 ELR 20326 (2d Cir. 1978); *United States v. Apollo Energies, Inc.*, 61 F.3d 679, 40 ELR 20176 (10th Cir. 2010).

55. *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (for agency interpretations such as opinion letters, the weight of the agency’s interpretation depends “upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”); see also *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

56. A discussion of the circuits’ split is found in Part IV below.

57. 43 U.S.C. §§1701 et seq.

58. See Memorandum From K. Jack Haugrud, *supra* note 49, at 1.

59. Memorandum From Principal Deputy Solicitor Appointed as Acting Solicitor, DOI, to Secretary et al., DOI (June 30, 2017) (M-37046, Withdrawal of M-37039, “The Bureau of Land Management’s Authority to Address Impacts of Its Land Use Authorizations Through Mitigation”), available at <https://www.doi.gov/sites/doi.gov/files/uploads/m-37046.pdf>.

60. Secretary of the Interior Order No. 3330, Improving Mitigation Policies and Practices of the Department of the Interior (Oct. 31, 2013), available at <https://www.doi.gov/sites/doi.gov/files/migrated/news/upload/Secretarial-Order-Mitigation.pdf>.

61. Secretary of the Interior Order No. 3349, American Energy Independence (Mar. 29, 2017), [https://www.doi.gov/sites/doi.gov/files/uploads/so\\_3349\\_american\\_energy\\_independence.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/so_3349_american_energy_independence.pdf).

62. *Id.* at 1.

63. Memorandum of Understanding Between the U.S. Department of the Interior Bureau of Land Management and U.S. Fish and Wildlife Service to Promote the Conservation of Migratory Birds (Apr. 12, 2010), available at <https://www.fws.gov/migratorybirds/pdf/management/moublm.pdf>.

64. *Id.* at 6.

avoiding identified raptor nests during motorcycle races, avoiding areas of raptor concentration when placing wind turbines, and retaining the integrity of breeding sites.<sup>65</sup> For its part, FWS committed to issuing a draft set of raptor conservation measures for public comment within one year of entering into the BLM MOU, and to finalizing those same measures within two years.<sup>66</sup> Importantly, the BLM MOU defined “take” to include “unintentional take,” borrowing that definition from the Clinton Executive Order.

In 2011, FWS and the Federal Energy Regulatory Commission (FERC) entered into an MOU (FERC MOU),<sup>67</sup> the purpose of which was to “further the purposes” of the MBTA, the BGEPA, the ESA, NEPA, the Fish and Wildlife Coordination Act, and “other pertinent statutes” by describing how FERC might avoid and minimize adverse impacts on migratory birds and “strengthen[ ] migratory bird conservation through enhanced collaboration” between FERC and FWS.<sup>68</sup> Provisions of the FERC MOU relevant to the issues described herein include commitments by FERC not only to avoid and minimize “the take of migratory birds and adverse effects on their habitat,” but also to “encourage” FERC applicants to consider potential impacts to migratory birds.<sup>69</sup> And, more than encourage, FERC committed to “[r]equire, as appropriate, applicant[s] to mitigate negative impacts on migratory birds *and their habitats* by proposed actions, in compliance with and/or supporting the intent of the MBTA, the Clinton Executive Order, the BGEPA, the ESA, and other applicable statutes.”<sup>70</sup> However, nothing in the MBTA requires any party to provide mitigation for “negative impacts” to birds or their habitats.

As the FERC MOU demonstrates, FWS’ overbroad interpretation of the MBTA has spread beyond DOI, and companies and private individuals having no regulatory connection to FWS or DOI may expect onerous mitigation measures that find no basis in law forced upon them any time they need federal licenses, permits, or other forms of approval or authorization.

### III. FWS Buffer Zone Policy Expands Not Only the MBTA Prohibitions, but Also Criminal Exposure

Perhaps the greatest demonstration of the inappropriate nature of the FWS Buffer Zone Policy is its reliance on the FWS Office of Law Enforcement (OLE) Chief’s Directive No. B53, “Enforcement of the Migratory Bird Treaty

Act as It Relates to Industry and Agriculture.”<sup>71</sup> The OLE directive provides guidance to OLE agents; its language may be easily interpreted as selective prosecution or non-prosecution.<sup>72</sup> While prosecutorial discretion may be the only rational approach to enforcement of unintentional take under the MBTA given the split in the circuits (see Part IV below) and in the Solicitor’s M-Opinions and relevant policy and guidance of FWS, the regulated community nevertheless remains at a significant disadvantage because there are no hard and fast rules to follow with confidence. As the U.S. Court of Appeals for the Fifth Circuit recently explained, the examples of individuals who would be potentially prosecutable if incidental take is prohibited by the MBTA are myriad:

If the MBTA prohibits all acts or omissions that “directly” kill birds, where bird deaths are “foreseeable,” then all owners of big windows, communication towers, wind turbines, solar energy farms, cars, cats, and even church steeples may be found guilty of violating the MBTA. This scope of strict criminal liability would enable the government to prosecute at will and even capriciously . . . for harsh penalties.<sup>73</sup>

While some courts have recognized the importance of prosecutorial discretion in the context of the MBTA as a means of avoiding an absurd result,<sup>74</sup> others have offered a more skeptical view:

[C]ourts should not rely on prosecutorial discretion to ensure a statute does not ensnare those beyond its proper confines. *See Baggett v. Bullitt*, 377 U.S. 360, 373-374, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964) (“It 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.”) . . . It is no answer to say that the statute would not be applied in such a case. While prosecutors necessarily enjoy much discretion, proper construction of a criminal statute cannot depend on the good will of those who must enforce it.<sup>75</sup>

Relying on prosecutorial discretion may be appropriate when it is exercised by the investigative agency and the U.S. attorney in the context of statutory crimes. In the case of the MBTA, however, the alleged criminal activity and the conduct necessary to secure prosecutorial discretion are not set by statute, investigators, or prosecutors; rather, prosecutorial discretion is exercised administratively by FWS and/or DOJ without public comment or rulemaking.

65. *Id.*

66. As of the date of this writing, no such FWS-wide raptor conservation measures have been issued for public comment.

67. Memorandum of Understanding Between the Federal Energy Regulatory Commission and the U.S. Department of the Interior U.S. Fish and Wildlife Service Regarding Implementation of Executive Order 13186, “Responsibilities of Federal Agencies to Protect Migratory Birds” (Mar. 2011), *available at* <https://www.ferc.gov/legal/mou/mou-fws.pdf>.

68. *Id.* at 1.

69. *Id.* at 3-4.

70. *Id.* at 5 (emphasis added).

71. BLM & FWS, ROUNDTABLE RESPONSES TO ADDITIONAL AUDIENCE QUESTIONS: WIND ENERGY TRAINING SERIES: THE TIERED APPROACH (2013), *available at* [https://www.fws.gov/ecological-services/energy-development/pdfs/Broadcast1\\_Q&A.pdf](https://www.fws.gov/ecological-services/energy-development/pdfs/Broadcast1_Q&A.pdf).

72. *Id.* (“consistent with the general policy of providing notice, encouraging compliance and an opportunity to correct before charging”).

73. *United States v. Citgo Petroleum Corp.*, 801 F.3d 477, 494 (5th Cir. 2016).

74. *See, e.g., United States v. FMC Corp.*, 572 F.2d 902, 905, 8 ELR 20326 (2d Cir. 1978).

75. *United States v. Moon Lake Elec. Ass’n, Inc.*, 45 F. Supp. 2d 1070, 1083 (D. Colo. 1999).



The result is that certain discrete members of a federal agency (i.e., specific FWS Ecological Services field offices) have a desired outcome (mandatory adherence to buffer zones and timing stipulations) and exact the outcome by threatening prosecution. Another arm of the same agency (FWS' OLE), exercising prosecutorial discretion, removes that threat, with the threat removal occurring only if an operator adheres to the policies set by the Ecological Services field offices that have no actual basis in law or regulation.

#### IV. The Circuit Split and Dueling Solicitor's Opinions Result in Uncertainty for the Regulated Community

While intentional take of birds, bird parts, nests, and/or eggs is generally recognized as being within the prohibitions of the MBTA, as referenced above, the circuits are split as to whether or not the statute also prohibits unintentional, indirect, or incidental take. The U.S. Courts of Appeals for the Fifth, Eighth, and Ninth Circuits, as well as district courts in the Third and Seventh Circuits, have held that the MBTA prohibits only intentional takings,<sup>76</sup> while the U.S. Courts of Appeals for the Second and Tenth Circuits have found that the prohibitions extend to unintentional or incidental takings.<sup>77</sup> The split among the circuits leaves the regulated community unsure of whether a lawful activity may result in a lawsuit over alleged indirect impacts to MBTA-protected species.

As described above, dueling Solicitor's Opinions between the Obama and Trump Administrations further demonstrate the continued uncertainty surrounding the MBTA. Within the last week and a half of the Obama Administration (January 10, 2017), an expansive interpretation of the MBTA was proffered by DOI Solicitor's Opinion M-37041. In the same year, 11 months after Trump's inauguration (December 22, 2017), new and diametrically oppositional Opinion M-37050 was issued. The conclusion of Opinion M-37050 opens as follows: "The text, history, and purpose of the MBTA demonstrates that it is a law limited in relevant part to affirmative and purposeful actions, such as hunting and poaching, that reduce migratory birds and their nests and eggs, by killing or capturing, to human control."<sup>78</sup> It concludes "that the MBTA's prohibition on pursuing, hunting, taking, capturing, killing, or attempting to do the same applies only to direct and affirmative purposeful actions that reduce migratory birds, their eggs, or their nests, by killing or capturing, to human control."<sup>79</sup>

76. See *Citgo Petroleum Corp.*, 801 F.3d 477; *Newton County Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 28 ELR 20020 (8th Cir. 1997); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 303, 22 ELR 20372 (9th Cir. 1991); *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 2d 1559, 26 ELR 21529 (S.D. Ind. 1996); *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202 (D.N.D. 2012); *Curry v. U.S. Forest Serv.*, 988 F. Supp. 541, 549 (W.D. Pa. 1997).

77. See *FMC Corp.*, 572 F.2d 902; *United States v. Apollo Energies, Inc.*, 61 F.3d 679, 40 ELR 20176 (10th Cir. 2010).

78. Opinion M-37050, *supra* note 38, at 41.

79. *Id.*

The obvious purpose of Opinion M-37050 was to nullify the position taken by Opinion M-37041 that "unintentional or incidental take" is prohibited under the MBTA. A new element in Opinion M-37050 is the phrase "reduce . . . to human control." This element removes the threat of prosecution for disruption of breeding, nesting, or brood-rearing activities, regardless of intent, since no control or custody is present. Interestingly, this interpretation precludes prosecution for the destruction of birds, eggs, and nests if there was no intent to "reduce . . . to human control" even if there was an intent to destroy.

Two observations, then, are relevant. First, as had been demonstrated in recent months, elections have consequences and Solicitor's Opinions change. Second, Solicitor's Opinions are binding only on DOI, not the courts. Several circuits may be amenable to a NEPA-based suit that presses for the Obama-era interpretation of the MBTA. Suffice it to say, the future remains uncertain.

Assume for a moment that a future solicitor returns to the Obama-era approach, and DOJ prosecutes a case based on alleged disruption of breeding and nesting of an MBTA-protected species. Such prosecution should prove difficult because of the issues of causation and the burden of a prosecutor to prove his or her case beyond a reasonable doubt. Reasonable doubt instructions vary slightly depending on the jurisdiction. The Ninth Circuit deals with reasonable doubt in a manner typical of such instructions:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of the evidence, or from a lack of evidence.

If after careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.<sup>80</sup>

This seems a difficult burden in the context of the FWS Buffer Zone Policy. A successful prosecution would require the demonstration not only that raptors did not nest in a particular nest or set of nests due to the action of an operator, but also that the raptors did not breed and nest in an alternative site or sites. Whether the case is tried to a magistrate or a jury, the actual text of the MBTA would be the controlling law, not the interpretation adopted by FWS. The obvious defense would be to ask: "What was killed, taken, or possessed by failure to adhere to the FWS Buf-

80. MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT (2010 ed., last updated Dec. 2017).

fer Zone Policy?” Or in the parlance of highbrow movies: “Where is the corpus delicti?”

A related issue is the question of causation. The government would be compelled to prove causation even in a strict liability case; that is, demonstrate that the take, kill, or possession was the probable result of the defendant’s conduct. This causation link is still under review within the scientific community. The criminal case would evolve into a parade of experts on both sides with the attendant and inevitable confusion and speculation.

## V. Citizen Suits and Enforcement Actions

While the MBTA does not include a private cause of action similar to the ESA’s citizen suit provision,<sup>81</sup> the circuits are not in consensus as to whether citizens may bring action under the Administrative Procedure Act (APA)<sup>82</sup> to enforce the underlying provisions of the MBTA.<sup>83</sup> Nevertheless, even where courts have allowed MBTA claims to proceed under the APA, they do not appear anxious to extend MBTA liability to federal agencies acting in their regulatory capacity.

For example, in *Protect Our Communities Foundation v. Jewell*, the Ninth Circuit recognized that a citizen may bring suit under the APA to “compel agency compliance” with the MBTA, but did not permit plaintiffs to bring an action against BLM for that agency’s issuance of a right-of-way permit to a wind energy facility allegedly in violation of the MBTA:

[W]e hold that Plaintiffs’ argument that the Project will inevitably result in migratory bird fatalities, even if true, is unavailing because the MBTA does not contemplate attenuated secondary liability on agencies like the BLM that act in a purely regulatory capacity, and whose regulatory acts do not directly or proximately cause the “take” of migratory birds within the meaning of 16 U.S.C. 703(a). Here, the BLM only authorized Tule to construct and operate a wind energy facility on public lands, and therefore did not act to “take” migratory birds without a permit, within the meaning of the MBTA.<sup>84</sup>

In holding that the MBTA does not contemplate secondary liability, the court relied in part on FWS’ own policy: “Rather, as the FWS has concluded, ‘the agencies themselves are not subject to the prohibitions of the MBTA when acting in their regulatory capacities,’ and thus are

generally not required to seek a permit to cover the separate actions of ‘third parties regulated by those agencies.’”<sup>85</sup>

When federal agencies (here, FWS and BLM) expand the range of activities potentially prohibited by a statute (here, the MBTA), they create fertile ground for plaintiffs to sue them for alleged violations in federal decisionmaking subject to APA review. These suits over alleged MBTA violations have arisen in the context of NEPA reviews, and have alleged failure to assure MBTA compliance as part of the NEPA process and subsequent decisions.<sup>86</sup> If the MBTA is construed to prohibit and even criminalize alleged disturbance of breeding or nesting behavior and to prohibit activity around unoccupied nests for extended periods of time, the number of projects at risk grows exponentially.

## VI. FLPMA

Some have argued that FLPMA provides an alternative source of authority for BLM’s adoption of the FWS Buffer Zone Policy. An admittedly cursory review of FLPMA suggests this may not be the case. A “savings clause” in FLPMA provides: “Nothing in this Act shall modify or change any provision of Federal law relating to migratory birds or to endangered or threatened species.”<sup>87</sup> FLPMA reflects specific congressional intent not to modify the application of the MBTA on public lands.

Even if BLM has independent authority to implement the BLM Raptor Policies, such authority would not include threatened criminal prosecution under the MBTA. Such prosecutions are the sole province of FWS. There is a world of difference between a BLM condition of approval or permit stipulation and a threatened criminal prosecution. Significant administrative appeal provisions and civil remedies exist to contest stipulations and other conditions of federal agency approval. A criminal prosecution can only be resolved by plea or at trial. Even if the case results in a defense verdict, the defendant experiences significant operational and reputational complications. Therefore, companies may risk a fight over permit conditions but will seldom risk a criminal prosecution.

## VII. A Note About Private Lands

The wide berth FWS has given itself with respect to its treatment of raptor species not protected by the ESA or the BGEPA may be just the tip of the iceberg. In the past several years, FWS has increasingly used guidance to enhance restrictions on regulated activities. For example, the FWS’ Mitigation Policy<sup>88</sup> and the ESA Compensatory Mitigation

81. 16 U.S.C. §1540(g).

82. 5 U.S.C. §§500-559.

83. *Compare, e.g., Humane Soc’y of the United States v. Glickman*, 217 F.3d 882, 30 ELR 20758 (D.C. Cir. 2000) (holding that federal action in violation of the MBTA may violate the APA), *with Alaska Fish & Wildlife Fed’n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 18 ELR 20156 (9th Cir. 1987) (holding that the APA did not permit plaintiffs’ challenge to an interagency cooperative plan to reduce hunting of certain migratory birds).

84. *Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 585, 46 ELR 20106 (9th Cir. 2016).

85. *Id.* at 586 (citing Migratory Bird Permits: Programmatic Environmental Impact Statement, 80 Fed. Reg. 30035 (May 26, 2015)).

86. *See, e.g., City of Sausalito v. O’Neill*, 386 F.3d 1186, 34 ELR 20121 (9th Cir. 2004); *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 26 ELR 21529 (S.D. Ind. 1996).

87. 43 U.S.C. §1732(b).

88. U.S. Fish and Wildlife Service Mitigation Policy, 81 Fed. Reg. 83440 (Nov. 21, 2016).

Policy<sup>89</sup> (together, Mitigation Policies), which were finalized in 2016, included restrictions on the type and extent of minimization and mitigation measures that regulated entities would have to produce in order to be considered in compliance with the various provisions of federal wildlife law, including in incidental take permits issued under §10 of the ESA and interagency consultations on federal actions conducted under ESA §7. Despite the fact that mitigation does not appear in §7, the ESA Compensatory Mitigation Policy requires that an applicant for an incidental take permit provide mitigation that results in a minimum of “no net loss” to species habitat and, preferably, a “net gain.”<sup>90</sup> Although FWS announced in November 2017 that it would review and receive additional public comments on the Mitigation Policies,<sup>91</sup> that review does not stop individual FWS Ecological Services field offices from requiring applicants to comply with the Mitigation Policies in order to move permit review processes forward.<sup>92</sup>

Moreover, it is entirely possible that FWS may build the FWS Buffer Zone Policy (or similar guidance later developed by FWS with respect to migratory birds generally) into the agency’s ESA §10 incidental take permit review and ESA §7 consultation processes. This could, in turn, substantially affect private lands, as ESA §7 applies any time an ESA-listed species may be affected by activities on either private or federal lands that are authorized or funded by federal agencies (e.g., issuance of a permit to a nonfederal entity under the Clean Water Act<sup>93</sup>), and ESA §10 applies to activities on nonfederal lands where no federal actions except issuance of an incidental take permits are involved. Should FWS withhold or substantially delay issuance of an incidental take permit under ESA §10 or issuance of a non-jeopardy biological opinion under ESA §7 until an applicant commits to implementing the FWS Buffer Zone Policy—which was established without congressional mandate and without public input—private entities whose activities may potentially affect ESA-listed species could be forced not only to implement minimization measures and provide significant mitigation for those species, but also to avoid development of significant areas of nonfederal land pursuant to the FWS Buffer Zone Policy for non-listed migratory birds.

## VIII. Recent Developments

### A. *The Scarlett Letter*

On January 10, 2018, Lynn Scarlett, deputy secretary of the interior under President George W. Bush, and a number of other officials from past administrations delivered a letter to Secretary of the Interior Ryan Zinke (the Scarlett Letter), in which the group expressed concern over Opinion M-37050 and requested that the secretary suspend Opinion M-37050 and “convene a bipartisan group of experts to recommend a consensus and sensible path forward” on the extent to which the MBTA reaches activities not intended to kill migratory birds.

Notably, while the Scarlett Letter takes issue with the interpretation of Opinion M-37050 that there is an MBTA violation only where the actor is “engaged in an activity the object of which was to render an animal subject to human control,” the letter does not appear to request that the secretary return to the interpretation set forth by Obama-era Opinion M-37041, which states broadly that all incidental take is strictly prohibited under the MBTA. Acknowledging that there exists disagreement about “the extent to which prosecutions under the MBTA are appropriate for activities that are not intended to kill birds, but which are reasonably likely and, indeed, quite likely to kill them,” the authors of the Scarlett Letter nevertheless indicate their belief that “significant progress has been made in defining the limits” of the MBTA through “refined interpretations, court decisions, and common sense,” and that relevant regulatory authorities have enforced the MBTA in a way that “fairly balances the goal of economic progress with the impact of that progress on bird populations.” These statements, when combined with the bipartisan authorship of the letter, illustrate well the continued uncertainty of the extent to which the MBTA will be interpreted—and enforced—as applying to unintentional, indirect take of migratory birds.

### B. *FWS Guidance Concerning Opinion M-37050*

On April 11, 2018, the principal deputy director for FWS issued “Guidance on the Recent M-Opinion Affecting the Migratory Bird Treaty Act” (M-Opinion Implementation Guidance),<sup>94</sup> which states FWS’ new interpretation, reflecting Opinion M-37050, that the MBTA’s prohibitions on take apply only “when the *purpose* of an action is to take migratory birds, their eggs, or their nests”<sup>95</sup> and that take of birds, their eggs, or their nests that occurs in connection with an activity the purpose of which is unrelated to take is not prohibited. The M-Opinion Implementation Guidance itself is quite short; however, attached to that guidance is the document “Frequently Asked Questions Regarding

89. Endangered Species Act Compensatory Mitigation Policy, 81 Fed. Reg. 95316 (Dec. 27, 2016).

90. *Id.* at 95317.

91. Mitigation Policies of the U.S. Fish and Wildlife Service; Request for Comments, 82 Fed. Reg. 51382 (Nov. 6, 2017).

92. A telling example of this point is the frequent willingness of FWS Ecological Services field office staff to bolster their desired ESA mitigation requirements by referencing the agency’s 1981 mitigation policy despite its explicit exclusion of the ESA. U.S. Fish and Wildlife Service Mitigation Policy, 46 Fed. Reg. 7644, 7656 (Jan. 23, 1981).

93. 33 U.S.C. §§1251-1387; ELR STAT. FWPCA §§101-607.

94. Memorandum From the Principal Deputy Director of FWS, Guidance on the Recent M-Opinion Affecting the Migratory Bird Treaty Act (Apr. 11, 2018), available at <https://www.akingump.com/images/content/7/0/v2/70445/m-opinion-memo-signed-4.11.18.pdf/>.

95. *Id.* at 1.

Implementation of the M-Opinion” (FAQs), which provides a number of scenarios and answers to questions as to whether an MBTA violation occurs in those scenarios.

Particularly interesting is one scenario in which the hypothetical landowner removes a barn with known nesting owls, which will die as a result of the removal. In connection with that scenario, the FAQs pose the question: “How does the knowledge or reasonable foreseeability that an activity will kill birds affect whether that action violates the MBTA?” In response, the FAQs state:

This would not be a violation of the MBTA . . . The landowner’s knowledge, or whether it was reasonably foreseeable, that destroying the barn would kill the owls is not relevant. All that is relevant is that the landowner undertook an action that did not have the killing of barn owls as its purpose.<sup>96</sup>

This response is potentially significant, as it is in direct contravention of several court decisions, such as *United States v. Moon Lake Electric Ass’n, Inc.*<sup>97</sup> and *United States v. CITGO Petroleum Corp.*,<sup>98</sup> which held that failure to correct situations that one knows would lead to bird deaths violates the MBTA.

As of the date this Comment went to press, it does not appear that the Combined Raptor Policies have been altered or revoked despite the issuance of Opinion M-37050 and the M-Opinion Implementation Guidance.

### C. Conservation Groups’ Legal Challenge Over Opinion M-37050

On May 24, 2018, conservation groups filed two lawsuits in federal court challenging Opinion M-37050.<sup>99</sup> Among other things, the groups allege that Opinion M-37050 reverses long-standing agency interpretation of “take” under the MBTA, that such a shift in policy required adherence to the public rulemaking procedures set forth in the APA, and that federal defendants failed to comply with the NEPA in adopting and implementing Opinion M-37050. Plaintiffs in both cases seek a declaration that Opinion M-37050 violates the APA and request that the court require the DOI to vacate Opinion M-37050. Additionally, the complaint filed by National Audubon Society, the American Bird Conservancy, and others requests the court require DOI to revert to its former interpretation of incidental take under the MBTA, ostensibly Opinion M-37041.

Although the lawsuits were strategically brought within the Second Circuit, which is one of the two circuit courts that have held that the MBTA prohibits incidental take,

plaintiffs may face a tough battle convincing the court that Opinion M-37050 is, in effect, a rule rather than a mere guidance document that is not challengeable under the APA. Plaintiffs may also be hard-pressed to demonstrate standing to challenge Opinion M-37050, as DOI has discretion whether and under what circumstances to enforce the provisions of the MBTA, and DOI’s decision not to enforce the MBTA against one or more actors may not result in demonstrable harm to the plaintiffs. Whether or not these legal challenges ultimately are successful, their very existence confirms that the issue of take under the MBTA remains controversial and, without congressional action or a ruling from the Supreme Court, is highly likely to move and evolve with each change in administration.

## IX. Conclusion

The Combined Raptor Policies may or may not constitute good biology, but most certainly exemplify bad policy. Federal agencies should not rely on administrative expansion of clear statutory and regulatory language to prohibit otherwise lawful activities, create new criminal violations, and offer only a handshake or less (in the hint of prosecutorial discretion) when a regulated entity commits to expending significant resources to address impacts that are not regulated in the first place. While Opinion M-37050 and the M-Opinion Implementation Guidance may stem the tide on prosecution of unintentional take of migratory birds for now, it is clear that, without congressional action, the pendulum could swing again and a future administration could easily reverse course.

Yet, Congress has, to date, failed to tackle the issue of unintentional or incidental take of migratory birds, and is unlikely to do so in the near term. For now, the potential for DOI to issue new MBTA regulations addressing the issue—as set forth in its “Final Report: Review of the Department of the Interior Actions That Potentially Burden Domestic Energy”<sup>100</sup>—will have to suffice. Should the pendulum be stopped in the middle, the new policy could look something like the Tenth Circuit’s decision in *United States v. Apollo Energies, Inc.*, which found that the strict liability provisions of the MBTA applied only where defendants had knowledge that their behavior could kill protected birds.<sup>101</sup> Whether the pendulum swings again or stops, the regulated community, federal agencies, and FWS itself would clearly benefit from consistent, long-term interpretation and application of the MBTA.

96. *Id.* at 4.

97. 45 F. Supp. 2d 1070 (D. Colo. 1999).

98. 893 F. Supp. 2d 841, 847, 42 ELR 20237 (S.D. Tex. 2012).

99. National Audubon Society et al. v. U.S. Dept. of the Interior et al., 1:18-cv-04061 (S.D.N.Y. May 24, 2018); National Resources Defense Council et al. v. U.S. Dept. of the Interior et al., 1:18-cv-04596 (S.D.N.Y. May, 24, 2018).

100. Final Report: Review of the Department of the Interior Actions That Potentially Burden Domestic Energy, 82 Fed. Reg. 50532 (Nov. 1, 2017) (suggesting that the department’s review of Opinion M-37041 and underlying regulations and decisions may “serve as the basis for the development of new internal guidance or regulations that provide clarity to this long-standing issue”).

101. *United States v. Apollo Energies, Inc.*, 61 F.3d 679, 40 ELR 20176 (10th Cir. 2010).