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Erika Bosack

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INCIDENTAL TAKE UNDER THE MIGRATORY BIRD TREATY ACT AND HOW TO SHARE THE SKIES

ERIKA BOSACK*

INTRODUCTION

Reducing greenhouse gas emissions on a large scale is crucial to combatting climate change which threatens to make the planet uninhabitable, and developing industrial-scale renewable energy is the best way to achieve this goal while increasing economic growth.¹ Several coastal states, such as Virginia, California, and New York, have set ambitious renewable energy goals to reduce greenhouse gas emissions and dependence on out-of-state resources.² To achieve these objectives, they are looking to develop an offshore wind industry to achieve these goals while also creating jobs.³ Unfortunately, wind turbines have been known to kill birds that collide with turbine blades or towers because the motion of the turbine is disorienting and difficult for birds to perceive while in flight.⁴ Accordingly, wind turbines must be sited with avian density studies in mind to reduce this effect as much as possible. Projects must also take into account aquatic wildlife, military operations, the fishing industry, tribal considerations, and commercial navigation, but those are well beyond the scope of this Note.⁵

* JD Candidate, William & Mary Law School, Class of 2022; Co-President, Student Environmental and Animal Law Society; Treasurer, William & Mary Law School Public Service Fund; BA International Relations/Environmental Science and Policy, Class of 2019. The author would like to thank her family, partner, and friends for their continued support, as well as her cat for not caring one way or the other—which really puts it all in perspective.

¹ Press Release, General Assembly, Renewable Energy Sources Cut Carbon Emissions, Efficiently Increase Energy Output Worldwide, Delegates Say in Second Committee, U.N. Press Release GA/EF 3501 (Oct. 16, 2018).

² See, e.g., Va. Exec. Order No. 43 (Sept. 16, 2019); CAL. PUB. UTIL. CODE §§ 399.11, 454.33 (Deering 2021); N.Y. STATE PLANNING BD., THE ENERGY TO LEAD: 2015 NEW YORK STATE ENERGY PLAN 5 (2015) (overview document).

³ Va. Exec. Order No. 43 (Sept. 16, 2019).

⁴ Victoria Sutton & Neal Tomich, *Harnessing Wind is Not (by Nature) Environmentally Friendly*, 22 PACE ENV'T L. REV. 91, 95–96 (2005).

⁵ See, e.g., *id.* at 97–100; John Lindt, *New Plan Could Bring Wind Turbines Closer to SLO County's Shore. And People Aren't Happy*, SAN LUIS OBISPO TRIB. (July 30, 2020), <https://>

This Note will focus on one piece of legislation that can protect birds from wind turbines: the Migratory Bird Treaty Act of 1918 (“MBTA” or “the Act”). The MBTA makes it illegal to hunt, kill, capture, import, export, sell, buy, pursue, possess, transport, or take a bird on the list of protected species, which covers hundreds of types of birds as well as their nests and eggs.⁶ The law forbids these acts in any manner, by any means, and at any time.⁷ The text itself does not explicitly state whether intentional and unintentional acts should both carry liability, which has caused stark discrepancies between judicial circuits that cannot logically coexist.⁸ One interpretation must eventually win the day. The one that will promote biodiversity conservation and provide more certainty to facilitate renewable energy development is also the one that most aligns with the statute’s plain text: that the MBTA covers unintentional takings.⁹

Between the circuit split and shifting executive branch attitudes toward environmental protection, tracking the treatment of incidental take under the MBTA is like watching a pendulum swing back and forth. During the Trump administration, the Department of the Interior (“DOI”) capitalized on the conflicting appellate approaches and published an administrative opinion advising that the MBTA should be interpreted to apply only to intentional takings of protected birds.¹⁰ The Natural Resources Defense Council successfully challenged the government’s interpretation of the MBTA, but the U.S. Fish and Wildlife Service (“USFWS”) codified the DOI interpretation in a final rule despite the court’s holding.¹¹ Promptly, several states and environmental groups challenged the final rule.¹² In February 2021, after President Biden took office, USFWS

www.sanluisobispo.com/news/local/article244230927.html [<https://perma.cc/E447-SPYL>]; KACIE COUCH & TRISTAN GRINDER, VA. COASTAL POL’Y CTR., OCEAN OF UNCERTAINTY: REGULATORY BARRIERS TO MULTIPLE USES IN FEDERAL WATERS 3, 7–10 (2020).

⁶ 16 U.S.C. § 703.

⁷ *Id.*

⁸ See Barry M. Hartman et al., *Where You Operate Matters: The Fifth Circuit Widens Split on MBTA Liability*, K&L GATES (Sept. 14, 2015), <https://www.klgates.com/Where-You-Operate-Matters-the-Fifth-Circuit-Widens-the-Split-on-MBTA-Liability-09-14-2015> [<https://perma.cc/8DL7-PLVQ>].

⁹ See *infra* Parts II–III.

¹⁰ OFF. OF THE SOLIC., U.S. DEP’T OF THE INTERIOR, M-37050, THE MIGRATORY BIRD TREATY ACT DOES NOT PROHIBIT INCIDENTAL TAKE 2, 41 (2017).

¹¹ See *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of the Interior*, 478 F. Supp. 3d 469, 469–70 (S.D.N.Y. 2020); Regulations Governing Take of Migratory Birds, 86 Fed. Reg. 1134 (Jan. 7, 2021) (to be codified at 50 C.F.R. pt. 10).

¹² See *generally* Complaint, Nat’l Audubon Soc’y v. U.S. Fish & Wildlife Serv., 1:21-cv-00448 (S.D.N.Y. Jan. 19, 2021); Complaint, New York v. U.S. Dep’t of the Interior, 1:21-cv-00452 (S.D.N.Y. Jan. 19, 2021).

delayed the effective date of the final rule by a month and asked for more public comments.¹³ The new Deputy Solicitor of the DOI then permanently revoked the prior administration's opinion memorandum.¹⁴ Six months later, the USFWS finalized a rule revoking the one that had codified the Trump administration's interpretation.¹⁵ However, the agency did not resolve the issue of implementing the inclusion of incidental take in MBTA criminal enforcement authority while the circuit split persists.¹⁶

Wind energy developers and states that want to encourage their projects would benefit from more consistent enforcement of MBTA liability for unintentional takings. The MBTA expressly allows states to create stricter rules for protecting birds than the MBTA itself provides.¹⁷ For instance, states can institute a negligence standard instead of strict liability, or enact their own legislation that places penalties on unintentional takings of the same species that the MBTA protects.

Part I of this Note will provide background on the MBTA and explain how different judicial circuits have interpreted it with respect to unintentional takings. Part II will focus on the Jorjani Opinion and the litigation that immediately followed its release. Part III provides recommendations to help states increase consistency in their regulations concerning incidental migratory bird takings and enforce existing best practices in the wind energy industry.

I. MIGRATORY BIRD TREATY ACT, IMPLICATIONS & INTERPRETATIONS

A. *Statutory Background*

The MBTA was signed into law in 1918, after a convention between the United States and Canada (then controlled by Great Britain)

¹³ Regulations Governing Take of Migratory Birds; Delay of Effective Date, 86 Fed. Reg. 8,715, 8,715 (Feb. 9, 2021) (to be codified at 50 C.F.R. pt. 10).

¹⁴ OFF. OF THE SOLIC., U.S. DEP'T OF THE INTERIOR, M-37065, PERMANENT WITHDRAWAL OF SOLICITOR OPINION M-37050 "THE MIGRATORY BIRD TREATY ACT DOES NOT PROHIBIT INCIDENTAL TAKE" (2021).

¹⁵ Regulations Governing Take of Migratory Birds; Revocation of Provisions, 86 Fed. Reg. 54,642, 54,642 (Oct. 4, 2021). At the time of writing, the USFWS had not issued a replacement regulation or implemented an incidental take permitting program.

¹⁶ Corinne Snow et al., VINSON & ELKINS LLP, *Biden Administration Looks to Recriminalize Accidental Bird Deaths in Traditional and Renewable Energy Sectors*, JDSUPRA (Mar. 18, 2021), <https://www.jdsupra.com/legalnews/biden-administration-looks-to-2642339/> [<https://perma.cc/AG3T-98QS>].

¹⁷ 16 U.S.C. § 708.

in response to unrestricted bird hunting and widespread trade in birds and their feathers.¹⁸ The two countries recognized that many species of migratory birds were “in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds” and adopted the goal of “saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man [as a source of food or by their eating insects that threaten crops and forests] or are harmless.”¹⁹ The law codifying the treaty agreement makes it:

Unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird [or] any part, nest, or egg of any such bird.²⁰

The MBTA protects over 1000 species of birds, including many species of coastal waterfowl.²¹ It is the oldest federal wildlife conservation law in the United States and has served as the cornerstone for subsequent animal protection measures.²²

The Act was meant to influence individual hunters' behavior as opposed to that of large corporations, so the penalties for individual violations are relatively low.²³ Violations of any MBTA provision or regulation carry a misdemeanor charge, a fine of not more than \$15,000, and/or imprisonment of not more than six months.²⁴ Intentional acts like knowingly selling a protected species or using baited fields carry more

¹⁸ *The Migratory Bird Act, Explained*, NAT'L AUDUBON SOC'Y (Jan. 26, 2018), <https://www.audubon.org/news/the-migratory-bird-treaty-act-explained> [https://perma.cc/SQ56-XTDU].

¹⁹ See Migratory Bird Protection Agreement, U.S.-Can., Dec. 8, 1916, 39 Stat. 1702.

²⁰ 16 U.S.C. § 703.

²¹ *Migratory Bird Treaty Act Protected Species (10.13 List)*, U.S. FISH & WILDLIFE SERV. (Apr. 16, 2020), <https://www.fws.gov/birds/management/managed-species/migratory-bird-treaty-act-protected-species.php#alphabetical> [https://perma.cc/6S32-6EVX].

²² See NAT'L AUDUBON SOC'Y, *supra* note 18; Ashley R. Fiest, Comment, *Defining the Wingspan of the Migratory Bird Treaty Act*, 47 AKRON L. REV. 587, 592 (2014).

²³ See NAT'L AUDUBON SOC'Y, *supra* note 18; 16 U.S.C. § 707.

²⁴ 16 U.S.C. § 707(a).

strict penalties.²⁵ Fines can run into the millions for large-scale violations by companies, so the MBTA remains a useful tool for holding large corporations accountable for their deleterious effects on wildlife.²⁶

The Act's text contains no knowledge element, so most jurisdictions have held that knowledge and purpose are not required for criminal liability and have upheld convictions for unintentional takings and killings of migratory birds.²⁷ The MBTA was effective in decreasing the pervasiveness of bird hunting by individuals.²⁸ Since new industries have grown during the intervening century, more protected birds are killed by incidental takings than intentional ones.²⁹ Therefore, imposing criminal liability for incidental takings is an important incentive for industries to protect birds,³⁰ including the burgeoning wind energy industry.

B. *Applying the MBTA to the Wind Industry*

The MBTA is a potential source of criminal liability for developers in the offshore wind industry; if they do not receive a permit for incidental takings, they can face criminal charges when protected birds collided with their wind turbines and die.³¹ Though wind energy is still relatively undeveloped in the United States, it has been established long enough that bird deaths by turbine collisions are a recognized fact of the industry.³² USFWS estimates that 234,000 birds are killed annually in wind turbine collisions.³³ However, this is relatively low in comparison to other incidental causes of bird deaths: an estimated 2.4 billion birds per year are killed by outdoor cats, 599 million by flying into building glass, and

²⁵ *Id.* § 707(b)–(c).

²⁶ OFF. OF PUB. AFFS., U.S. DEP'T OF JUST., 13-1253, UTILITY COMPANY SENTENCED IN WYOMING FOR KILLING PROTECTED BIRDS AT WIND PROJECTS (2014), <https://www.justice.gov/opa/pr/utility-company-sentenced-wyoming-killing-protected-birds-wind-projects> [<https://perma.cc/C8BG-ZABB>].

²⁷ *See infra* Sections I.B–C.

²⁸ NAT'L AUDUBON SOC'Y, *supra* note 18.

²⁹ *See* Regulations Governing Take of Migratory Birds, *supra* note 11, at 1140.

³⁰ Richard Lazarus, *Will 2018 Be the Year of the Bird? If So, Not Necessarily a Good One*, 35 ENV'TL. FORUM 13, 13 (Mar./Apr. 2018), http://www.law.harvard.edu/faculty/rlazarus/docs/columns/LAZARUS_FORUM_2018_March.pdf [<https://perma.cc/GK9M-5TK7>].

³¹ *See* OFF. OF PUB. AFFS., *supra* note 26.

³² *See, e.g.*, Sutton & Tomich, *supra* note 4, at 93; Robert J. Martin & Rob Ballard, *Article: Reconciling the Migratory Bird Treaty Act with Expanding Wind Energy to Keep Big Wheels Turning and Endangered Birds Flying*, 20 ANIMAL L. 145, 153 (2013).

³³ Regulations Governing Take of Migratory Birds, *supra* note 11, at 1140.

214.5 million by vehicle collisions.³⁴ Wind turbine collisions are ninth on USFWS's list of top threats to avian wildlife.³⁵

Even though wind turbines are not the largest anthropogenic threat to birds, their deadly effects on birds are often a principal concern for members of the public, and justifiably so.³⁶ Offshore wind energy does not seem like a viable solution to the current environmental crisis if it comes at the expense of wildlife conservation.³⁷ Preserving biodiversity is just as important as reducing greenhouse gas emissions from fossil fuels.³⁸ Both are essential for maintaining an environment that supports healthy human communities.³⁹

To avoid collisions with birds and protect biodiversity, wind energy developers can site their projects according to birds' flight patterns, as scientists have the methodology to study species-specific vulnerability and the distribution of individual birds.⁴⁰ In Denmark, which has a well-established offshore wind industry that should serve as a model for the United States, scientists even mapped the height at which seabirds near a wind farm were flying and their turbine avoidance tactics.⁴¹ Preliminary environmental assessments—which are required during the offshore wind energy area leasing process⁴²—should have a similar level

³⁴ *Id.*

³⁵ *See id.*

³⁶ *See, e.g.*, Ocean Fallout Group, *Stop the Morro Bay Offshore Wind Farm*, FACEBOOK, https://www.facebook.com/whaleshatewind/?ref=page_internal [<https://perma.cc/9VRG-KZDX>] (last visited Mar. 11, 2022); *Frequently Asked Questions*, DOMINION ENERGY COASTAL VA. OFFSHORE WIND, <https://coastalvawind.com/about-offshore-wind/frequently-asked-questions/environmental.aspx> [<https://perma.cc/RCR7-V928>] (last visited Mar. 11, 2022).

³⁷ *See infra* Part III.

³⁸ *See infra* Part III.

³⁹ *See Biodiversity and Health*, WORLD HEALTH ORG. (June 3, 2015), <https://www.who.int/news-room/fact-sheets/detail/biodiversity-and-health> [<https://perma.cc/8ER8-B94D>]; *Health Impacts: Climate and Human Health*, NAT'L. INST. OF ENV'T HEALTH SCIS. (Oct. 31, 2019), https://www.niehs.nih.gov/research/programs/climatechange/health_impacts/index.cfm [<https://perma.cc/6B59-9RCA>].

⁴⁰ *See generally* ARLISS J. WINSHIP ET AL., BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, MODELING AT-SEA DENSITY OF MARINE BIRDS TO SUPPORT ATLANTIC MARINE RENEWABLE ENERGY PLANNING: FINAL REPORT (2018), https://epis.boem.gov/final%20reports/BOEM_2018-010.pdf [<https://perma.cc/M3RB-X99N>]; JOSH ADAMS ET AL., BUREAU OF OCEAN ENERGY MGMT., U.S. DEP'T OF THE INTERIOR, COLLISION AND DISPLACEMENT VULNERABILITY AMONG MARINE BIRDS OF THE CALIFORNIA CURRENT SYSTEM ASSOCIATED WITH OFFSHORE WIND ENERGY INFRASTRUCTURE 4, 69 (2017), <https://pubs.usgs.gov/of/2016/1154/ofr20161154.pdf> [<https://perma.cc/5L7L-GD2B>].

⁴¹ Mark Desholm & Johnny Kahlert, *Avian Collision Risk at an Offshore Wind Farm*, 1 BIOLOGY LETTERS 296, 296 (2005).

⁴² BUREAU OF OCEAN ENERGY MGMT., WIND ENERGY COMMERCIAL LEASING PROCESS FACT

of scientific rigor to ensure they will effectively determine where a turbine will have the least effects on avian wildlife.

Wind farms have been prosecuted under the MBTA for years;⁴³ however, courts and presidential administrations have disagreed about whether an activity that is known to kill birds, but is not directed at them, is a taking under the MBTA. The Act prohibits takings “at any time, by any means or in any manner.”⁴⁴ Though a plain language reading of this term suggests the MBTA covers both intentional and unintentional acts, circuit courts have interpreted the requisite intent for criminal liability in varying ways.⁴⁵ As a result, industries such as wind energy, oil and gas, and communications lack clarity as to whether they could face criminal penalties if their activities result in the deaths of protected birds.⁴⁶

C. *Second & Tenth Circuits: Holding Companies Accountable for Incidental Takings*

The Second and Tenth judicial circuits both endorse the interpretation that the MBTA applies to both intentional and unintentional bird takings.⁴⁷ In *United States v. FMC Corp.*, a pesticide manufacturer’s wastewater pond contained a toxic chemical which killed protected birds, and the court held the company criminally liable.⁴⁸ The Second Circuit recognized that “cases involving hunters have consistently held that ‘. . . it is not necessary that the government prove that a defendant violated its [MBTA] provisions with guilty knowledge or specific intent to commit the violation.’”⁴⁹

SHEET 2 (2017), <https://www.boem.gov/sites/default/files/boem-newsroom/Wind-Energy-Comm-Leasing-Process-FS-01242017-%281%29.pdf> [<https://perma.cc/JDB9-L6H7>].

⁴³ OFF. OF PUB. AFFS., *supra* note 26.

⁴⁴ 16 U.S.C. § 703(a).

⁴⁵ *See* Nat. Res. Def. Council, Inc. v. U.S. Dep’t of the Interior, 478 F. Supp. 3d 469, 480–81 (S.D.N.Y. 2019); *infra* Sections I.C–E.

⁴⁶ Stephen Wiegand & Emily von Qualen, *Uncertainty About Migratory Bird Treaty Act “Takes”: The Biden Administration Delays the Effective Date of the Final Regulations Governing Take of Migratory Birds*, LISKOW & LEWIS: THE ENERGY LAW BLOG (Feb. 24, 2021), <https://www.theenergylawblog.com/2021/02/articles/energy/energy-natural-resources/uncertainty-about-migratory-bird-treaty-act-takes-the-biden-administration-delays-the-effective-date-of-the-final-regulations-governing-take-of-migratory-birds/> [<https://perma.cc/5HXD-G44Z>].

⁴⁷ *See* *United States v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978); *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 684–85 (10th Cir. 2010).

⁴⁸ *FMC Corp.*, 572 F.2d at 908.

⁴⁹ *Id.* at 906 (citing *Rogers v. United States*, 367 F.2d 998, 1001 (8th Cir. 1966)).

More fact-specifically, this particular defendant was manufacturing industrial-grade poisons, an inherently dangerous enough activity to impose strict liability upon the company's failure to prevent the toxins from escaping into the wastewater pond where they killed protected birds.⁵⁰ The company did not know at first that the wastewater pond was contaminated and attempted (unsuccessfully) to keep birds away from the pond when they found out.⁵¹ However, the MBTA "does not include as an element of the offense 'wilfully, knowingly, recklessly, or negligently'" because "Congress recognized the important public policy behind protecting migratory birds," so the company's lack of knowledge and intent did not preclude its conviction.⁵²

Likewise, the Tenth Circuit has interpreted Section 703(a) of the MBTA to mean that the Act "does not require any particular mental state or mens rea to violate the statute."⁵³ The court went even further than the Second Circuit by adopting a blanket rule that "misdemeanor violations under Section 703 are strict liability crimes" without any consideration of how inherently dangerous the activity was.⁵⁴ The court relied on the plain language of the section as well as several other holdings that MBTA violations are strict liability crimes.⁵⁵

In the Tenth Circuit, knowledge is not required to establish liability, but foreseeability that an activity or practice can kill birds is. In *U.S. v. Apollo Energies*, the Tenth Circuit had held that a defendant cannot be liable for bird deaths without proximate cause, which requires reasonable foreseeability that an activity can kill birds either directly or indirectly.⁵⁶ The court accordingly reversed one of the defendant's MBTA convictions because it was not widely known that a certain type of oil equipment could kill birds if left uncovered, and affirmed the conviction for a bird death by the same equipment a year later.⁵⁷

⁵⁰ *Id.* at 908.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 682 (10th Cir. 2010).

⁵⁴ *United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997).

⁵⁵ *Id.* (citing *United States v. Smith*, 29 F.3d 270, 273 (7th Cir. 1994); *United States v. Engler*, 806 F.2d 425, 431 (3d Cir. 1986), *cert. denied*, 481 U.S. 1019, 95 L. Ed. 2d 506, 107 S. Ct. 1900 (1987); *United States v. Chandler*, 753 F.2d 360, 363 (4th Cir. 1985); *United States v. Catlett*, 747 F.2d 1102, 1105 (6th Cir. 1984); *United States v. Wood*, 437 F.2d 91 (9th Cir. 1971); *Rogers v. United States*, 367 F.2d 998, 1001 (8th Cir. 1966), *cert. denied*, 386 U.S. 943, 17 L. Ed. 2d 874, 87 S. Ct. 976 (1967)).

⁵⁶ *Apollo Energies, Inc.*, 611 F.3d at 690.

⁵⁷ *Id.* at 691.

To satisfy due process, a defendant must be on notice that their conduct carries criminal liability.⁵⁸ Essentially, a defendant does not need to know or intend that their conduct *will* cause bird deaths to be held criminally liable for them, but they must know that it *can*. In *FMC*, the company was on notice even for the first incidence of bird deaths, because it was apparent that the pesticide they were manufacturing was toxic to any organism that might come in contact with it.⁵⁹ The Second and Tenth Circuits are among the most protective of migratory birds by way of enforcing the MBTA's criminal penalties for unintentional takings.

D. Ninth & Eighth Circuits: Need a Close Connection

The Ninth and Eighth Circuits are less willing to impose criminal liability for incidental takings than the Second and Tenth Circuits.⁶⁰ When faced with determining whether the MBTA applies to actions that indirectly caused bird deaths, the Ninth Circuit has held that an activity needs to directly affect birds for liability to apply.⁶¹ In *Seattle Audubon Society v. Evans*, the court held that *FMC* and other unintentional takings cases do not imply that habitat destruction is a taking under the MBTA.⁶² The court argued that the Act's definition of taking is not inclusive enough to apply to activities that cause bird deaths so indirectly, especially when habitat destruction and modification are explicitly covered by the Endangered Species Act.⁶³

Addressing wind farms directly in *Protect Our Communities Foundation v. Jewell*, the Ninth Circuit decided that the Bureau of Land Management ("BLM") cannot be held liable under the MBTA for approving a permit for a wind energy project.⁶⁴ Even though the project would likely result in some bird fatalities despite the mitigation measures outlined in its Environmental Impact Statement, "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

⁵⁸ *See id.* at 687–91.

⁵⁹ *See* *United States v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978).

⁶⁰ *See, e.g., Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991); *Protect Our Cmty. Found. v. Jewell*, 825 F.2d 571, 588 (9th Cir. 2016); *Newton Cnty. Wildlife Ass'n v. United States*, 113 F.3d 100, 115–16 (8th Cir. 1997).

⁶¹ *Seattle Audubon Soc'y*, 952 F.2d at 297; *Protect Our Cmty. Found.*, 825 F.2d at 571; *Newton Cnty. Wildlife Ass'n*, 113 F.3d at 115–16.

⁶² *Seattle Audubon Soc'y*, 952 F.2d at 303.

⁶³ *Id.*

⁶⁴ *Protect Our Cmty. Found.*, 825 F.2d at 583.

proximately cause the 'take' of migratory birds."⁶⁵ Even if the acts being approved would eventually do so, albeit unintentionally, there is not a strong enough causal connection between regulatory approval and the actual bird deaths from the forthcoming project.⁶⁶

The plaintiffs likely did not want to wait for the project to be constructed and then for several birds to die from wind turbine collisions before bringing litigation to stop the project; however, this is essentially what the court is instructing them to do by requiring proximate cause. This case highlights a weakness in the MBTA: it cannot be used for prevention, only for retroactive punishment. The hope is that punishment will deter future takings, but still only after protected birds have already been killed.

The Eighth Circuit agreed with the Ninth Circuit's holding in *Seattle Audubon Society v. Evans*.⁶⁷ In a case concerning the U.S. Forest Service's approval of logging operations that would disrupt nesting migratory birds and kill some, the Eight Circuit held that "it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that indirectly results in the death of migratory birds."⁶⁸ Like the Ninth Circuit in *Protect Our Communities Foundation v. Jewell*, the Eight Circuit declined to hold an agency liable under the MBTA for approving an action. Rather than reach the issue of proximate causation, however, the court based this holding on more straightforward statutory language: that "MBTA sanctions apply to 'any person, association, partnership, or corporation,'" not regulatory agencies.⁶⁹ Both judicial circuits leave room for an industry actor to face criminal penalties if its actions proximately caused bird deaths.

E. Fifth Circuit: Liability for Intentional Takings Only

The Fifth Circuit disagrees with other circuits that the MBTA could ever punish unintentional takings and killings, and only imposes criminal penalties for intentional acts directed at birds.⁷⁰ In *United States v. CITGO Petroleum Corp.*, the Fifth Circuit acknowledged that some courts have held that MBTA does apply to unintentional takings and reviewed

⁶⁵ *Id.* at 585.

⁶⁶ *See id.*

⁶⁷ *Newton Cnty. Wildlife Ass'n v. United States*, 113 F. 3d 100, 115 (8th Cir. 1997).

⁶⁸ *Id.*

⁶⁹ *Id.* (citing 16 U.S.C. § 707(a)).

⁷⁰ *See United States v. CITGO*, 801 F.3d 477, 488–89 (5th Cir. 2015).

the issue de novo.⁷¹ The court held that “a ‘taking’ is limited to deliberate acts done directly and intentionally to migratory birds.”⁷² The court focused on the common law definition of a wildlife taking—“to ‘reduce those animals, by killing or capturing, to human control,’”—and argued that the qualifiers “at any time, by any means or in any manner” do not change the meaning of “take” to include anything other than such affirmative acts.⁷³ This circuit is the least protective of all, limiting the MBTA more than the Eighth and Ninth Circuits, and completely at odds with the Tenth and Second. In fact, the court explicitly mentions the Second and Tenth Circuits’ holdings, but declines to accept their argument that a taking encompasses more than intentional killing and capturing.⁷⁴

The court suggests that holding defendants liable for unintentional takings is against public policy: “[i]f 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.”⁷⁵ Prosecutorial discretion has heretofore been sufficient to avoid such frivolous charges,⁷⁶ not to mention that investigating them would simply be impracticable.

Holding the wind energy industry liable for the bird deaths it causes will encourage more careful, science-based siting decisions. This is consistent with public policy, unlike prosecuting individuals for their windows, pets, or church steeples. However, the Trump administration agreed with the Fifth Circuit’s public policy argument and interpretation of the MBTA, and attempted to settle the issue to that effect.⁷⁷

II. THE JORJANI OPINION AND *NRDC v. DOI*

A. *The Trump Administration’s Interpretation of the MBTA*

In 2017, Daniel Jorjani, Deputy Solicitor of the DOI—acting with the authority of the Principal Solicitor—issued an opinion that sided with the Fifth Circuit’s holding that limits MBTA liability for incidental

⁷¹ *Id.* at 488–89.

⁷² *Id.*

⁷³ *Id.* at 489, 490; 16 U.S.C. § 703(a).

⁷⁴ *CITGO*, 801 F.3d at 492.

⁷⁵ *Id.* at 494 (emphasis added).

⁷⁶ See Nat. Res. Def. Council, Inc. v. U.S. Dep’t of the Interior, 478 F. Supp. 3d 469, 487 (S.D.N.Y. 2020).

⁷⁷ See *infra* Section II.A.

takings (hereinafter referred to as “the Jorjani Opinion”).⁷⁸ The Jorjani Opinion went farther than most circuit courts in concluding that the MBTA applies “only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs.”⁷⁹ Jorjani echoes the Fifth Circuit in arguing that holding otherwise would produce absurd results if a prosecutor was feeling particularly vindictive or exercising bad judgment.⁸⁰ Even the Second Circuit’s holding in *FMC* was too indeterminate for Jorjani, because the Court did not define what constituted an “extrahazardous [sic] activity.”⁸¹ Taken together, he argues that the MBTA, as DOI has historically interpreted it, is too vague to satisfy due process.⁸² Never mind that courts regularly decline to consider issues that the facts of the case in front of them do not raise, particularly when doing so would require changing or adding to the text of a law without legislative action.⁸³

Jorjani recognized that his argument was a deviation from DOI’s prior practices and interpretation of the MBTA; however, he argued that the cases that penalize unintentional takings rest on a “slim foundation.”⁸⁴ According to Jorjani, there was more support to a limited interpretation of the MBTA because the legislature’s purpose in 1918 was to restrict bird hunting, not activities that are not directed at birds but incidentally cause bird deaths.⁸⁵ Additionally, he argues that “take” is grouped with directed, intentional acts like “pursue,” “hunt,” “capture,” and “kill,” so “[p]ursuant to the canon of *noscitur a sociis* (‘it is known by its associates’), when any words ‘are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar.’”⁸⁶ This is a logical way to group the verbs, but Jorjani drastically undercuts the importance of the qualifier ‘by any means or in any manner,’ which applies to the whole list.⁸⁷ Given that the Jorjani Opinion runs counter to the text of the MBTA and undoes decades of precedent, it is unsurprising that environmental groups

⁷⁸ See OFF. OF THE SOLIC., *supra* note 10, at 1–2.

⁷⁹ *Id.* at 2.

⁸⁰ *Id.* at 36.

⁸¹ *Id.* at 36–37.

⁸² *Id.*

⁸³ See, e.g., *George v. People of the Virgin Islands*, 69 V.I. 553, 561 (2018).

⁸⁴ *Id.* at 2 n.4.

⁸⁵ *Id.* at 1–6.

⁸⁶ *Id.* at 18.

⁸⁷ See 16 U.S.C. § 703.

and states swiftly challenged the Jorjani Opinion and the USFWS rule that codified it on multiple grounds.⁸⁸

B. Legal Challenges to the Jorjani Opinion and the USFWS Rule

The Natural Resources Defense Council, along with other environmental non-profits as well as several states, sued the DOI because the Jorjani Opinion inserted a mens rea requirement into the MBTA where none exists.⁸⁹ They argued that this unduly scrapped fifty years of agency precedent and would allow large amounts of industry actions to kill and injure birds without legal consequences.⁹⁰

Fortunately for protected bird species, the Southern District of New York vacated the Jorjani Opinion.⁹¹ The court held that the MBTA text was not ambiguous: “any means or any manner” clearly modifies the term “kill,” meaning activities that unintentionally kill birds, “including . . . building wind turbines,” carry criminal liability.⁹²

The district court made short work of DOI’s argument that the MBTA should be interpreted narrowly to avoid absurd results and keep individuals from being subject to prosecutorial discretion.⁹³ The court patently disagreed that there was anything absurd about “an interpretation of the MBTA that broadly criminalizes killing migratory birds as a misdemeanor, subject to reasonable agency regulation and case-by-case adjudication. That has, after all, been the law of the land for decades.”⁹⁴ USFWS, an agency within DOI, has been responsible for enforcing the MBTA and has historically focused on “high-risk commercial activities that most threaten bird populations.”⁹⁵ Essentially, DOI’s counter-textual interpretation was “a solution in search of a problem.”⁹⁶

DOI had argued that the circuit split created a “patchwork” of contradictory decisions, but the court held that this view “vastly overstates circuit disagreement and blurs the actual boundaries that have been

⁸⁸ See *Migratory Bird Treaty Act*, AUDUBON, <https://www.audubon.org/news/migratory-bird-treaty-act> [<https://perma.cc/A2DN-2G98>] (last visited Mar. 11, 2022).

⁸⁹ *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of the Interior*, 478 F. Supp. 3d 469, 475 (S.D.N.Y. 2020).

⁹⁰ *Id.* at 472.

⁹¹ *Id.* at 489.

⁹² *Id.* at 482.

⁹³ *Id.* at 487.

⁹⁴ *Id.*

⁹⁵ *NRDC*, 478 F. Supp. 3d at 487.

⁹⁶ *Id.*

drawn.”⁹⁷ The Eighth and Ninth Circuits’ exclusion of habitat destruction in MBTA liability can coexist with the Second and Tenth Circuits’ holdings that unintentional acts which proximately cause bird deaths are unlawful.⁹⁸ The only decision that cannot mesh with the others is the Fifth Circuit’s holding in *United States v. CITGO*, and “DOI took prompt action [in the form of a previous Solicitor’s Opinion] to reaffirm that its long-standing position remained unchanged notwithstanding the Fifth Circuit’s decision.”⁹⁹

Immediately after *NRDC v. DOI* was decided, some observers warned that the court’s vacatur of the Jorjani Opinion may not be the end of the Trump administration’s efforts to promulgate their interpretation of the MBTA.¹⁰⁰ During the litigation, USFWS published an opinion outlining how the Jorjani Opinion would modify its rules and practices, as well as a proposed rule codifying the Jorjani Opinion.¹⁰¹ Just as the commentators predicted, the rule was finalized on January 7, 2021, despite the Southern District of New York’s ruling.¹⁰²

Like the proposed rule, the final rule relies heavily on the Jorjani Opinion and makes many of the same or similar arguments.¹⁰³ One difference between the two is that the final rule had to justify its existence given the vacatur of the document on which it is based, although it did not explicitly do so until the public comments section.¹⁰⁴ USFWS relies on *National Cable & Telecommunications Association v. Brand X Internet Services*, arguing that the case allows agencies to codify rules even when a court strikes down the preliminary interpretation on which the rule is based.¹⁰⁵

This oversimplifies the case. In *Brand X*, the Supreme Court concluded that the Federal Communications Commission was entitled to

⁹⁷ *Id.* at 478.

⁹⁸ *Id.* at 479.

⁹⁹ *See id.* at 480.

¹⁰⁰ Bobby Magill, *Migratory Bird Rule Expected to Proceed Despite Court Defeat*, BLOOMBERG LAW (Aug. 12, 2020, 1:58 PM), <https://news.bloomberglaw.com/environment-and-energy/migratory-bird-rule-expected-to-proceed-despite-court-defeat> [https://perma.cc/2NYH-FNR9].

¹⁰¹ Eric J. Murdoch et al., *USFWS Makes Another Move to Exclude Incidental Take From the Migratory Bird Treaty Act*, LEXOLOGY: THE NICKEL REPORT (Mar. 17, 2020), <https://www.lexology.com/library/detail.aspx?g=f988bdf0-499b-42d7-9f13-9805ccf161ae> [https://perma.cc/MHF6-VH7G].

¹⁰² Regulations Governing Take of Migratory Birds, *supra* note 11, at 1134.

¹⁰³ *See id.* at 1134–42.

¹⁰⁴ *Id.* at 1145.

¹⁰⁵ *Id.*

Chevron analysis¹⁰⁶: first asking whether there is an ambiguity in a statute about which Congress has been silent, and if so, asking whether the agency's interpretation was "a permissible construction of the statute."¹⁰⁷ The agency's final rule was affirmed because there was an ambiguity in the statute and the agency's interpretation was reasonable even though it was contrary to the court's decision.¹⁰⁸ However, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."¹⁰⁹ To reiterate, *NRDC v. DOI* held that the text of the MBTA is unambiguous.¹¹⁰ Therefore, the *Chevron* analysis that *Brand X* allows when an agency makes a rule contrary to a court decision would stop at the first step, and the rule would be held unlawful. Other than this point, the final rule does not really address *NRDC*'s holding so much as rehash the *Jorjani* Opinion and the proposed rule's previously overruled arguments about the MBTA's text.¹¹¹

DOI filed a notice of appeal regarding *NRDC v. DOI* on October 9, 2020, presumably in an attempt to reduce uncertainty in its rule's validity.¹¹² By promulgating the final rule while the *NRDC v. DOI* verdict stands, USFWS took "an enormous legal risk and waste[d] government resources," as the rule began facing political and legal backlash almost immediately after it was published.¹¹³ The Canadian government released a statement voicing concern about this apparent departure from the treaty terms,¹¹⁴ several states and environmental groups sued,¹¹⁵ and the Biden administration took swift regulatory action.¹¹⁶

¹⁰⁶ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

¹⁰⁷ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

¹⁰⁸ *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 982.

¹⁰⁹ *Id.*

¹¹⁰ *Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior*, 478 F. Supp. 3d 469, 480 (S.D.N.Y. 2020).

¹¹¹ See Regulations Governing Take of Migratory Birds, *supra* note 11, at 1136–37.

¹¹² See generally *Shepard's NRDC v. U.S. Dep't of the Interior*, 478 F. Supp. 3d 469.

¹¹³ Magill, *supra* note 100.

¹¹⁴ *Minister Wilkinson Expresses Concern over Proposed Regulatory Changes to the United States' Migratory Bird Treaty Act*, ENV'T AND CLIMATE CHANGE CAN., GOV'T OF CANADA (Dec. 18, 2020), <https://www.canada.ca/en/environment-climate-change/news/2020/12/minister-wilkinson-expresses-concern-over-proposed-regulatory-changes-to-the-united-states-migratory-bird-treaty-act.html> [<https://perma.cc/DR2C-938C>].

¹¹⁵ See Complaint, *Nat'l Audubon Soc'y v. U.S. Fish & Wildlife Serv.*, *supra* note 12; Complaint, *New York v. U.S. Dep't of the Interior*, *supra* note 12.

¹¹⁶ See OFF. OF THE SOLIC., *supra* note 14; Regulations Governing Take of Migratory Birds; Proposed Rule, 86 Fed. Reg. 24,573, 24,573 (May 7, 2021).

C. *Backlash in the Courts and from the Biden Administration*

In January 2021, several states commenced an action challenging the new rule on grounds that it runs counter to the text and purpose of the MBTA.¹¹⁷ They alleged that excluding incidental takings from MBTA liability would negatively affect their economy, as the states either own or hold the protected species in trust when they are within the states' borders and the wildlife supports recreation as well as scientific research.¹¹⁸ MBTA penalties have also been used to fund wetlands restoration projects, particularly in Massachusetts, one of the plaintiff states.¹¹⁹

Multiple environmental non-profits also filed a suit with the same statutory interpretation claim as the states.¹²⁰ The non-profits added an allegation that DOI and USFWS “[ran] roughshod over the National Environmental Policy Act (“NEPA”) in several respects, including by failing to consider reasonable alternatives to a regulation that will allow millions of migratory birds to be killed with impunity.”¹²¹ This issue had been raised before, in the comments to the final rule.¹²² DOI had conducted the rule-making process and the NEPA process simultaneously, implying that it intended to promulgate the rule regardless of the NEPA process's results.¹²³ Both lawsuits emphasized that DOI had not respected the ruling of *NRDC v. DOI* by pushing the rule forward despite the vacatur of the *Jorjani* Opinion.¹²⁴

Immediately after President Biden's inauguration, the new administration stepped in and began reversing the Trump administration's actions.¹²⁵ First, USFWS delayed the effective date of the final rule from February 8, 2021, to March 8, 2021, and asked for additional public comment, citing the pending legal challenges as the purpose of the delay.¹²⁶ When the new effective date arrived, the Biden administration's Principal

¹¹⁷ Complaint, *New York v. U.S. Dep't of the Interior*, *supra* note 12, at 30.

¹¹⁸ *Id.* at 31–32.

¹¹⁹ *Id.* at 32.

¹²⁰ See Complaint, *Nat'l Audubon Soc'y v. U.S. Fish & Wildlife Serv.*, *supra* note 12, at 1–2.

¹²¹ *Id.* at 2.

¹²² Regulations Governing Take of Migratory Birds, *supra* note 11, at 1152.

¹²³ *Id.*

¹²⁴ See Complaint, *New York v. U.S. Dep't of the Interior*, *supra* note 12, at 23–24;

Complaint, *Nat'l Audubon Soc'y v. U.S. Fish & Wildlife Serv.*, *supra* note 12, at 2.

¹²⁵ See Regulations Governing Take of Migratory Birds; Delay of Effective Date, *supra* note 13; OFF. OF THE SOLIC., *supra* note 14.

¹²⁶ Regulations Governing Take of Migratory Birds; Delay of Effective Date, *supra* note 13, at 8,716.

Deputy Solicitor of the DOI, Robert T. Anderson, published a memorandum permanently revoking the Jorjani Opinion.¹²⁷ The memorandum is all of three paragraphs and simply states that the Jorjani Opinion was vacated by *NRDC v. DOI*, a ruling which aligned with the department's precedents.¹²⁸ Meanwhile, the DOI withdrew its appeal of *NRDC v. DOI* from the Second Circuit.¹²⁹ On May 7, 2021, the USFWS proposed a rule revoking the January 7 Rule codifying the Jorjani Opinion, which became final on October 4, 2021.¹³⁰ Biden's USFWS agrees with the Southern District of New York and disagrees with the Fifth Circuit's decision in *United States v. CITGO*, because there is no precedent for the latter's narrow construction of "take," "capture," and "kill" to only mean intentional acts.¹³¹ The new administration views the revocation as a return to its treaty obligations with Canada as well Russia and Japan, with which the United States has also signed conventions protecting migratory birds.¹³²

While it appears the Jorjani Opinion and subsequent USFWS rule have been dealt a death blow, the issue of unintentional take under the MBTA is still not completely settled.¹³³ Revoking the Jorjani Opinion still leaves the judicial circuit split unresolved.¹³⁴ Without decisive action by either the Supreme Court or Congress, it will remain an unanswered legal question.¹³⁵ Consequently, the current conservative majority on the Supreme Court or a future anti-environmental president could again undermine whatever rule the Biden administration may promulgate to implement enforcement of criminal liability for incidental bird takings.

III. RECOMMENDATIONS

The judicial and executive branches' inconsistent MBTA enforcement has created an uncertain landscape for industries, particularly wind energy infrastructure development. If developers are discouraged from investing in offshore wind because of doubts about the security of

¹²⁷ OFF. OF THE SOLIC., *supra* note 14.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Regulations Governing Take of Migratory Birds; Proposed Rule, *supra* note 116, at 24,573; Regulations Governing Take of Migratory Birds; Revocation of Provisions, *supra* note 15.

¹³¹ Regulations Governing Take of Migratory Birds; Proposed Rule, *supra* note 116, at 24,574–575.

¹³² *See id.* at 24,576.

¹³³ Snow et al., *supra* note 16.

¹³⁴ *Id.*

¹³⁵ *Id.*

their investment brought on by potential liability for accidental bird deaths, it could prevent states from achieving their greenhouse gas emissions reduction goals. In order to make meaningful impacts to curb climate change, the United States and other countries need to transition to renewable energy from fossil fuels that are actively contributing to it.¹³⁶ At the same time, anthropogenic climate change has accelerated an ongoing mass extinction event, so preserving biodiversity is also crucial.¹³⁷

Wind energy installations could help wildlife conservation in the long run by reducing the effects of climate change if they were implemented on an industrial scale.¹³⁸ However, the same development could also endanger wildlife colliding with or displaced by the turbines.¹³⁹ The problems of climate change and biodiversity loss are interrelated, and a solution for one will not be successful without considering the other.¹⁴⁰ Wind energy is far from the largest source of anthropogenic bird mortality, but it is a significant contributor and can be more readily mitigated through siting and design decisions than other activities, such as individuals' motor vehicles and cats.¹⁴¹

Although a federal statute explicitly clarifying that MBTA liability attaches to unintentional takings and killings would be an obvious solution, it would likely be difficult to pass. The most recent effort, the Migratory Bird Protection Act of 2020, did not pass the first chamber.¹⁴² The bill would have amended the MBTA to include "incidentally take" in the list of prohibited activities in Section 701(a).¹⁴³

In light of the Biden administration's revocation of the Jorjani Opinion, some advocates are calling for a revitalization of Obama-era efforts to create a permitting system for unintentional takings of protected

¹³⁶ See, e.g., Complaint at 4, *Juliana v. U.S.*, 217 F. Supp. 3d 1224 (D. Or. 2016); *The Causes of Climate Change*, NASA (Jan. 27, 2022), <https://climate.nasa.gov/causes/> [<https://perma.cc/qq3h-g2xv>].

¹³⁷ Ivana Kottasová, *The Sixth Mass Extinction Is Happening Faster than Expected. Scientists Say It's Our Fault*, CNN (June 1, 2020, 6:20 PM), <https://www.cnn.com/2020/06/01/world/sixth-mass-extinction-accelerating-intl/index.html> [<https://perma.cc/45kq-y5c4>].

¹³⁸ See Meredith Blaydes Lilley & Jeremy Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, 38 ENV'T L. 1167, 1169, 1174 (2008).

¹³⁹ *Id.*

¹⁴⁰ See Don A. Driscoll et al., *Priorities in Policy and Management When Existing Biodiversity Stressors Interact with Climate-Change*, 111 CLIMATIC CHANGE 533, 544 (2012).

¹⁴¹ Regulations Governing Take of Migratory Birds, *supra* note 11, at 1140.

¹⁴² *116 Legislative Outlook H.R. 1552*, LEXISNEXIS, <https://plus.lexis.com/api/permalink/acac2539-ea98-46ff-a311-4903b1fa346d/?context=1530671> [<https://perma.cc/2CJB-QLYW>] (last visited Mar. 11, 2022).

¹⁴³ Migratory Bird Protection Act of 2020, 116 H.R. 5552, 116th Cong. (2020).

birds.¹⁴⁴ The system would need to account for each industry's specific needs, balanced with the administrative difficulties of issuing company-specific permits.¹⁴⁵ Even if the Biden administration was able to achieve this, a nationally applicable system would still likely face litigation if it was established while the circuit split remained unresolved.¹⁴⁶

The MBTA provides that “[n]othing in this Act shall be construed to prevent the several States and Territories from making or enforcing laws or regulations not inconsistent with the provisions of said conventions or of this Act, or from making or enforcing laws or regulations which shall give further protection to migratory birds.”¹⁴⁷ Therefore, coastal states can create their own solutions that provide more protection and consistency than the federal executive and judicial branch.

During project site selection, developers should rely on studies showing birds' migratory patterns and avoidance tactics. Researchers at Cornell University are using weather radar to detect where individual birds are flying and forecast migration patterns.¹⁴⁸ The birds' signatures are usually removed from the weather data when used for meteorological purposes, but the full picture can inform where turbines should be built or perhaps when they should be turned off to avoid collisions.¹⁴⁹ A European study also used radar, but they created their own data from surveillance radar beams to track the trajectories of individual birds and the ways in which they avoid wind turbines.¹⁵⁰ Similar studies at existing wind farms in the United States could help determine what types of environments are most conducive to avoidance and what species are most adaptive to the presence of windmills.

There are also existing best practices that can help limit wind turbines' danger to birds. For example, bird fatalities can be reduced by seventy percent by painting one turbine blade black, because it makes the birds more able to perceive and avoid the blades.¹⁵¹ Additionally,

¹⁴⁴ Michael Phillis, *Biden's Shift on Bird Death Rule Opens Door for Overhaul*, LAW360 (Mar. 8, 2021, 9:57 PM), <https://www.law360.com/articles/1362380/biden-s-shift-on-bird-death-rule-opens-door-for-overhaul> [<https://perma.cc/U49P-UB9X>].

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 16 U.S.C. § 708.

¹⁴⁸ Tom Metcalfe, *Wind Energy Takes a Toll on Birds, But Now There's Help*, NBC NEWS (Apr. 17, 2018, 4:18 AM), <https://www.nbcnews.com/mach/science/wind-energy-takes-toll-birds-now-there-s-help-nca866336> [<https://perma.cc/W46F-PV7S>].

¹⁴⁹ *Id.*

¹⁵⁰ Desholm & Kahlert, *supra* note 41, at 296.

¹⁵¹ Jonathan M. Gitlin, *Bird Deaths Down 70 Percent After Painting Wind Turbine Blades*,

various kinds of avian wildlife are attracted to light, so using intermittent red lights at night instead of constantly burning ones or connecting lights to motion or heat sensors can help keep flying creatures away.¹⁵²

Coastal states aiming to develop offshore wind to meet their renewable energy goals should enact statutes and regulations to mandate, or at least incentivize, implementing technical best practices and using or conducting wildlife studies that employ the latest methodologies before choosing a project site. In the interest of consistency, representatives of stakeholder groups from coastal states could collaborate on what specific measures would strike the best balance between renewable energy development and wildlife conservation, like they do for other marine spatial planning efforts.¹⁵³

States should adopt a consistent regime of liability for unintentional takings, such as by passing laws imposing criminal liability on industries' actions that incidentally kill birds. If they are worried about discouraging wind energy development, they could make exceptions for companies who sited their turbines in accordance with avian wildlife studies or employed other mitigation techniques, which would be in accordance with *U.S. v. Apollo Energies*.¹⁵⁴ Section 708 of the MBTA would also allow a mitigation exception for liability because it would likely increase the amount of protections in place for migratory birds.

The offshore wind industry would benefit from more certainty and consistency in enforcement of MBTA liability for incidental bird killings. The approval process for offshore wind projects is already long, expensive, and multifaceted.¹⁵⁵ It will be difficult for the industry to develop enough to have a positive impact on greenhouse gas emissions and climate change if developers are dissuaded by the possibility that a different DOI

ARS TECHNICA (Aug. 25, 2020, 1:43 PM), <https://arstechnica.com/science/2020/08/black-paint-on-wind-turbines-helps-prevent-bird-massacres/#:~:text=According%20to%20a%20study%20conducted,the%20number%20of%20bird%20deaths> [<https://perma.cc/77BL-8M29>].

¹⁵² U.S. FISH & WILDLIFE SERV., LAND-BASED WIND ENERGY GUIDELINES 50 (2012), https://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf [<https://perma.cc/P93D-4AS5>].

¹⁵³ See generally BUREAU OF OCEAN ENERGY MGMT., MID-ATLANTIC REGIONAL OCEAN ACTION PLAN (2016), <https://www.boem.gov/sites/default/files/environmental-stewardship/Mid-Atlantic-Regional-Planning-Body/Mid-Atlantic-Regional-Ocean-Action-Plan.pdf> [<https://perma.cc/V5NQ-3UYT>].

¹⁵⁴ See *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 691 (10th Cir. 2010).

¹⁵⁵ See DOMINION ENERGY, COASTAL VIRGINIA OFFSHORE WIND COMMERCIAL FISHERIES PROJECT ROUNDTABLE 8, 10–11 (2020), <https://cdn-dominionenergy-prd-001.azureedge.net/-/media/pdfs/global/projects-and-facilities/2020-09-30-virginia-coastal-wind-update-roundtable-slides.pdf?la=en&rev=c90f868604534605b6d7a0f5d0ae84b4&hash=8263A503D684B3FD4B4F1290B7F6C07E> [<https://perma.cc/MD2R-APSL>].

Solicitor will reverse course or that expanding into another jurisdiction may change their potential MBTA liability.

CONCLUSION

The offshore wind industry can conflict with migratory bird conservation, and developers must mitigate their effects on birds to comply with the MBTA. This is as it should be. Biodiversity conservation is equally important as greenhouse gas emissions reduction by renewable energy development. To promote both goals, state policy should encourage developers to site their projects in accordance with avian wildlife density studies and use best practices in their windmill designs.

The MBTA regulates industries, among other actors, by imposing criminal penalties on anyone who hunts, kills, takes, captures, trades, or sells birds, nests, or eggs that are listed as protected, at any time and by any means and manner.¹⁵⁶ There is an ongoing debate as to whether this language means the MBTA extends to incidental takings.¹⁵⁷ There are discrepancies between the judicial circuits, the most glaring of which is *United States v. CITGO*, which refuses to follow the multitude of cases that hold actors accountable for incidental bird takings.¹⁵⁸ The Trump administration's interpretation of the MBTA, promulgated in the Jorjani Opinion and the final USFWS rule, favors the Fifth Circuit's interpretation.¹⁵⁹ A federal judge vacated the Jorjani Opinion on grounds that the interpretation is contrary to the plain language of the MBTA and DOI has interpreted the statute to include incidental bird killings for decades despite the variation between judicial circuits.¹⁶⁰ Nevertheless, USFWS promulgated a final rule that limits MBTA liability to intentional takings only.¹⁶¹

Although DOI withdrew the Jorjani Opinion and its appeal of *NRDC v. DOI*, any program the Biden administration may establish to implement enforcement of unintentional takings under the MBTA will rest on an uncertain foundation while the circuit split persists.¹⁶² It seems

¹⁵⁶ 16 U.S.C. § 703(a).

¹⁵⁷ See *supra* Sections I.B–E.

¹⁵⁸ See *U.S. v. CITGO*, 801 F.3d 477, 492 (5th Cir. 2015).

¹⁵⁹ See OFF. OF THE SOLIC., *supra* note 10, at 17–18; Regulations Governing Take of Migratory Birds, *supra* note 11, at 1134.

¹⁶⁰ *Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior*, 478 F. Supp. 3d 469, 478–80 (S.D.N.Y. 2020).

¹⁶¹ Regulations Governing Take of Migratory Birds, *supra* note 11, at 1134.

¹⁶² Snow et al., *supra* note 16.

that the best hope for regulatory certainty in coastal states that wish to develop offshore wind industries is their own governments.

To support the wind energy industry by increasing certainty in their investments, states should use the tools at their disposal to promulgate laws and regulations that impose criminal liability for incidental takings that could have been prevented by more robust siting studies or mitigation techniques. This would force the implementation of technical best practices and help develop more robust methodologies for mapping bird population densities, migration patterns, and species-specific vulnerability.