

# Resolving the Migratory Bird Treaty Act Circuit Split: Support for a Strict Liability Standard and Proposal for an Incidental Take Permit

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Millions of birds die every year from mistaking open-air oil and wastewater pits with safe ponds.<sup>1</sup> In 2009, ExxonMobil pleaded guilty to the killing of at least eighty-five protected migratory birds across five states, many of which died from exposure to oil reserve pits and wastewater storage facilities.<sup>2</sup> The oil and gas giant was fined \$400,000, required to make \$200,000 in community service payments,<sup>3</sup> and then spent over \$2.5 million in an effort to prevent future harm to protected birds.<sup>4</sup> ExxonMobil was prosecuted under the Migratory Bird Treaty Act of 1918 (“MBTA”),<sup>5</sup> which makes it unlawful to kill or “take” any listed migratory bird.<sup>6</sup>

The MBTA has become increasingly popular for its use in prosecuting companies that unintentionally kill protected migratory birds while engaged in lawful activities unrelated to hunting and poaching.<sup>7</sup> The MBTA, whether or not it was

intended to be limited to hunting and poaching activities, is written broadly to make the killing or taking of any listed migratory bird, “by any means or in any manner,” unlawful.<sup>8</sup> In addition to broad protective language, the MBTA currently lists over 1000 species of migratory birds.<sup>9</sup> The U.S. Fish and Wildlife Service (“FWS”) estimates that two million birds die annually in oil and wastewater pits.<sup>10</sup> Although two million deaths due to exposure to oil and wastewater pits is relatively small compared to other causes of bird deaths,<sup>11</sup> these deaths are at the center of an ongoing controversy on the proper scope of the MBTA. On one side, oil and gas companies argue that extending the MBTA to the unintentional deaths of migratory birds outside of hunting and poaching activities would go too far and impose criminal liability on millions of individuals and companies that accidentally kill

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1. *Migratory Bird Mortality: Many Human-Caused Threats Afflict Our Bird Populations*, U.S. FISH & WILDLIFE SERV. 2 (Jan. 2002), <http://www.fws.gov/migratorybirds/CurrentBirdIssues/Hazards/Mortality-Fact-Sheet.pdf>.  
 2. Jennifer Koons, *Exxon Mobil Pleads Guilty to Killing Migratory Birds*, N.Y. TIMES (Aug. 13, 2009), <http://www.nytimes.com/gwire/2009/08/13/13greenwire-exxon-mobil-pleads-guilty-to-killing-migratory-90137.html>.  
 3. Plea Agreement and Statement of Facts Relevant to Sentencing at 2, United States v. Exxon Mobil Corp., No. 97-mj-01097 (D. Colo. Aug. 1, 2009), available at <http://www.justice.gov/archive/usao/co/news/2009/August09/EXXON%20plea%20agreement.pdf>. Under the terms of the agreement, community service payments were made to local nonprofit organizations. *Id.* at 12–15.  
 4. Koons, *supra* note 2.  
 5. Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703–712 (2012). The case involved five misdemeanor violations of the Act. Plea Agreement and Statement of Facts Relevant to Sentencing, *supra* note 3.  
 6. 16 U.S.C. § 703(a).  
 7. See, e.g., United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010); Protect Our Cmty. Found. v. Salazar, No. 12cv2211–GPC(PCL), 2013 WL 5947137 (S.D. Cal. Nov. 6, 2013); United States v. Brigham Oil & Gas, L.P.,

840 F. Supp. 2d 1202 (D.N.D. 2012); United States v. Citgo Petroleum Corp., 893 F. Supp. 2d 841 (S.D. Tex. 2012).

8. See 16 U.S.C. § 703(a).

9. Revised List of Migratory Birds, 78 Fed. Reg. 65,844 (Nov. 1, 2013) (codified at 50 C.F.R. § 10.13(c)(1) (2015)). It is difficult to find data on the percentage of total U.S. species covered by the MBTA or on population of birds covered by the MBTA. The American Ornithologists’ Union—the organization that the Fish and Wildlife Service defers to in the listing of bird species—lists a total of 2098 species in North America, some of which are not native to the United States. A conservative estimate is that the MBTA applies to about half of all bird species in the United States. R. TERRY CHESSEY ET AL., FIFTY-FIFTH SUPPLEMENT TO THE AMERICAN ORNITHOLOGISTS’ UNION: CHECK-LIST OF NORTH AMERICAN BIRDS 559 (2014). “The list of birds now protected as ‘migratory birds’ under the MBTA is a long one, including many of the most numerous and least endangered species one can imagine.” Mahler v. U.S. Forest Serv., 927 F. Supp. 1559, 1576 (S.D. Ind. 1996).

10. *Migratory Bird Mortality: Many Human-Caused Threats Afflict Our Bird Populations*, *supra* note 1.

11. *Id.* Other causes of bird deaths—and approximate number of deaths—include their crashing into windows (100 million), cars (60 million), aircrafts (millions), and wind turbines (33 thousand), human use of pesticides (70 million), cats (hundreds of millions), and by-catch (tens to hundreds of thousands). See *id.* at 1–2.

a protected bird.<sup>12</sup> On the other side, environmentalists and the federal government argue that the statutory text of the MBTA provides strict criminal liability for the killing of any listed bird.<sup>13</sup>

As a result of these differing views on the MBTA, a circuit split has developed. The Eighth and Ninth Circuit Courts have interpreted the MBTA to apply only to hunting and poaching activities, excluding from the scope of the MBTA unintentional, and otherwise lawful, activity that incidentally results the death of a protected bird.<sup>14</sup> The Second and Tenth Circuit Courts, and several district courts, have imposed—to differing degrees—criminal liability for incidental MBTA violations.<sup>15</sup> Until the U.S. Supreme Court resolves this issue or until Congress or the FWS provide further clarification and direction on the MBTA, the legal question of the proper scope of MBTA will persist. Continued expansion of the natural gas industry, especially the practice of hydraulic fracturing, will only exacerbate this problem due to the use of large amounts of water and open-air wastewater pits.<sup>16</sup>

This Note reviews and proposes a solution to the current circuit split regarding the appropriate scope of the MBTA. This Note argues for the more expansive interpretation of the MBTA adopted by some circuit courts, arguing against an alternative approach, and proposing a regulatory mechanism to deal with the problems that accompany an expansive interpretation. Part I provides background information on oil and wastewater pits, the MBTA, and incidental take permits authorized by the Endangered Species Act (“ESA”).<sup>17</sup> Part II discusses how the courts have been unable to consistently apply the MBTA to unintentional takings. Part III argues for the line of judicial reasoning advocating an expansive interpretation of the MBTA. Part IV argues for implementing an incidental take permit scheme that builds

off of the MBTA special purpose permit and the existing ESA incidental take permit.

## I. Background

Understanding the process by which birds die from oil wastewater pits and the necessity of these pits for the oil and gas industry helps underscore the stakes involved with holding oil and gas companies liable for the unintentional killing of protected migratory birds. The legal solution contemplated in this Note was developed based on the types and purposes of open-air pits used by the oil and gas industry, the effects of these pits on bird mitigation efforts and laws governing the pits, and the MBTA.

### A. Overview of Oil and Wastewater Pits

From extraction to production, oil and gas companies use several types of open-air oil field waste pits, which pose a significant risk to migratory birds. Open-air pits, or reservoirs, used by the oil and gas industry include: (1) reserve pits, (2) production skim pits, (3) flare pits, and (4) commercial oil field wastewater disposal facilities.<sup>18</sup> Reserve pits are used during drilling and extraction operations to store drilling fluid and produced water.<sup>19</sup> After extraction, production skim pits are used to further separate oil and water via gravity separation.<sup>20</sup> Flare pits are typically earthen holes constructed below flare stacks that collect residual oils and other liquids resulting from the flaring process.<sup>21</sup> These residual oils and liquids mix with precipitation to form small ponds.<sup>22</sup> As the name indicates, commercial oil field wastewater disposal facilities are used to treat and dispose of waste resulting from oil and gas exploration and production.<sup>23</sup> These facilities typically use large, open-air evaporation ponds to dispose of the wastewater.<sup>24</sup>

### B. Wastewater and Its Effect on Migratory Birds

Although some pits contain oil, produced water is a much bigger concern. A byproduct of the oil and gas extraction process, produced water is the water returned to the sur-

12. The district court finding for the oil and gas companies states that the “Migratory Bird Treaty Act, as broadly interpreted by the Government, offers unlimited potential for criminal prosecutions” and “would have to criminalize driving, construction, airplane flights, farming, electricity and wind turbines, which cause bird deaths, and many other everyday lawful activities.” *Brigham*, 840 F. Supp. 2d at 1213; *see also* *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991).
13. The circuit court finding for the government states that “its ‘plain language’—an indicia of legislative intent—supported a strict liability interpretation.” *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 686 (10th Cir. 2010).
14. *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991); *Newton Cnty. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997); *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202, 1209 (D.N.D. 2012).
15. *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 682 (10th Cir. 2010); *United States v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978); *United States v. Citgo Petroleum Corp.*, 893 F. Supp. 2d 841, 848 (S.D. Tex. 2012); *United States v. Moon Lake Elec. Ass’n*, 45 F. Supp. 2d 1070, 1088 (D. Colo. 1999); *Sierra Club v. Martin*, 933 F. Supp. 1559, 1564 (N.D. Ga. 1996).
16. David Martin Davies, *More Fracking Produces More Open Waste Pits*, MARKETPLACE.ORG (Oct. 14, 2014 2:40 PM), <http://www.marketplace.org/topics/sustainability/more-fracking-produces-more-open-waste-pits>.
17. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544 (2012)).

18. *Contaminants Issues—Oil Field Waste Pits: The Problem*, U.S. FISH & WILDLIFE SERV., [www.fws.gov/mountain-prairie/contaminants/contaminants1a.html](http://www.fws.gov/mountain-prairie/contaminants/contaminants1a.html) (last visited May 31, 2015).
19. *Id.*
20. *Id.*
21. *See Contaminants Issues—Oil Field Waste Pits: Flare Pits*, U.S. FISH & WILDLIFE SERV., [www.fws.gov/mountain-prairie/contaminants/contaminants1f.html](http://www.fws.gov/mountain-prairie/contaminants/contaminants1f.html) (last visited May 31, 2015).
22. *Id.*
23. *See Contaminants Issues—Oil Field Waste Pits: Commercial Oil Field Waste Disposal Facilities*, U.S. FISH & WILDLIFE SERV., [www.fws.gov/mountain-prairie/contaminants/contaminants1b.html](http://www.fws.gov/mountain-prairie/contaminants/contaminants1b.html) (last visited May 31, 2015).
24. *Id.*

face through a well borehole.<sup>25</sup> It is comprised of the naturally occurring water in the formation and, in the case of hydraulic fracturing, injected water.<sup>26</sup> Produced water often contains inorganic constituents (e.g., silt, sodium, bicarbonate, and chloride) and organic contaminants (e.g., benzene, toluene, ethylbenzene, and xylene).<sup>27</sup> On average, seven to ten barrels of produced water are generated for every barrel of crude oil produced.<sup>28</sup> Approximately fifty-six million barrels of produced water resulted from oil and gas operations each day in the United States in 2007.<sup>29</sup> Unsurprisingly, “produced water comprises approximately 98% of the total volume of exploration and production waste generated by the oil and gas industry and is the largest volume waste stream generated by the oil and gas industry.”<sup>30</sup> Because the amount of produced water generated each year is so large, it is a significant cost in oil and gas production.<sup>31</sup> Consequently, if the produced water cannot be re-injected underground or reused in future extraction processes,<sup>32</sup> oil and gas companies will undoubtedly continue to look for the most cost effective method for disposal or temporary containment, i.e., open-air wastewater pits.<sup>33</sup>

The use of open-air oil and wastewater pits pose significant dangers to wildlife, especially to birds that mistake the pits for wetlands. Exposure to oil and wastewater can result in a bird’s death in several ways. Direct ingestion of oil or toxic wastewater can result in damage to internal organs or

death.<sup>34</sup> Unintentional ingestion of oil or wastewater through preening can damage a bird’s gastrointestinal tract, making it weaker and more susceptible to disease.<sup>35</sup> Oil in feathers can cause matting and reduce insulation, resulting in the loss of critical body heat and making cold temperatures fatal.<sup>36</sup> Additionally, oiled birds can lose their natural buoyancy and drown.<sup>37</sup> Despite the dangers to birds and other wildlife, oil and gas companies continue to utilize open-air oil and wastewater pits.<sup>38</sup>

### C. Mitigation Measures and Laws, and Regulations Governing Pits

Oil and gas companies have used several techniques to provide some protection to protected migratory birds and other wildlife from the harmful chemicals in the oil and wastewater pits.<sup>39</sup> Oil and gas companies often use flagging<sup>40</sup> as a deterrent for birds.<sup>41</sup> Additionally, pits are sometimes equipped with strobe lights, metal reflectors, and noisemakers.<sup>42</sup> Unfortunately, these methods are ineffective deterrents.<sup>43</sup> The FWS recommends three straightforward solutions to reduce or eliminate the risk open-air oil and wastewater pits pose to migratory birds: (1) use closed containment systems, (2) eliminate pits or keep oils out of open pits, and (3) use effective and proven wildlife deterrents or exclusionary devices, such as netting.<sup>44</sup>

Although simple solutions exist, oil and gas companies do not always use the best methods to prevent migratory bird deaths because laws do not exist to compel mitigation measures, or because regulations requiring deterrents or closed containment measures are too lenient, or provide for broad exceptions. State oil and gas regulatory agencies regulate the use of open-air oil and wastewater pits on private- and state-owned land, and the U.S. Bureau of Land Management (“BLM”) regulates the pits on federal- and tribally-owned land.<sup>45</sup> Only thirteen states require or recommend netting

25. Matthew E. Mantell, Chesapeake Energy Corp., *EPA Hydraulic Fracturing Study Technical Workshop #4 Water Resources Management*, U.S. ENVTL. PROTECTION AGENCY 7 (2011), [http://www2.epa.gov/sites/production/files/documents/09\\_Mantell\\_-\\_Reuse\\_508.pdf](http://www2.epa.gov/sites/production/files/documents/09_Mantell_-_Reuse_508.pdf).

26. *Id.*

27. KATIE GUERRA ET AL., U.S. DEP’T OF THE INTERIOR, OIL AND GAS PRODUCED WATER MANAGEMENT AND BENEFICIAL USE IN THE WESTERN UNITED STATES 1 (2011). Produced water is described depending on its quality in terms of total dissolved solids (“TDS”): “brackish” (5,000 to 35,000 ppm TDS), “saline” (35,000 to 50,000 ppm TDS), or “brine” (50,000 to 150,000+ ppm TDS). Mantell, *supra* note 25.

28. GUERRA ET AL., *supra* note 27, at 5.

29. Although the volume of produced water varies by type of hydrocarbon produced, given the geographic location of the well, and the method of production used, the 56 million barrels/day (20 billion barrels/year) is likely an *underestimate*. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-156, ENERGY-WATER NEXUS: INFORMATION ON THE QUANTITY, QUALITY, AND MANAGEMENT OF WATER PRODUCED DURING OIL AND GAS PRODUCTION 9 (2012); *see also* AM. PETROLEUM INST., OVERVIEW OF EXPLORATION AND PRODUCTION: WASTE VOLUMES AND WASTE MANAGEMENT PRACTICES IN THE UNITED STATES 2 (2000), available at [http://www.api.org/environment-health-and-safety/environmental-performance/-/media/Files/EHS/Environmental\\_Performance/ICF-Waste-Survey-of-EandP-Wastes-2000.ashx](http://www.api.org/environment-health-and-safety/environmental-performance/-/media/Files/EHS/Environmental_Performance/ICF-Waste-Survey-of-EandP-Wastes-2000.ashx) (stating 18 billion barrels/year in 1995).

30. JOHN A. VEIL ET AL., ARGONNE NAT’L LAB., A WHITE PAPER DESCRIBING PRODUCED WATER FROM PRODUCTION OF CRUDE OIL, NATURAL GAS, AND COAL BED METHANE 17 (2004), available at <http://www.circleofblue.org/waternews/wp-content/uploads/2010/08/prodwaterpaper1.pdf>.

31. *Id.* at 1.

32. Over 90% of produced water is managed through underground injection practices. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 29, at 15. The remaining 10% is either stored in wastewater pits, discharged into surface water, reused for hydraulic fracturing, or reused for irrigation. *See id.*

33. *See id.* at 23 (stating that cost is primary factor in determining what method of disposal is used).

34. B.C. Soc’y for the Prevention of Cruelty to Animals, *How Oil Affects Birds*, BCSPCA, <http://www.sPCA.bc.ca/welfare/wildlife/injured/oiled-wildlife/how-oil-affects-birds.html#.UtmFf3n0At8> (last visited May 31, 2015).

35. *Id.*

36. *Id.*

37. *Id.*

38. *See The Ineffectiveness of Flagging to Deter Migratory Birds From Oilfield Production Skim Pits and Reserve Pits*, U.S. FISH & WILDLIFE SERV. 1 (Feb. 2011), [www.fws.gov/mountain-prairie/contaminants/documents/Flagging\\_oil\\_pits.pdf](http://www.fws.gov/mountain-prairie/contaminants/documents/Flagging_oil_pits.pdf).

39. *Id.*

40. “Flagging” involves tying long strings of small, colorful flags over the top of an open-air pit. *See id.*

41. *Id.*

42. *Id.*

43. “[P]its with flagging, reflectors, and strobes all had similar mortality to pits without deterrents.” *Id.* (quoting B. Esmoil & S. Anderson, *Wildlife Mortality Associated With Oil Pits in Wyoming*, 27 PRAIRIE NATURALIST 81 (1995)).

44. Pedro Ramirez, *Wildlife Mortality Risk in Oil Field Waste Pits*, U.S. FISH & WILDLIFE SERV. 2 (Dec. 2000), [www.fws.gov/mountain-prairie/contaminants/papers/pitsisk.pdf](http://www.fws.gov/mountain-prairie/contaminants/papers/pitsisk.pdf).

45. PEDRO RAMIREZ, U.S. FISH & WILDLIFE SERV., RESERVE PIT MANAGEMENT: RISKS TO MIGRATORY BIRDS 14 (2009), available at [www.fws.gov/mountain-prairie/contaminants/documents/reservepits.pdf](http://www.fws.gov/mountain-prairie/contaminants/documents/reservepits.pdf).

or screening of pits or open tanks.<sup>46</sup> Of these thirteen states, only two states require netting or screening; the rest require mitigation measures but allow for exceptions or only recommend mitigation measures.<sup>47</sup> North Dakota's regulation provides an example of a lenient netting regulation:

All open pits and ponds which contain saltwater must be fenced. All pits and ponds which contain oil must be fenced, screened, and netted.

This is not to be construed as requiring the fencing, screening, or netting of a drilling pit or reserve pit used solely for drilling, completing, recompleting, or plugging unless such pit is not reclaimed within ninety days after completion of drilling operations.<sup>48</sup>

Netting in North Dakota is required, but not during drilling operations or for the first ninety days after completion of drilling operations.<sup>49</sup> Texas has a similar regulation that requires netting in most situations but exempts temporary storage tanks used during drilling operations, workovers, or well tests from the netting requirement.<sup>50</sup>

Other states carve out exceptions for particular types of pits. In Montana, Nebraska, and Wyoming, fencing and netting are required for pits that contain oil, but only fencing is required for pits that contain produced water.<sup>51</sup> Fencing may deter ground animals but not birds that can easily fly over a fence. Furthermore, produced water, like oil, is harmful to birds and other wildlife and it is also generated in large quantities daily.<sup>52</sup> Requiring netting for oil pits but not for wastewater pits provides little protection for migratory birds.<sup>53</sup>

BLM regulation also fails to compel adequate mitigation measures.

To prevent contamination of ground water and soils or to conserve water, it is *recommended* that operators use a closed-loop drilling system or line reserve pits with an impermeable liner . . . .

. . . .

Reserve pits *should* be appropriately fenced to prevent access by persons, wildlife, or livestock. During drilling in active livestock areas, the reserve pit must be fenced with an enclosure fence on three sides and then fenced on the fourth side once drilling has been completed. . . .

The fence should remain in place until pit reclamation begins. After cessation of drilling and completion operations, any visible or measurable layer of oil must be removed from the surface of the reserve pit and the pit kept free of oil. *In some situations and locations, precautions, such as netting, may be required* in order to prevent access and mortality of birds and other animals.<sup>54</sup>

Unlike the state laws discussed above, netting under BLM regulation is entirely *optional*.<sup>55</sup> The BLM only “recommends” that certain mitigation efforts be implemented and “may” require netting under certain, unspecified conditions.<sup>56</sup>

#### D. Overview of the Migratory Bird Treaty Act

Congress passed the MBTA in response to reductions in bird populations caused by the intentional killing of birds for food, sport, and millinery purposes.<sup>57</sup> The MBTA codified bilateral treaties between the United States and four countries—Canada (then part of Great Britain), Mexico, Japan, and the former Soviet Union—for the protection of migratory birds.<sup>58</sup> The Act regulates most aspects of the killing, taking, possession, transportation, sale, purchase, barter, exportation, and importation of listed migratory birds.<sup>59</sup>

The central provisions of the MBTA are contained in §§ 703, 704, and 707 of title 16 of the U.S. Code. Section 703(a) provides the simple mandate of the MBTA:

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 . . . any migratory bird . . . included in the terms of the conventions . . .*<sup>60</sup>

This straightforward mandate—that it shall be unlawful at any time or by any means to take or kill any migratory bird—has remained largely unchanged since enactment in 1918.<sup>61</sup> Section 704(a) authorizes the Secretary of the Interior to issue regulations that permit the taking of protected birds that are “compatible with the terms” and “carry out the purposes” of the migratory bird treaties.<sup>62</sup>

The MBTA imposes both misdemeanor and felony criminal penalties for violation of the Act:

(a) Except as otherwise provided in this section, any person . . . or corporation who shall violate any provisions . . .

46. See *id.* at 13. Although most of the big oil producing states do require or recommend proven mitigation measures, there are several notable exceptions, including Arizona, Kansas, Idaho, Oregon, and all states in the Appalachian region. *Id.* at 13, fig. 15.

47. See *id.* at 18–32.

48. N.D. ADMIN. CODE 43-02-03-19.1 (2012).

49. States vary on whether a pit must be closed at all *and*, if pit closure is required, on the time frames for pit closure after well completion. See RAMIREZ, *supra* note 45, at 15, tbl. 2. Two states—Virginia and Illinois—require immediate closure. *Id.* Twenty-four states require closure from between 30 to 365 days after well completion. *Id.*

50. 16 TEX. ADMIN. CODE § 3.22(b)(1) (1991).

51. MONT. ADMIN. REG. 36.22.1005 (1992); 267 NEB. ADMIN. CODE § 022.12A (2014); 4 WYO. ADMIN. CODE § 1(bb) (2010).

52. See *supra* Part.I.B.

53. See *supra* text accompanying notes 34–38.

54. U.S. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, THE GOLD BOOK—SURFACE OPERATING STANDARDS AND GUIDELINES FOR OIL AND GAS EXPLORATION AND DEVELOPMENT 17 (4th ed. 2007) (emphasis added).

55. *Id.*

56. *Id.*

57. Collette L. Adkins Giese, *Spreading Its Wings: Using the Migratory Bird Treaty Act to Protect Habitat*, 36 WM. MITCHELL L. REV. 1157, 1160 (2010).

58. Revised List of Migratory Birds, 78 Fed. Reg. 65,844 (Nov. 1, 2013) (codified at 50 C.F.R. § 10.13(c)(1) (2015)).

59. *Id.*

60. 16 U.S.C. § 703(a) (2012) (emphasis added).

61. The MBTA as a whole has undergone very modest changes since its passing in 1918. For a list of all changes to the MBTA, see Adkins Giese, *supra* note 57, at 1163.

62. Adkins Giese, *supra* note 57, at 1161.

of this subchapter . . . *shall* be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$15,000 or be imprisoned not more than six months, or both.

(b) Whoever, in violation of this subchapter, shall *knowingly*—

(1) take by any manner whatsoever any migratory bird . . . or

(2) sell . . . any migratory bird shall be guilty of a felony and shall be fined not more than \$2,000 or imprisoned not more than two years, or both.<sup>63</sup>

Section 707(a)—the misdemeanor provision—plainly states that any violator “*shall*” be guilty of a misdemeanor<sup>64</sup>; whereas, section 707(b)—the felony provision—states that any person who “*knowingly*” violates the treaty is guilty of a felony.<sup>65</sup> This difference in language supports arguments that the MBTA is a strict liability statute for misdemeanor violations.<sup>66</sup>

The MBTA protects an expansive array of birds. The MBTA defines the migratory birds that are protected by deferring to the definitions used in the multiple treaties.<sup>67</sup> Due to differences in the manner each treaty defines and lists migratory birds, the Secretary of the Interior—pursuant to § 704—has undertaken rulemaking to define the migratory birds that fall within MBTA protections and periodically publishes an updated list of the protected species.<sup>68</sup> The MBTA currently provides protections for 1026 bird species.<sup>69</sup>

### E. The ESA Incidental Take Permit and Habitat Conservation Plan

This Note proposes implementing an incidental take permit that operates similar to the ESA’s incidental take permit. Therefore, a brief overview of the ESA permit scheme and its requirements are discussed below.

The ESA incidental take permit provides a compromise for competing land development interests and interests of protecting *endangered* species.<sup>70</sup> An incidental take per-

mit allows a permit holder to harass, harm, kill, or otherwise take threatened or endangered species if the “taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”<sup>71</sup> To obtain an ESA incidental take permit, an applicant must submit a habitat conservation plan (“HCP”) that details the likely impact to result from the taking, the measures the applicant will use to avoid, minimize, and mitigate the impact, the alternative actions considered by the applicant but rejected, and any other measures deemed necessary or appropriate by the FWS.<sup>72</sup> The FWS will issue an incidental take permit only after finding that the HCP commits the applicant to mitigation to the “maximum extent practicable,” that the HCP is sufficiently funded, and that the level of incidental take will not appreciably reduce the likelihood of survival and recovery of the threatened or endangered species.<sup>73</sup>

The issuance of an incidental take permit is a federal action subject to compliance with the National Environmental Policy Act (“NEPA”).<sup>74</sup> To satisfy NEPA requirements, a proposed HCP must qualify for a categorical exclusion or, depending on the scope and impact of the HCP, provide an Environmental Assessment (“EA”) or an Environmental Impact Statement (“EIS”).<sup>75</sup> The FWS issued a HCP Handbook that succinctly explains the NEPA requirements for a HCP as follows:

An EIS is required when the project or activity that would occur under the HCP is a major Federal action significantly affecting the quality of the human environment. An EA is prepared when it is unclear whether an EIS is needed or when the project does not require an EIS but is not eligible for a categorical exclusion. An EA culminates in either a decision to prepare an EIS or a Finding of No Significant Impact (FONSI). Activities which do not individually or cumulatively have a significant effect on the environment can be categorically excluded from NEPA.<sup>76</sup>

In addition to NEPA compliance, a HCP must also comply with ESA consultation requirements.<sup>77</sup> Section 1536(a)(2) of title 16 of the U.S. Code requires federal agencies to consult with the FWS to ensure that any action “authorized, funded, or carried out” by any agency “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat.<sup>78</sup>

Therefore, the overall steps required for an ESA incidental take permit include: (1) completing a HCP, (2) publish-

63. 16 U.S.C. § 707(a)–(b) (2012) (emphasis added).

64. *Id.* § 707(a) (emphasis added).

65. *Id.* § 707(b) (emphasis added).

66. Adkins Giese, *supra* note 57, at 1163.

67. “[I]t shall be unlawful at any time, by any means or in any manner, to . . . take . . . kill . . . any migratory bird . . . included in the terms of the conventions between the United States and Great Britain . . . the United Mexican States . . . the government of Japan . . . and the Union of Soviet Socialist Republics.” 16 U.S.C. § 703(a) (2012).

68. The Canadian treaty defines migratory birds by taxonomic families and by common names of included species; the Mexican treaty defines migratory birds by taxonomic families without listing included species; the Japanese and Russian treaties define migratory birds simply as those birds that migrate between their respective country and the United States. Larry Martin Corcoran & Elinor Colbourn, *Shocked, Crushed and Poisoned: Criminal Enforcement in Non-Hunting Cases Under the Migratory Bird Treaties*, 77 DENV. U. L. REV. 359, 379 (1999).

69. Revised List of Migratory Birds, 78 Fed. Reg. 65,844 (Nov. 1, 2013) (codified at 50 C.F.R. § 10.13(c)(1) (2015)).

70. H.R. REP. NO. 97-835, at 31 (1982) (Conf. Rep.).

71. 16 U.S.C. § 1539(a)(1)(B) (2012).

72. *Id.* § 1539(a)(2)(A).

73. *Id.* § 1539(a)(2)(B).

74. U.S. FISH & WILDLIFE SERV., U.S. DEP’T OF THE INTERIOR, HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK 1-6 (1996); *see also* National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347 (2012)).

75. U.S. FISH & WILDLIFE SERV., *supra* note 74.

76. *Id.*

77. *Id.* at 6-12.

78. 16 U.S.C. § 1536(a)(2) (2012).

ing the HCP with a NEPA analysis in the Federal Register for public review and comment, and (3) conducting a consultation with the FWS. This process is expensive and time consuming.<sup>79</sup> To expedite the process, the FWS has created a low-effect HCP category that substantially simplifies the permitting process. The low-effect HCP permitting process eliminates unnecessary review procedures and categorically excludes low-effect HCPs from NEPA requirements.<sup>80</sup> A low-effect incidental take permit is allowed for activities whose incidental take of protected species have a low or negligible effect on the species covered in the HCP.<sup>81</sup> Projects or activities that affect smaller geographical areas are typically more suitable candidates for a low-effect incidental take permit.<sup>82</sup> The FWS must consider each HCP on a case-by-case basis and geographic size of a project, or activity, is one factor in determining whether a project or activity belongs in the low-effect category.<sup>83</sup>

In summary, various types of oil and wastewater pits are used throughout the drilling and extraction phases of oil and gas production. Particularly prevalent in oil and gas production is the use of open-air pits to store produced water. Exposure to the oil and wastewater pits poses a significant hazard to migratory birds that mistake the pits for wetlands. Millions of birds die annually from exposure to the pits. State and federal regulatory agencies have attempted to promote or require mitigation measures. Exceptions contained in the regulations and the nonmandatory nature of many of these regulations have weakened the effect of these regulatory protections. Regardless of regulatory efforts specific to waste pits, the MBTA provides broad protection for many migratory birds. The broad statutory protections offered and the continued use of open-air pits has resulted in a circuit split on the proper scope of the MBTA.

## II. Circuit Split on Scope of Migratory Bird Treaty Act

The seemingly broad language in § 703 of title 16 of the U.S. Code and the arguably strict liability imposed by § 707(a) make determining the actual scope of the MBTA difficult. The Supreme Court has yet to take up this issue, leaving lower courts to adopt conflicting interpretations on the applicability of the MBTA.<sup>84</sup> In particular, courts have disagreed on whether criminal liability could result from an unintended migratory bird death in an otherwise lawfully established oil or wastewater pit.<sup>85</sup> Some courts have taken a narrow view

of MBTA liability and have held that the MBTA does not apply to unintentional bird deaths resulting from lawful commercial activity.<sup>86</sup> Other courts have taken an expansive approach to MBTA liability and have imposed strict liability for MBTA violations.<sup>87</sup> Some courts taking this expansive view have further required evidence of proximate causation between the bird death and the lawful commercial activity for strict liability to attach.<sup>88</sup>

Courts have narrowly interpreted the scope of the MBTA and held that lawful commercial activities that indirectly or unintentionally cause the death of migratory birds are outside the scope of the MBTA.<sup>89</sup> Proponents of this view argue that by using terms particularly related to hunting and poaching, Congress clearly intended to limit to the Act's scope to the types of activities engaged in by hunters and poachers.<sup>90</sup> Proponents further argue that if § 707(a) imposed strict liability, then criminal liability would "stretch [the] 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."<sup>91</sup> In several cases, the activity at issue is the use of open-air waste or reserve pits.<sup>92</sup> Reserve pits clearly are not related to hunting and poaching and typically have little actual impact on the habitat of migratory birds.<sup>93</sup>

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*and* United States v. Moon Lake Elec. Ass'n, 45 F. Supp. 2d 1070, 1085 (D. Colo. 1999) (taking expansive view of MBTA but requiring proximate causation), *with* United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1214 (D.N.D. 2012) (taking narrow view and holding the MBTA does not apply to unintentional nonhunting activity).

79. The target permit application processing times are less than ten months for a HCP with an EIS, approximately three to five months for a HCP with an EA, and less than three months for a low-effect HCP. U.S. FISH & WILDLIFE SERV., *supra* note 74, at 1-14.

80. *Id.* at 1-9.

81. *Id.* at 1-8.

82. *Id.* at 1-9.

83. *Id.* at 1-8.

84. Kalyani Robbins, *Paved With Good Intentions: The Fate of Strict Liability Under the Migratory Bird Treaty Act*, 42 ENVTL. L. 579, 598 (2012).

85. *Compare* United States v. Apollo Energies, Inc., 611 F.3d 679, 686 (10th Cir. 2010) (taking expansive view and holding the MBTA imposes strict liability),

86. *See* Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997); Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991); *Brigham*, 840 F. Supp. 2d at 1213-14; United States v. Ray Westall Operating, Inc., No. CR 05-1516-MV, 2009 WL 8691615 (D.N.M. Feb. 25, 2009); Mahler v. U.S. Forest Serv., 927 F. Supp. 1559 (S.D. Ind. 1996); Citizens Interested in Bull Run, Inc. v. Edrington, 781 F. Supp. 1502 (D. Or. 1991).

87. *See* Apollo Energies, 611 F.3d at 682; United States v. Engler, 806 F.2d 425 (3d Cir. 1986); United States v. Chandler, 753 F.2d 360, 363 (4th Cir. 1985); United States v. FMC Corp., 572 F.2d 902, 908 (2d Cir. 1978); United States v. Chevron USA, Inc., No. 09-CR-0132, 2009 WL 3645170 (W.D. La. Oct. 30, 2009); United States v. Corbin Farm Serv., 444 F. Supp. 510 (E.D. Cal. 1978).

88. *See* United States v. Citgo Petroleum Corp., 893 F. Supp. 2d 847 (S.D. Tex. 2012); *Moon Lake*, 45 F. Supp. 2d at 1085.

89. *Newton Cnty. Wildlife Ass'n*, 113 F.3d at 115 (holding that logging activities that would inevitably disrupt nesting migratory birds was not a taking); *Seattle Audubon Soc'y*, 952 F.2d at 302 (holding that habitat destruction leading to indirect deaths of migratory birds is not a taking); *Chevron*, 2009 WL 3645170, at \*5 (holding MBTA does not apply to commercial activity that, occasionally, incidentally kills protected birds as a result of totally legal and permissible activities).

90. *Seattle Audubon Soc'y*, 952 F.2d at 302 (relying upon actions listed in the Act to conclude that it was limited to hunting and poaching activities). Terms related to hunting and poaching activities are: pursue, hunt, take, capture, kill, sell, barter, purchase, deliver, ship, export, import, transport. *See* 16 U.S.C. § 703(a) (2012).

91. *Newton Cnty. Wildlife Ass'n*, 113 F.3d at 115.

92. United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1205 (D.N.D. 2012) (oil reserve pit); *Citgo Petroleum Corp.*, 893 F. Supp. 2d at 842 (open-air oil tanks); United States v. Ray Westall Operating, Inc., No. CR 05-1516-MV, 2009 WL 8691615, at \*2 (D.N.M. Feb. 25, 2009) (evaporation pit at oil production site).

93. *Brigham*, 840 F. Supp. at 1211.

Additional support for the narrow interpretation is that the term “take,” as it is defined in the MBTA, bars indirect takings of migratory birds.<sup>94</sup> Unlike the ESA, which defines “take” to include harm from significant habitat modification,<sup>95</sup> the definition of “take” in the MBTA does include “harm.”<sup>96</sup> As a result, “take” under the MBTA cannot include significant habitat modification and is limited only to direct bird deaths.<sup>97</sup> A district court in the Eighth Circuit applied this narrow interpretation of the MBTA in *United States v. Brigham Oil & Gas, L.P.*,<sup>98</sup> holding the death of migratory birds in contaminated open-air oil reserve pits did not constitute a taking under the MBTA because the company’s actions were unintentional, lawful commercial activities unrelated to hunting or poaching.<sup>99</sup>

Alternatively, other courts have broadly interpreted the MBTA to include unintentional, lawful commercial activities unrelated to hunting and poaching.<sup>100</sup> These courts reason that the MBTA imposes strict liability because § 707(a) does not contain a scienter requirement,<sup>101</sup> and, consequently, the specific intent of violators is not relevant.<sup>102</sup> Therefore, the MBTA necessarily covers unintentional conduct. Furthermore, a broad interpretation could concede that the MBTA expresses Congress’ concern for hunting, but rely upon the broadness of the statute’s language to dismiss the notion that hunting was Congress’ sole concern.<sup>103</sup> The Act prohibits the taking or killing of migratory birds “by any means or in any manner.”<sup>104</sup> In *United States v. Corbin Farm Service*,<sup>105</sup> the court reasoned that had Congress intended to limit the imposition of criminal penalties to hunting and

poaching activities, it would not have used such expansive language.<sup>106</sup> Additionally, the court in *Corbin Farm* noted the MBTA listed many songbirds and other birds not commonly hunted, further supporting the argument that Congress did not intend to limit the MBTA to hunting and poaching activities.<sup>107</sup>

A few courts have attempted to take a middle ground approach to this issue. In *United States v. Moon Lake Electric Ass’n*,<sup>108</sup> the court held that the MBTA imposes strict liability if the violator’s conduct proximately caused the death of the protected bird.<sup>109</sup> The court argued that “requiring the prosecution to prove proximate cause beyond a reasonable doubt under § 707(a), can effectively avoid absurd and unintended results” created by adopting a strict liability approach.<sup>110</sup> Although this causal link approach falls somewhere between the two previously discussed approaches, it still allows for the MBTA to apply to unintentional and indirect conduct unrelated to hunting and poaching activities. This approach is a middle-ground approach that leans heavily to a broader interpretation. Recently, a district court in the Fifth Circuit applied this interpretation of the MBTA to the unintentional death of protected birds in open-air reserve tanks in *United States v. Citgo Petroleum Corp.*,<sup>111</sup> holding that the MBTA imposed strict liability for the unintentional death of protected birds in open-air reserve tanks.<sup>112</sup>

### III. Proposed Solution: Strict Liability Approach to Resolve the Circuit Split

Courts should resolve the circuit split by adopting the broad interpretation of the MBTA that imposes a strict liability standard in future cases—an interpretation bolstered by the FWS implementing regulations that support the strict liability approach. Also, an “incidental take” permit scheme should be adopted to temper the scope of a strict liability approach.

There are several justifications for applying strict liability to MBTA violators engaged in unintentional, lawful commercial activity unrelated to hunting or poaching activities. First, the restrictive approach contravenes the main purpose of the MBTA, which is to protect migratory birds. Second, the strict liability approach establishes an easy to apply bright-line rule. An incidental take permit scheme—the second proposed solution—would provide a safe harbor for good actors and reduce the harshness of adhering to the strict liability standard. Harsh and absurd outcomes from applying a bright-line strict liability approach are unlikely to occur due to prosecutorial discretion.

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

95. 16 U.S.C. § 1532(19) (2012) (defining “take” under the ESA); 50 C.F.R. § 17.3 (2015) (defining “harm” in the ESA’s definition of “take”).

96. The MBTA does not define the term “take.” 16 U.S.C. § 703(a) (2012). “Take” under the MBTA is defined by the FWS regulation to mean “to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.” 50 C.F.R. § 10.12 (2015).

97. *Seattle Audubon Soc’y*, 952 F.2d at 303; see *Earth Island Inst. v. Carlton*, No. CIV. S-09-2020 FCD/EFB, 2009 WL 9084754, at \*26 (E.D. Cal. Aug. 20, 2009) (“[T]he indirect killing of birds through habitat modification, resulting from logging operations, does not violate the MBTA.”), *aff’d*, 626 F.3d 462 (9th Cir. 2010).

98. *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202, 1213–14 (D.N.D. 2012).

99. *Id.* at 1211.

100. See, e.g., *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 686 (10th Cir. 2010) (holding that the MBTA contains no scienter requirement and therefore imposes strict liability); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 536 (E.D. Cal. 1978) (holding that the MBTA properly applied to the accidental poisoning of migratory ducks as a result of application of pesticide to an alfalfa field).

101. Compare 16 U.S.C. § 707(a) (2012) (“[A]ny person . . . who shall violate or fail to comply with any regulation . . . shall be deemed guilty of a misdemeanor.”), with *id.* § 707(b) (“Whoever, in violation of this subchapter, shall knowingly . . . take . . . any migratory bird . . . shall be guilty of a felony.”). In 1986, Congress added the term “knowingly” to § 707(b), but intentionally left § 707(a) without it to maintain § 707(a) as a strict liability offense. Robbins, *supra* note 84, at 583.

102. *Apollo Energies*, 611 F.3d at 686 (taking expansive view of the MBTA because the take provision does not contain a scienter requirement).

103. See *Corbin Farm*, 444 F. Supp. at 532.

104. 16 U.S.C. § 703(a) (2012).

105. *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal. 1978).

106. *Id.* at 532.

107. *Id.*

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

109. *Id.* at 1085.

110. *Id.*

111. *United States v. Citgo Petroleum Corp.*, 893 F. Supp. 2d 841 (S.D. Tex. 2012).

112. *Id.* at 847 (holding that a causal link existed because it was reasonably foreseeable that Citgo’s operation of open-air reserve tanks would result in bird death given that Citgo employees on several occasions found dead birds in the tank, yet failed to take any preventative measures).

Third, the strict liability approach is based on a literal reading of the statute and is supported by amendments made to the Act. Congress added a mens rea requirement to the felony violation provision of § 707(b),<sup>113</sup> but not to the misdemeanor violation provision of § 707(a).<sup>114</sup> A court holding that § 707(a) does *not* impose strict liability would essentially equate the misdemeanor provision with the felony provision, rendering the 1986 amendment to § 707(b) superfluous. Courts opposing the strict liability approach attempt to justify a restrictive reading of the statute based on legislative history.<sup>115</sup> Despite whichever interpretation the legislative history supports,<sup>116</sup> courts should give effect to plain and unambiguous statutory language.<sup>117</sup>

Fourth, the causal link approach is traditionally, or solely, limited to harm that is foreseeable, but strict liability is not hampered by that limitation. Applying a proximate cause standard to a strict liability provision is counterintuitive<sup>118</sup> and would not guarantee consistent application of the MBTA.

#### IV. Proposed Solution: Create Incidental Take Permit for the MBTA

Adopting a strict liability approach for misdemeanor MBTA violations may slow the pace of economically beneficial oil and gas exploration and drilling activities. The Act's broad language and the FWS regulation's expansive coverage of bird species is a valuable tool for environmentalists trying to protect wildlife habitat.<sup>119</sup> To temper the expansiveness

of a strict liability standard for misdemeanor violations, the FWS should promulgate regulations to develop an incidental take permit for migratory bird losses. The MBTA incidental take permit should build from the existing permit scheme and incorporate aspects of the ESA low-effect incidental take permit.

##### A. Foundation for a MBTA Incidental Take Permit

Adding an incidental take permit program to the MBTA would be a natural supplement to update an anachronistic law. Support for this extension is provided by (1) a statutory framework that already exempts takings for authorized reasons, (2) MBTA take permits for other purposes, and (3) the issuance of incidental take permits for animals generally more critically endangered than the listed migratory birds.

The statutory language of the MBTA allows for permit exceptions to the general rule against takings. The MBTA begins: "*Unless and except as permitted by regulations made as hereinafter in this subchapter, it shall be unlawful to . . . take . . . or kill . . . any migratory bird.*"<sup>120</sup> Furthermore, the pertinent misdemeanor provision states that "any person . . . who shall violate any provisions . . . or *fail to comply with any regulation made pursuant to this subchapter* shall be deemed guilty of a misdemeanor."<sup>121</sup> This statutory framework provides the permissive authority for an agency to develop an incidental take permit program through rulemaking.

Although the FWS presently stops short of allowing incidental takings of migratory birds from activities unrelated to hunting and poaching, the FWS has established take permits for various migratory bird related activities.<sup>122</sup> These take permit provisions show that the FWS views a measured reduction in the migratory bird population as acceptable, and, in some instances (e.g., depredation permits or incidental take permit for military readiness activities<sup>123</sup>), even beneficial. Establishing an incidental take permit for migratory birds would be a logical step in expanding MBTA take permits.

The ESA provides a programmatic precedent for the expansion of the MBTA's existing permit program. When compared to the ESA, establishing an incidental take permit program for the MBTA is not an unrealistic or extreme action. One would have expected the incidental take permit to have first appeared in a statute that did *not* deal with threatened or endangered species—like the MBTA—where the stakes are not as high and the vast majority of the protected animals are common and abundant. Any argument that establishing an incidental takings permit scheme goes directly against the preservation and protection of listed migratory birds is severely weakened when the ESA provides for an incidental takings permit scheme.<sup>124</sup>

113. In 1960, 16 U.S.C. § 707(b) was added to permit treating hunters who took one bird out of season differently from market hunters who killed hundreds of birds to sell. Congress added "knowingly" in 1986, when concerns were raised about the constitutionality of strict liability for felony offenses. Adkins Giese, *supra* note 57, at 1173.

114. Courts have been cognizant of this difference. See, e.g., *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 684 (10th Cir. 2010) ("[A] plain reading of § 703's text—'it shall be unlawful' to possess protected birds—did not require any particular state of mind or scienter."); *United States v. Engler*, 806 F.2d 425, 431 (3d Cir. 1986) ("Scienter is not an element of criminal liability under the Act's misdemeanor provisions."); *United States v. Chandler*, 753 F.2d 360, 363 (4th Cir. 1985) ("[A] hunter is strictly liable for shooting on or over a baited area.").

115. See *Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997); *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202, 1212 (D.N.D. 2012).

116. The use of terms directed to hunting and poaching is undercut by the listing of nongame birds. See *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070, 1081 (D. Colo. 1999) (quoting 56 CONG. REC. 7364 (1918) (statement of Rep. Huddleston) ("[This bill] puts it within the power of the Secretary of Agriculture to forbid the killing of game birds as much as the killing of song or insectivorous birds. They are put on the same level.")).

117. *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) (stating that a court should "not resort to legislative history to cloud a statutory text that is clear").

118. See *Robbins*, *supra* note 84, at 591 (explaining that proximate cause can be a defense to strict liability, but only to the extent that it negates actus reus, not mens rea because there is no mens rea in strict liability crimes).

119. Adkins Giese, *supra* note 57, at 1159 (discussing how the National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended at 16 U.S.C. §§ 1600–1614 (2012)), provides no protection for wildlife on private lands, and how the ESA provides protection often too late to allow for successful recovery, whereas the MBTA covers activities on public and private land and protects species before they are designated as "threatened" or "endangered").

120. 16 U.S.C. § 703(a) (2012) (emphasis added).

121. 16 U.S.C. § 707(a) (2012) (emphasis added).

122. Activities include banding and marking, scientific collecting, taxidermy, falconry, raptor propagation, and depredation. See 50 C.F.R. §§ 21.13–21.41 (2015).

123. 50 C.F.R. § 21.15.

124. 16 U.S.C. § 1539 (2012).

## B. The MBTA Special Purpose Permit

The MBTA does not have an incidental take permit provision like that of the ESA. However, the FWS has established take permit provisions for several particularized purposes and activities.<sup>125</sup> The closest thing to an incidental take permit in the MBTA is the special purpose permit.<sup>126</sup> The special purpose permit is issued for migratory bird related activities not otherwise covered by any other permit.<sup>127</sup> An applicant for a special purpose permit must provide a detailed statement describing the project or activity, state the numbers and species of migratory birds involved that can reasonably be anticipated to be affected, and provide a “statement of disposition which will be made of migratory birds involved in the permit activity.”<sup>128</sup> Although the special purpose permit is similar to an incidental take permit, it is limited in a significant way. The permit is for *migratory bird related activities* only.<sup>129</sup> Unlike the ESA incidental take permit, the MBTA special purpose permit is not available for activities unrelated to migratory birds, such as losses resulting from oil and gas production.<sup>130</sup>

## C. Requirements for a MBTA Incidental Take Permit

The MBTA does not include a permit scheme that adequately addresses the problems caused by imposing a strict liability standard for misdemeanor violations. Economically beneficial activities that are unrelated to migratory bird activities are not contemplated under any existing MBTA take permit scheme. Without a permit, oil and gas operators remain exposed to potential MBTA liability. Without effective state and federal regulations requiring mitigation measures for oil and wastewater pits, the deaths of migratory birds continue to be the unintended cost of doing business. In short, the current state of the law leaves oil and gas companies at risk for MBTA litigation and fines, and migratory birds at risk for death. Combining aspects of the MBTA special purpose permit and the ESA incidental take permit to create a new MBTA incidental take permit can help alleviate this problem.

The proposed MBTA incidental take permit would expand on the “detailed statement” requirement of the spe-

cial purpose permit to include several requirements originating in the ESA low-effect incidental take permit. The MBTA incidental take permit should require a detailed statement from the applicant that provides the following information: (1) a description of the project or activity, its purpose, and a delineation of the area in which it will be conducted, (2) the numbers and species of migratory birds involved that can reasonably be determined in advance, (3) a statement of disposition which will be made of migratory birds involved in the permit activity, (4) an explanation on how the taking will be incidental, (5) mitigation efforts that will be implemented to the fullest extent practicable, and (6) findings showing that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. Requirements (1)–(3) are present in the existing special purpose permit<sup>131</sup> and requirements (4)–(6) borrow ESA’s low-effect incidental take permit.<sup>132</sup> Applying ESA’s incidental take permit directly to the MBTA context without adjustment may overcomplicate a historically straightforward statute. The proper balance should incorporate aspects of both preexisting permit regimes.

This proposed MBTA incidental take permit scheme is intended to establish a permitting scheme more stringent than the existing special purpose permit, yet less stringent than that of obtaining an incidental take permit under the ESA. Since the MBTA deals with animals that are at less risk than the animals listed in the ESA, a simpler and more expedient incidental take permit program is justified. Additionally, a stringent MBTA incidental take permit scheme could result in an expensive, time consuming, and burdensome process for regulated entities. Allowing for controlled incidental takings is better than creating a program so tough that companies would rather forego any attempt to obtain a permit and simply continue operation in violation of the MBTA. Importantly, incidental take permits bind the permit holders to implement and fund mitigation efforts. With an incidental take permit program, the MBTA can be imposed as written, permit holders can engage in economically beneficial activities, and mitigation efforts can be effectively implemented to minimize the risks to birds posed by oil and wastewater pits.

## D. Purpose and Applicability of Proposed MBTA Incidental Take Permit

This proposed solution is designed to: (1) temper the expansive scope of adopting a strict liability approach, (2) reduce the number of migratory bird takings, particularly in the oil and wastewater pit context, and, importantly, (3) provide a permitting scheme that is efficient and expedient. To make this permitting scheme efficient and expedient, the goal of the proposed MBTA incidental take permit is to create a permitting scheme that would be categorically excluded from NEPA requirements, similar to the ESA low-effect HCP permitting scheme.

125. Activities that are eligible for a migratory bird take permit include scientific collecting, taxidermy, falconry, raptor propagation, rehabilitation, possession for education (live or dead), game bird propagation, abatement activities using raptors, avian mortality monitoring, take of depredating eagles, eagle exhibition, eagle falconry, eagles takings for Native American religious purposes, and incidental takings allowed for military readiness activities. 50 C.F.R. § 21.13–21.41.

126. 50 C.F.R. § 21.27.

127. *Id.* Special purpose permits have come to be used mainly for six activities: (1) wildlife rehabilitation, (2) educational purposes, (3) captive-bred migratory game bird activities, (4) non-eagle Native American religious uses, (5) salvage of dead birds, and (6) miscellaneous activities such as airport safety. *See* Corcoran & Colbourn, *supra* note 68, at 374.

128. 50 C.F.R. § 21.27(b).

129. 50 C.F.R. § 21.27(a). An additional, but less important, limitation on the special purpose permit is that it is only for non-eagle activities. *Id.* § 21.27(b).

130. *See, e.g.,* United States v. Apollo Energies, Inc., 611 F.3d 679, 682, 689–91 (10th Cir. 2010) (holding that two oil drilling operators were liable for incidental takings under the MBTA).

131. 50 C.F.R. § 21.27(b)(1)–(3).

132. 16 U.S.C. § 1539(a)(2)(A)(i)–(iii) (2012).

To be categorically excluded from NEPA requirements in the ESA permitting regime, a permit applicant must make a showing that incidental take of protected species will have a low or negligible effect on the species covered in the HCP.<sup>133</sup> The proposed MBTA incidental take permit requires the same showing in order to also receive a categorical exclusion under NEPA.<sup>134</sup> In the context of oil and wastewater pits, oil and gas companies may actually be able to demonstrate that appropriate mitigation efforts would result in incidental takings that have a low or negligible effect on migratory bird species. This is so because the mitigation efforts that can reduce or eliminate the risk of open-air oil and wastewater pits are known and relatively inexpensive. As previously stated, the FWS recommends using closed containment systems or, at a minimum, using effective and proven wildlife deterrents or exclusionary devices, such as netting.<sup>135</sup> The mitigation measures, however, may not be as straightforward and inexpensive for other risks to migratory birds, such as the risks posed by communication towers, high tension transmission and distribution power lines, or wind turbine towers.<sup>136</sup> The streamlined nature of the proposed MBTA incidental take permit scheme may limit its applicability to risks that are more easily curable, like open-air oil and wastewater pits. Despite this limitation, this proposal can serve as a model for a more comprehensive MBTA incidental take permit program.

## V. Conclusion

The ultimate goal of resolving the circuit split on the proper scope of the MBTA should be more than simply choosing an interpretation of the statute and applying it consistently throughout the country. Adopting a restrictive approach by holding that the MBTA does not apply to commercial activities unrelated to hunting and poaching would render much of the statute meaningless because the vast majority of bird deaths are unrelated to hunting and poaching. On the other hand, adopting an expansive approach by holding that the MBTA does apply to the unintentional taking of protected birds through otherwise lawful commercial activity would, in theory, make industries strictly liable for any taking.

A better solution is to choose an interpretation and then implement regulations that will cure the deficiencies of that interpretation. Implementing a MBTA incidental take permit program would temper the broad reach of the strict liability approach for misdemeanor violations, at least in the context of oil and wastewater pits. The harsh reality of strict liability would work to encourage application and compliance with MBTA incidental take permits. The ultimate goal is to provide protection for migratory birds without unreasonably hindering economically beneficial activity. Where mitigation measures are known and can be inexpensively applied, a regulatory scheme should be implemented to encourage mitigation to the fullest extent practicable.

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133. See *supra* notes 80–81 and accompanying text.

134. See *supra* text accompanying note 135.

135. See *supra* notes 39–44 and accompanying text.

136. See *supra* note 11 (listing dangers to migratory birds).