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A Special Purpose: The Migratory Bird Treaty Act and Wind Energy

ABSTRACT

The Migratory Bird Treaty Act (MBTA), almost a century old, incites disagreement between conservationists, wind energy developers, and the courts. The MBTA protects over 800 bird species but unlike other conservation laws, the MBTA and its regulations do not provide for “incidental takes” (an unintentionally caused bird death or injury). In the absence of an incidental take permitting program, the United States Fish and Wildlife Service (FWS) developed the voluntary Land-Based Wind Energy Guidelines to reduce wind energy impacts on migratory birds. A circuit court split exists on whether a wind energy developer violates the MBTA when a bird is killed or injured during an otherwise lawful activity. The current situation is flawed. This article presents a solution that benefits both birds and wind energy development. FWS should use its “special purpose permit” to require commercial actors to engage in thoughtful pre-construction siting and mitigation in exchange for incidental takes.

I. INTRODUCTION

Wind turbines have been described as “bird blender[s]”¹ and, conversely, part of America’s “clean and secure energy future.”² While the monikers change, the facts about wind turbines remain constant. First, wind turbines kill or injure approximately 440,000 birds annually.³ Sec-

* Juris Doctor Candidate 2015, University of New Mexico School of Law. The author would like to thank her husband, for learning about migratory birds, and her writing seminar instructor, Professor Alex Ritchie.

1. Mike Barnard, *Want to Save 70 Million Birds a Year? Build More Wind Farms*, RENEWECONOMY, Aug. 10, 2012, <http://reneweconomy.com.au/2012/want-to-save-70-million-birds-a-year-build-more-wind-farms-18274>.

2. Press Release, The White House, FACT SHEET: President Obama’s Blueprint for a Clean and Secure Energy Future (Mar. 15, 2013), <http://www.whitehouse.gov/the-press-office/2013/03/15/fact-sheet-president-obama-s-blueprint-clean-and-secure-energy-future>.

3. Estimates vary, but the American Bird Conservancy places the annual wind-turbine caused bird deaths at 440,000. Media Release, American Bird Conservancy, American Bird Conservancy Response to Speaker Gingrich’s Statement on Energy Industry Killing of Migratory Birds (Feb. 23, 2012), <http://www.abcbirds.org/newsandreports/releases/120223.html>. In addition to bird deaths and injuries, wind energy development can destroy bird habitats and displace some birds from their breeding grounds. *Birds and Wind Develop-*

ond, the United States continues to set records in wind energy production and manufacturing.⁴ This causes tension between bird conservationists, wind energy developers, and politicians.⁵ The Migratory Bird Treaty Act⁶ (MBTA) sits at the very center of the debate. Congress enacted the MBTA in 1916, nearly a century ago, and long before commercial wind turbines cranked out energy. In a 1916 treaty between the United States and Canada,⁷ the countries officially recognized that overhunting and “indiscriminate slaughter”⁸ of migratory birds lead to population declines. Consequently, the United States entered into successive treaties with Mexico, Japan, and the former Soviet Union to further protect migratory birds.⁹ Today, the MBTA protects over 1000 different bird species,¹⁰ many of which are especially vulnerable to commercial wind energy development.¹¹ Modern courts, interpreting the 1918 law, are split on commercial actors’ liability under the MBTA when protected birds are unintentionally killed.

ment, AMERICAN BIRD CONSERVANCY, http://www.abcbirds.org/abcprograms/policy/collisions/wind_farms.html (last visited Nov. 11, 2014).

4. The Energy Department released two new reports recently, showcasing record growth across the U.S. wind market—increasing America’s share of clean, renewable energy and supporting tens of thousands of jobs nationwide. According to these reports, the United States continues to be one of the world’s largest and fastest growing wind markets. “In 2012, wind energy became the number one source of new U.S. electricity generation capacity for the first time—representing 43 percent of all new electric additions and accounting for \$25 billion in U.S. investment.” *Energy Dept. Reports: U.S. Wind Energy Production and Manufacturing Reaches Record Highs*, ENERGY.GOV (Aug. 6, 2013), <http://energy.gov/articles/energy-dept-reports-us-wind-energy-production-and-manufacturing-reaches-record-highs>.

5. Since 2009, the Department of the Interior has approved eleven new wind farms in accordance with the Obama Administration’s goal of investing in clean energy. *Renewable Energy Project Approved Since the Beginning of Calendar Year 2009*, U.S. DEPT. OF THE INTERIOR, BUREAU OF LAND MGMT., http://www.blm.gov/wo/st/en/prog/energy/renewable_energy/Renewable_Energy_Projects_Approved_to_Date.htm (last updated Aug. 4, 2014). In addition to subsidies and tax incentives, the administration supported a “\$1 billion-a-year tax break to the industry that has nearly doubled the amount of wind power in [Obama’s] first term.” Dina Cappiello, *Wind Farms Get Pass on Eagle Deaths*, THE ASSOCIATED PRESS (May 14, 2013), <http://bigstory.ap.org/article/ap-impact-wind-farms-get-pass-eagle-deaths>.

6. 16 U.S.C. §§ 703–712 (2012).

7. Convention between the United States and Great Britain (for Canada) for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702.

8. *Id.*

9. 16 U.S.C. § 703(a).

10. General Provisions, Revised List of Migratory Birds, 78 Fed. Reg. 65,844 (Nov. 1, 2013).

11. Wind development impacts many bird species, especially night-migrating songbirds, raptors, and waterfowl. *Birds and Wind Development*, *supra* note 3.

The U.S. Department of the Interior administers the MBTA, acting through the U.S. Fish and Wildlife Service (FWS).¹² Although several permits are available, FWS has not promulgated any permit for the unintentional injury or death of protected birds.¹³ In the absence of such a permit, FWS developed the Land-Based Wind Energy Guidelines (Wind Energy Guidelines) for wind energy developers.¹⁴ The Wind Energy Guidelines, which are purely voluntary, provide wind developers with a system for evaluating potential impacts on the environment and species of concern.¹⁵ The Wind Energy Guidelines operate on a “tiered” system, beginning broadly with an initial site evaluation and progressively narrowing to post-construction impact studies.¹⁶ FWS recommends early consultation so wind energy developers may avoid high impact sites, difficult or costly mitigation remedies, and potential MBTA criminal liability and fines.¹⁷

The voluntary Wind Energy Guidelines are costly and time-consuming, but so is the alternative. Duke Energy Renewables developed wind turbines in Wyoming without following the voluntary compliance FWS advocates for in the Wind Energy Guidelines.¹⁸ This was a costly choice. After Duke’s wind turbines started spinning, they killed 163 protected migratory birds, including golden eagles, hawks, blackbirds, and sparrows.¹⁹ Upon discovering the deaths of these birds, Duke self-reported to the FWS²⁰ and the Department of Justice subsequently charged Duke with unpermitted MBTA takes.²¹ By forgoing voluntary compliance with the Wind Energy Guidelines, this decision cost Duke \$1 million dollars in fines, restitution and community service.²² The

12. 16 U.S.C. § 701 (2012).

13. See 50 C.F.R. §§ 21.21–21.31 (2013).

14. U.S. FISH & WILDLIFE SERV., U.S. FISH AND WILDLIFE SERVICE LAND-BASED WIND ENERGY GUIDELINES (2012) [hereinafter WIND ENERGY GUIDELINES], http://www.fws.gov/windenergy/docs/weg_final.pdf.

15. *Id.* at vi.

16. *Id.*

17. *Id.* at vii, 1–2.

18. Press Release, U.S. Dep’t of Justice, Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Projects (Nov. 22, 2013), <http://www.justice.gov/opa/pr/utility-company-sentenced-wyoming-killing-protected-birds-wind-projects>.

19. *Id.*

20. News Release, Duke Energy, Duke Energy Renewables Reaches Agreement with Department of Justice Regarding Bird Mortalities at Two Wind Facilities (Nov. 22, 2013), <http://www.duke-energy.com/news/releases/2013112203.asp>.

21. Press Release, U.S. Dep’t of Justice, *supra* note 18.

22. See *id.* (stating that Duke did not take reasonable steps to protect birds when warned by FWS).

Department of Justice prosecuted Duke, marking the first MBTA criminal enforcement against a wind energy developer.²³

This article presents a solution that benefits both birds and wind energy development. FWS should issue “special purpose permits”²⁴ and require commercial actors to engage in thoughtful pre-construction siting and mitigation in exchange for incidental takes. Part I provides a general context of the MBTA and commercial actors. Part II gives a bird’s eye view of the MBTA’s implications for wind energy development, including FWS’s current permitting system and courts’ interpretation of commercial actors’ liability. Part III focuses on two sites—Altamont Pass and Duke Energy—dealing with post-construction mitigation. Altamont Pass, in California, was built before FWS’s current Wind Energy Guidelines existed, and demonstrates the consequences of failing to use best-practices in wind energy development. Duke Energy Renewables built two Wyoming sites after the Wind Energy Guidelines existed, but decided not to undertake the voluntary compliance. Duke’s subsequent prosecution demonstrates the Department of Justice’s willingness to prosecute those who do not heed voluntary guidelines. Both Altamont Pass and Duke exemplify the consequences and complexities arising from post-construction mitigation.

Part IV of the article examines a different approach to MBTA compliance. Unlike commercial actors, federal agencies must consult with FWS. This section examines a 2001 Executive Order that mandates federal agency compliance with the MBTA’s conservation principles. In a recent development, one federal agency applied for and received a special purpose permit for incidental takes. Part V focuses on the article’s proposal: FWS should issue the special purpose permit to commercial actors for incidental takes. The Conclusion examines how the special purpose permit may improve the situation for birds, commercial actors, and industry certainty.

II. OVERVIEW OF THE MIGRATORY BIRD TREATY ACT

Wind turbines tower over the landscape and rise up to 260 feet tall.²⁵ The turbine blades may reach a whopping 200 feet long²⁶ and can

23. *Id.*

24. The special purpose permit is issued for “migratory bird related activities not otherwise provided for” by an applicant that “makes a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.” 50 C.F.R. § 21.27 (2013).

25. NAT’L WIND COORDINATING COLLABORATIVE, WIND TURBINE INTERACTIONS WITH BIRDS, BATS, AND THEIR HABITATS 1 (2010), http://www1.eere.energy.gov/wind/pdfs/birds_and_bats_fact_sheet.pdf.

cut through the air at 138 to 182 miles per hour.²⁷ Wind turbines have been described as “giant airplane propellers on a stick.”²⁸ While scientists do not completely understand wind turbine-bird collisions, they believe the bird’s eye cannot see the blade at high velocity.²⁹ Birds therefore register the spinning turbine as a safe fly zone.³⁰ Scientists additionally believe that birds focus their attention on either scanning the ground for prey or observing obstacles on the horizon, but not both.³¹ Thus birds collide with these giant propellers with predictable results.

To put the 440,000³² wind turbine bird deaths a year into perspective, consider the other forces that kill birds in much larger numbers. Annually, collisions of all kinds, including buildings, towers, and wind turbines, kill between 97–976 million birds; poisoning kills 72 million birds; and cats kill hundreds of millions of birds.³³ Collectively, these bird deaths have an impact on the avian population. While laws and regulations exist to protect migratory birds, the MBTA and its attendant regulations provide the most expansive, and perhaps the most conflicting, bird protections.

A. The MBTA Statute and the Special Purpose Permit

In the early 1900s, overhunting led to decreasing wildlife populations across the United States.³⁴ Concerned over the “unrestrained killing of game birds, market hunting and wanton waste,” Congress passed migratory bird protections.³⁵ But courts repeatedly struck these protections

26. *Wind Power*, NATIONAL GEOGRAPHIC, <http://environment.nationalgeographic.com/environment/global-warming/wind-power-profile/> (last visited Oct. 21, 2014).

27. NAT’L WIND COORDINATING COLLABORATIVE, *supra* note 25, at 1.

28. *Wind Power*, *supra* note 26.

29. The phenomenon is referred to as “motion blur” or “motion smear.” W. HODOS, MINIMIZATION OF MOTION SMEAR: REDUCING AVIAN COLLISIONS WITH WIND TURBINES i (Nat’l Renewable Energy Lab. ed., 2003), available at <http://www.nrel.gov/docs/fy03osti/33249.pdf>.

30. *Id.*

31. *Id.* at 1.

32. Estimates vary, but the American Bird Conservancy places the annual wind-turbine caused bird deaths at 440,000. Media Release, American Bird Conservancy, American Bird Conservancy Response to Speaker Gingrich’s Statement on Energy Industry Killing of Migratory Birds (Feb. 23, 2012), <http://www.abcbirds.org/newsandreports/releases/120223.html>.

33. U.S. FISH & WILDLIFE SERV., MIGRATORY BIRD MORTALITY: MANY HUMAN-CAUSED THREATS AFFLICT OUR BIRD POPULATIONS (2002), available at <http://www.fws.gov/birds/mortality-fact-sheet.pdf>.

34. Conrad A. Fjetland, *Possibilities for Expansion of the Migratory Bird Treaty Act for the Protection of Migratory Birds*, 40 NAT. RESOURCES J. 47, 47 (2000).

35. *Id.*

down as unconstitutional.³⁶ Perhaps frustrated by the courts' response,³⁷ the United States enacted the Migratory Bird Treaty Act³⁸ to implement a 1916 treaty between the United States and Canada.³⁹ The United States entered into similar migratory bird treaties⁴⁰ with Mexico in 1936,⁴¹ with Japan in 1972,⁴² and with the former Soviet Union in 1976.⁴³ Commentators point out that the MBTA "runs into conflict with activities and ap-purtenances of modern society."⁴⁴

The MBTA states it is unlawful "at any time, by any means or in any manner" to take or attempt to take a protected bird.⁴⁵ The MBTA grants the Secretary of the Interior power to enforce the MBTA.⁴⁶ In turn, the Secretary of the Interior delegates enforcement to the Fish and Wild-life Service.⁴⁷

FWS has the power, granted by the MBTA, to allow bird deaths and injuries.⁴⁸ The MBTA does not define take; however, FWS promul-gated a permitting system that allows for "takes" of protected birds.⁴⁹ Regulations define "take" to mean "pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect" a migratory bird.⁵⁰ FWS defines the take permits narrowly, including specific exceptions for: importation and exportation,

36. *Id.* at 47 n.2.

37. Fjetland seems to suggest that the United States entered into a treaty to avoid con-stitutional questions. *See id.* at 47-48.

38. 16 U.S.C. §§ 703-712 (2012).

39. Convention between the United States and Great Britain (for Canada) for the Pro-tection of Migratory Birds, *supra* note 7.

40. For a discussion of the treaties forming the MBTA's foundation, see 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 (1999); *see also* HOLLAND & HART, LLC, DEVELOPMENT OF A PERMIT PROGRAM FOR INCIDENTAL TAKE OF MI-GRATORY BIRDS (2010), <http://www.ingaa.org/File.aspx?id=11062>.

41. Convention between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311.

42. Convention between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinc-tion, and their Environment, U.S.-Japan, Mar. 4, 1972, 25 U.S.T. 3329.

43. Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647.

44. Corcoran & Colbourn, *supra* note 40, at 401.

45. 16 U.S.C. § 703 (2012) (emphasis added).

46. 16 U.S.C. § 706 (2012).

47. 50 C.F.R. § 10.1 (2013).

48. *See* 50 C.F.R. §§ 21.11-21.61 (2013).

49. *Id.*

50. 50 C.F.R. § 10.12 (2013).

banding or marking, scientific collecting, taxidermy, waterfowl and Canadian Geese migration, falconry, raptor propagation, rehabilitation, and special purpose permitting.⁵¹ Absent from this list is the “incidental take” permit, provided for under the Endangered Species Act, which allows permittees to take a species “if such takings incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”⁵² The MBTA is unique among major wildlife protective acts because no “incidental take” permit exists in its regulatory framework.⁵³

51. 50 C.F.R. §§ 21.21–21.31 (2013).

52. 16 U.S.C. § 1539(a)(1)(B) (2012).

53. The MBTA is not the only bird-protective act in town. Certain species enjoy additional protection under other congressional acts. Providing more general protection for wildlife and plants, the Lacey Act prohibits the import, export, selling, acquiring, or purchasing of wildlife or plants taken, transported, or sold in violation of United States or Indian law, treaties, or regulations. 16 U.S.C. § 3372(a)(1) (2012). The Bald and Golden Eagle Protection Act (BGEPA) specifically protects eagles. 16 U.S.C. §§ 668–668d (2012). The BGEPA prohibits the taking of bald and golden eagles, their parts, or their nests. 16 U.S.C. Section 668. “Take” is defined within the BGEPA as “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb.” Section 668c. Knowing or wanton disregard violations carry up to a \$5,000 fine or a year in prison. Section 668(a). Civil penalties for violations are also up to \$5,000. Section 668(b). The BGEPA authorizes the Secretary of the Interior to issue permits for scientific, exhibition, and religious purposes. Section 668a. The BGEPA also permits the Secretary of the Interior to allow certain takes of protected birds. *Id.* FWS administers the permitting system under the BGEPA. 50 C.F.R. §§ 22.1–22.32 (2013). Unlike the MBTA, the BGEPA allows for incidental takes of bald or golden eagles. *See* 50 C.F.R. § 22.26 (2013). The regulation does not refer to the permit as an incidental take. Instead, the regulation is a permit for an eagle take that is “associated with but not the purpose of [an] activity.” *Id.* FWS may issue a programmatic take permit when a take is “unavoidable even though advanced conservation practices are being implemented.” Section 22.26(a)(2). FWS has discretion in issuing any incidental take permit. *See* § 22.26. Permittees are required to comply with advanced mitigation measures before FWS will issue a permit. Section 22.26(c)(1). FWS reviews permits in five-year increments. Section 22.26(h) On December 9, 2013, FWS amended the length of an incidental take permit up to thirty years. 78 F.R. 73,704 (Dec. 9, 2013) (codified at 50 C.F.R. § 22.26(i)). FWS’s express purpose for extending incidental take permits is the facilitation of “responsible development of renewable energy and other projects designed to operate for decades, while continuing to protect eagles consistent with our statutory mandates.” *Id.* FWS’s new rule was not without detractors. The 30-year permit was able to unite parties who are often at loggerheads. Louisiana Republican Senator David Vitter, the ranking member of the Environment and Public Works Committee, called the permits “unpatriotic.” Scott Streater, *Renewable Energy: Obama Admin Extends Eagle ‘Take’ Permits to 30 Years*, GREENWIRE (Dec. 6, 2013), <http://www.eenews.net/stories/1059991443>. The National Resource Defense Council called the rule a “wrong-headed approach.” Press Release, Natural Res. Def. Council, New Federal Rule on Eagles and Wind Turbines Sets False Choice on Conservation (Dec. 6, 2013), <http://www.nrdc.org/media/2013/131206.asp>. The Audubon Society’s CEO, David Yarnold, characterized the rule as “a blank check” for the wind industry. Press Release, Nat’l Audubon Soc’y, Interior Dept. Rule Greenlights Eagle Slaughter at Wind Farms, Says

Among its MBTA permits, FWS provides a “special purpose” permit.⁵⁴ Unfortunately, the special purpose permit regulations fail to specify what activities qualify for the permit.⁵⁵ Rather, FWS may issue the special purpose permit “for migratory bird related activities not otherwise provided for” and upon “a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.”⁵⁶

Absent a permit, a take may result in liability for a person, association, partnership or corporation.⁵⁷ MBTA violations are criminal offenses, and may include up to a \$15,000 fine, six months imprisonment, or both for each violation.⁵⁸ The MBTA misdemeanor violations do not require *mens rea* (criminal intent) to be liable for an unpermitted migratory bird take.⁵⁹ The lack of an intent requirement or incidental take permitting gives some courts pause, resulting in a circuit split.

B. Circuit Court Split: When Is a Take Really a Take?

Many courts⁶⁰ have held that any unpermitted misdemeanor take is a strict liability offense.⁶¹ Put simply, a defendant’s specific intent or

Audubon CEO (Dec. 5, 2013), <http://www.audubon.org/newsroom/press-releases/2013/interior-dept-rule-greenlights-eagle-slaughter-wind-farms-says-audubon->

54. 50 C.F.R. § 21.27 (2013).

55. *Id.*

56. *Id.* Commentators point out that the regulations do not define a “sufficient showing of benefit” to migratory birds nor a “compelling justification.” HOLLAND & HART, *supra* note 40, at 8.

57. 16 U.S.C. § 707(a) (2012).

58. *Id.* The Migratory Bird Treaty Reform Act of 1998 also amends the law to allow the fine for misdemeanor convictions under the Migratory Bird Treaty Act to be up to \$15,000 rather than \$500. Pub. L. No. 105–312, § 103(1), 112 Stat. 2956.

59. 16 U.S.C. § 707(a).

60. *See, e.g.*, U.S. v. FMC Corp., 572 F.2d 902 (2d Cir. 1978); U.S. v. Corbin Farm Serv., 444 F. Supp. 510 (E. D. Cal. 1978), *aff’d* 578 F.2d 259 (9th Cir. 1978); U.S. v. Moon Lake Elec. Ass’n, Inc., 45 F. Supp. 2d 1070 (D. Colo. 1999). *But see*, Newton Cnty. Wildlife Ass’n v. U.S. Forest Serv., 113 F.3d 110, 115 (8th Cir. 1997) (indicating that the strict liability provisions in the MBTA apply only to conduct directed at birds, such as those who hunt or poach protected birds); Seattle Audubon Soc’y v. Evans, 952 F.2d 297, 302–03 (9th Cir. 1991) (distinguishing between the prohibition on taking a migratory bird by “physical conduct of the sort engaged in by hunters and poachers” as different from habitat modification or destruction and holding that the latter is not an MBTA violation); U.S. v. Brigham Oil and Gas L.P., 840 F. Supp. 2d 1202 (D. N.D. 2012) (dismissing a case against an oil company for “taking” migratory birds that died in the company’s reserve pits).

61. For a lively and thorough discussion of the circuit split, see Scott W. Brunner, *The Prosecutor’s Vulture: Inconsistent MBTA Prosecution, Its Clash With Wind Farms, and How to Fix It*, 3 SEATTLE J. ENVTL. L. 1, 17 (2013).

knowledge is unnecessary to prove a MBTA violation.⁶² These courts read the MBTA's take prohibition broadly, including commercial activities where migratory birds are unintentionally killed. For example, in *United States v. FMC Corp.*,⁶³ the court held that FMC was strictly liable for the poisonings and deaths of 32 protected birds after they landed in FMC's pesticide-contaminated wastewater storage pond. Still, the court expressed concerns about applying strict liability to MBTA violations:

Migratory birds are killed by many accidental means, such as jet airplanes, air pollution and the windows of tall buildings. Their nests and eggs are destroyed in clearing land for housing, recreation and highways. Can the Government charge land developers and high rise building constructions with the deaths of birds under the statute?⁶⁴

Despite these concerns, the court refused to dismiss the defendant's unintentional taking of the 32 birds.⁶⁵

In *United States v. Corbin Farm Service*,⁶⁶ the court found an alfalfa farmer, a pesticide seller, and a pilot who aerially applied the pesticide guilty of violating the MBTA.⁶⁷ After the pesticide application, approximately 1,000 protected ducks died from feeding near the field. The court held strict liability was appropriate even for "those who did not intend to kill migratory birds."⁶⁸

Other courts, while rejecting a *mens rea* (criminal intent) requirement, still require proximate cause. In *United States v. Moon Lake Electric Association, Inc.*,⁶⁹ a Colorado federal district court held an electric company strictly liable for the electrocution of protected birds. Relying on the statutory language, the regulation's "take" definition, and legislative history, the court held "the MBTA's language and regulations suggest that Congress intended to prohibit conduct beyond that normally exhibited by hunters and poachers."⁷⁰ Rejecting a *mens rea* requirement,⁷¹ the court held "reasonable regulations" and "proper application of the law, which includes requiring the prosecution to prove proximate cause be-

62. *U.S. v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997) (quoting *U.S. v. Manning*, 787 F.2d 431, n.4 (8th Cir. 1986)).

63. 428 F. Supp. 615 (W.D. N.Y. 1977), *aff'd* 572 F.2d 902 (2d Cir. 1978).

64. *Id.* at n.2.

65. *Id.* at 620.

66. 444 F. Supp. 510 (E.D. Cal. 1978), *aff'd* 578 F.2d 259 (9th Cir. 1978).

67. *Id.* at 536.

68. *Id.*

69. 45 F. Supp. 2d 1070 (D. Colo. 1999).

70. *Id.* at 1074.

71. *Id.* at 1077.

yond a reasonable doubt” are necessary to “avoid absurd and unintended results.”⁷²

The Tenth Circuit reiterated that an MBTA unintentional take violation does not require *mens rea*, but does require proximate cause in *United States v. Apollo Energies, Inc.*⁷³ Acting on an anonymous tip, FWS discovered dead birds in oilfield heater-treaters.⁷⁴ FWS launched an extensive public service campaign, exposing the dangers heater-treaters posed to birds.⁷⁵ FWS did not pursue prosecution of MBTA violations for at least a year as the public service campaign ran.⁷⁶ FWS resumed inspections and found dead birds in the defendants’ heater-treaters in April 2007.⁷⁷ In April 2008, FWS’s inspection revealed more dead birds in one of the defendant’s heater-treaters. The court reversed the defendant’s first conviction, but affirmed the last. The court reasoned that, without previous knowledge, “no reasonable person would conclude that the exhaust pipes of a heater-treater would lead to the deaths of migratory birds.”⁷⁸ The court refused to hold the defendant accountable before FWS’ campaign, but affirmed the defendant’s later conviction because he was aware that his actions could result in a take of protected birds.

Some courts read the MBTA even more narrowly. In such instances, commercial actors who unintentionally kill protected migratory birds do not face liability. In *United States v. Brigham Oil and Gas, L.P.*,⁷⁹ seven oil and gas companies were charged under the MBTA after oil from pits overflowed into wetlands, killing protected birds.⁸⁰ The court held the MBTA’s take prohibition does not extend to acts or omissions that only impact birds unintentionally or incidentally.⁸¹ The court then

72. *Id.* at 1085.

73. 611 F.3d 679, 682 (10th Cir. 2010).

74. Heater-treaters are cylindrical equipment up to 20 feet high and more than three feet wide that separate oil from water when the mixture is pumped from the ground. The heater-treaters at issue in this case have vertical exhaust pipes that are approximately nine inches in diameter Birds can crawl into the exhaust pipes or through the louvers to form nests. Once inside the heater-treaters, escape can be difficult for some birds.

Id.

75. FWS mailed letters to oil field operators, created a poster and distributed it to oil field suppliers, placed advertisements on local radio and television channels, and gave in-person presentations to the Kansas Independent Oil and Gas Association and at a Kansas Corporation Commission Oil and Gas meeting. *Id.* at 683.

76. *Id.*

77. *Id.*

78. *Id.* at 691.

79. 840 F. Supp. 2d 1202 (D. N.D. 2012).

80. *Id.* at 1203.

81. *Id.* at 1211.

dismissed liability for bird deaths that might result from ordinary land uses like thinning vegetation, agricultural use, or other “ordinary activities such as driving a vehicle, owning a building with windows, or owning a cat.”⁸² Other courts have also expressed doubt about the strict liability application to the MBTA.⁸³

The current court split highlights the uncertainty wind energy developers face. Depending on the location of the wind turbine, a commercial actor may face liability, fines, and potential criminal prosecution. Alternatively, wind turbines sited in another circuit could take a migratory bird without the fear of prosecution. Wind developers face great uncertainty because of the lack of judicial uniformity and unavailability of incidental take permits. For commercial actors facing the latter circumstance, consultation with FWS may provide a glimmer of certainty.

III. VOLUNTARY WIND ENERGY GUIDELINES FOR NON-FEDERAL ACTORS

Once wind farms are constructed, wind developers have minimal options to mitigate bird deaths aside from shutting down or removing turbines.⁸⁴ The National Wind Coordinating Collaborative identified that the size of the bird population and type of habitat at wind turbine sites are tied to bird fatalities.⁸⁵ For example, raptors “concentrate along ridge tops, upwind sides of slopes, and canyons to take advantage of wind currents that are favorable for hunting and traveling, as well as for migratory flights.”⁸⁶ Wind turbines located in raptor hunting grounds, with a dense raptor population, would likely take more raptors than an area with less favorable hunting and lower raptor populations.⁸⁷ As such, thoughtful wind turbine siting may reduce collisions and takes.⁸⁸

The California wind farm, Altamont Pass, typifies the importance of proper wind turbine siting. In 2010, 5,400 turbines covered a 50-square mile area.⁸⁹ One commentator described Altamont Pass as “a laboratory

82. *Id.* at 1212.

83. See *Newton Cnty Wildlife Ass'n v. Ark. Forestry Ass'n*, 113 F.3d 110, 115 (8th Cir. 1997) (discussing the logic in applying strict liability for MBTA violations by hunters and poachers, the court commented 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”).

84. See Cappiello, *supra* note 5.

85. NAT'L WIND COORDINATING COLLABORATIVE, *supra* note 25, at 4.

86. *Id.*

87. See *id.* at 5.

88. *Id.*

89. *Wind Turbines to be Upgraded in Altamont Pass*, THE ASSOCIATED PRESS (Dec. 6, 2010), <http://sanfrancisco.cbslocal.com/2010/12/06/wind-turbines-to-be-upgraded-in-altamont->

for how to site and not site wind turbines.”⁹⁰ Altamont Pass is both a breeding area for raptors and other species, and a major migratory route.⁹¹ Researchers have estimated that each year at least 1,127 raptors and 2,710 birds die at Altamont Pass.⁹² A settlement agreement between environmental groups and the operators of Altamont Pass required replacing smaller turbines with larger, more modern turbines in an attempt to reduce bird deaths.⁹³ Approximately 2,400 wind turbines, using technology from the 1970s and 1980s, must be phased out by 2018.⁹⁴ However, not all scientists agree that the change from the older, first generation turbines to the newer, monopole turbines will actually reduce bird deaths.⁹⁵

As Altamont Pass illustrates, once wind turbines are up and running, meaningful mitigation includes replacing and re-siting turbines. Implementing low-tech options that reduce bird activity near the turbines may curtail unintentional takes. These options include removing carcasses that attract raptors, eliminating prey habitat, and avoiding actions that startle roosting birds that then flee and fly into spinning turbines.⁹⁶ Sometimes mitigation requires shutting down turbines as birds approach, or decommissioning turbines altogether.⁹⁷ These operations cost wind energy developers, because they may have to employ more workers to maintain the sites and lose energy output as a result of shutting down the turbines. Companies, like Duke Energy Renewables, face

pass/. Before 2010, many of the wind turbines at Altamont were outdated and killed thousands of birds annually. Press Release, California Department of Justice, Office of the Attorney General, Brown’s Office Brokers Settlement to Save Birds and Make Altamont Wind Turbines More Efficient (Dec. 6, 2010), <http://oag.ca.gov/news/press-releases/browns-office-brokers-settlement-save-birds-and-make-altamont-wind-turbines-more>.

90. Wendie L. Kellington, *Land Use Considerations in Siting Renewable Energy Projects (With a Focus on Wind)*, ALI-ABA 587, 611 (2009).

91. *Wind Turbines to be Upgraded in Altamont Pass*, *supra* note 89; Melissa Lowitz, *Altamont Pass, California*, THE ENCYCLOPEDIA OF EARTH (June 23, 2009, updated Aug. 18, 2011), <http://www.eoearth.org/view/article/150003/>.

92. K. Shawn Smallwood & Carl Thelander, *Bird Mortality in the Altamont Pass Wind Resource Area, California* 72 J. WILDLIFE MGMT. 215, 219 (2008).

93. STATE OF CAL. DEP’T OF JUSTICE, OFFICE OF THE ATTORNEY GEN. AGREEMENT TO REPOWER TURBINES AT THE ALTAMONT PASS WIND RES. AREA (Dec. 3, 2010), *available at* http://oag.ca.gov/system/files/attachments/press_releases/n2011_apwra_settlement_agreement.pdf?

94. *See* Press Release, California Department of Justice, *supra* note 89.

95. *See, e.g.,* Andrew Curry, *Will Newer Wind Turbines Mean Fewer Bird Deaths? The Jury is Still Out on What Works to Protect Wildlife*, NATIONAL GEOGRAPHIC (Apr. 27, 2014), <http://news.nationalgeographic.com/news/energy/2014/04/140427-altamont-pass-will-newer-wind-turbines-mean-fewer-bird-deaths/>.

96. Cappiello, *supra* note 5.

97. *See id.*

negative publicity when they are in the headlines for killing bald eagles and other protected birds.

A. Land-Based Wind Energy Guidelines

To address bird deaths and disruption, FWS published the Land-Based Wind Energy Guidelines (Wind Energy Guidelines) on March 23, 2012.⁹⁸ The Wind Energy Guidelines seek to promote compliance with relevant laws and regulations, encourage scientific monitoring, and resolve arising conflicts.⁹⁹ FWS encourages wind energy developers to follow a five-tiered approach to wind development.¹⁰⁰

During the pre-construction tiers (Tiers 1, 2, and 3), developers work to identify, avoid, and minimize risks to species of concern. During post-construction tiers (Tiers 4 and 5), developers assess whether actions taken in earlier tiers (to avoid and minimize impacts) are achieving these goals, and when necessary, force developers to take additional steps to compensate for impacts.¹⁰¹ The tiers build upon one another and provide wind energy developers criteria for evaluating risks at the developer's site.¹⁰²

Tier 1, a preliminary site evaluation,¹⁰³ requires approximately 83 hours for completion.¹⁰⁴ FWS describes Tier 1 as a "first look at a broad geographic area"¹⁰⁵ to identify species of concern and general issues that may affect habitat and wildlife.¹⁰⁶ Tier 1 "screens" the selected geographic area, and points out sensitive sites and locations that would require in-depth study (and the associated costs of those studies).¹⁰⁷ Once a wind energy developer rules out sensitive or costly sites, Tier 2 analysis begins. FWS estimates 375 hours for Tier 2 completion.¹⁰⁸ Tier 2 narrows the focus to specific sites and the potential presence of species and plants

98. FWS developed the guidelines in collaboration with the Wind Turbine Guidelines Advisory Committee. See WIND ENERGY GUIDELINES *supra* note 14, at vi.

99. *Id.* at 1.

100. "Adherence to the Guidelines is voluntary and does not relieve any individual, company, or agency of the responsibility to comply with laws and regulations. However, if a violation occurs the Service will consider a developer's documented efforts to communicate with the Service and adhere to the Guidelines." *Id.* at vi.

101. *Id.* at 6.

102. The Wind Energy Guidelines provide criteria for considering bird collisions, habitat loss, fragmentation, degradation, and other effects on wildlife. *Id.*

103. *Id.* at 5.

104. *Id.*

105. *Id.* at 11.

106. *Id.* at ii.

107. *Id.* at 12.

108. *Id.* at ii.

of concern.¹⁰⁹ A biologist must visit the site and communicate his or her findings with FWS.¹¹⁰ In response, FWS communicates with the necessary federal agencies.¹¹¹

Tier 3 focuses on field studies and impact prediction, and is estimated to take 2,880 hours to complete.¹¹² This requires studies on “bird distribution, abundance, behavior, and site use.”¹¹³ Such studies include periodic bird monitoring and raptor nest searches.¹¹⁴ At the end of Tier 3 studies, FWS evaluates a wind energy site’s potential impact and then issues one of three recommendations dependent on this impact.¹¹⁵ Low impact sites need no further study.¹¹⁶ Moderate to high impact sites, where mitigation measures are possible, may move forward but may require post-construction studies.¹¹⁷ FWS recommends foreclosure of high-impact sites when the impacts cannot be mitigated.¹¹⁸

Once wind turbines are operational in moderate to high impact sites, FWS recommends Tier 4 analysis, which includes post-construction studies to estimate impact.¹¹⁹ These studies assess the accuracy of Tier 3 predictions regarding species fatality and impacts to habitat.¹²⁰ Tier 4 recommendations include monitoring bird fatalities for at least a year post-construction.¹²¹ Depending on Tier 4 findings, a wind operator may be required to move into FWS’s final tier.¹²² Tier 5 studies are site-specific, “complex and time-consuming.”¹²³ The studies attempt to answer whether fatalities are having a “significant adverse impact on local populations”; whether mitigation measures worked; and whether species’ populations will decline.¹²⁴ Overall, the guideline’s five-tiered approach steers wind turbine developers away from sites requiring significant mitigation.¹²⁵

109. *Id.* at 14–16.

110. *Id.*

111. *Id.* at 14.

112. *Id.* at ii, 19.

113. *Id.* at 28.

114. *Id.* at 28–30.

115. *Id.* at 33.

116. *See id.*

117. *See id.*

118. *Id.*

119. *Id.* at 33–34.

120. *Id.* at 34.

121. *Id.* at 34, 39.

122. *Id.* at 41–42.

123. *Id.* at 43.

124. *Id.*

125. *Id.*

The Wind Energy Guidelines recommend that wind energy developers keep records called Bird and Bat Conservation Strategies (BBCS) as they progress through Wind Energy Guidelines' tiers.¹²⁶ The BBCS explain "the analyses, studies, and reasoning that support progressing from one tier to the next in the tiered approach."¹²⁷ While FWS may review or discuss a wind energy developer's BBCS, FWS will not approve or disapprove the BBCS.¹²⁸

B. Post-Construction: Too Late for Effective Voluntary Compliance

Despite the rigorous, ever-increasing work required under each tier of the Wind Energy Guidelines, they are purely voluntary and non-binding.¹²⁹ It is possible for a wind farm to avoid voluntary consultation with FWS and the Wind Energy Guidelines from pre-construction to operation.¹³⁰ However, FWS has a large carrot to reward voluntary compliance. The Department of Justice prosecutes MBTA violations based on recommendations from the FWS's Chief of Law Enforcement.¹³¹ Given FWS's influence over prosecution, FWS explicitly states in its Wind Energy Guidelines:

While it is not possible to absolve individuals or companies from MBTA or BGEPA liability, the Office of Law Enforcement focuses its resources on investigating and prosecuting those who take migratory birds without identifying and im-

126. *Id.* at 55.

127. *Id.*

128. *Id.* ("Any Service review of, or discussion with a developer, concerning its BBCS is advisory only, does not result in approval or disapproval of the BBCS by the Service, and does not constitute a federal agency action subject to the National Environmental Policy Act or other federal law applicable to such an action.").

129. "These voluntary Guidelines provide a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development." *Id.* at vi.

130. Wind energy development sited on private land does not automatically fall within the scope of federal review. If the development of a wind farm is on private land, and such development does not implicate federal permitting requirements, federal regulatory authority and guidance is all but absent. See AMERICAN WIND ENERGY ASSOCIATION, WIND ENERGY SITING HANDBOOK at 4-2 to -4 (Feb. 2008), http://awea.files.cms-plus.com/AWEA_Siting_Handbook_Feb2008.pdf. The Federal Aviation Administration is one regulatory authority that may still require consultation. The Federal Aviation Administration Clearances requires a Notice of Proposed Construction for any structure greater than 200 feet above ground. *Id.* at 4-21; FAA, NOTICE OF PROPOSED CONSTRUCTION OR ALTERATION, FORM 74601 (2012). If the facility does not require a federal permit, then no further federal action is mandated. Issuance of a federal permit triggers the National Environmental Policy Act (NEPA) and its attendant requirements. WIND ENERGY GUIDELINES, *supra* note 14, at 10.

131. WIND ENERGY GUIDELINES, *supra* note 14, at 6.

plementing reasonable and effective measures to avoid the take. The Service will regard a developer's or operator's adherence to these Guidelines, including communication with the Service, as appropriate means of identifying and implementing reasonable and effective measures to avoid the take of species protected under the MBTA and BGEPA.¹³²

FWS discretion mitigates the harshness of the MBTA. While Department of Justice retains prosecutorial discretion of MBTA violations, good faith compliance with the Wind Energy Guidelines appears to mitigate risk for wind energy developers.

Consultation and compliance with the Wind Energy Guidelines may also result in fewer MBTA takes.¹³³ Tier 3 suggests pre-construction field studies to document site wildlife and habitat and predict project impacts.¹³⁴ These studies evaluate whether a site is worthy of development.¹³⁵ Design and operational factors may be adjusted at this stage to minimize impacts.¹³⁶ While FWS reiterates compliance with the Wind Energy Guidelines is voluntary, others have called for a different approach.¹³⁷ Commentators note “[o]ne of the major issues with the voluntary nature of the Wind Energy Guidelines is that they fail to address the problem of poor siting [of wind turbines], which is incredibly important in protecting migratory bird species.”¹³⁸ Wind energy developers are free to ignore potential issues, to ignore consultation with FWS, and to build wind turbines as they see fit.¹³⁹ In a recent case, a company paid for that choice.

132. *Id.*

133. FWS argues that the voluntary Wind Energy Guidelines provide “a structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development. They also promote effective communication among wind energy developers and federal, state, and local conservation agencies and tribes. When used in concert with appropriate regulatory tools, the Guidelines form the best practical approach for conserving species of concern.” *Id.* at vi.

134. *Id.* at 19.

135. *Id.*

136. *Id.*

137. “The [American Bird Conservancy] recently filed a petition with the U.S. Department of the Interior calling for mandatory rules protecting millions of birds from the negative impacts of wind energy and rewarding responsible wind energy development.” Roddy Scheer & Doug Moss, *Are Wind Turbines Getting More Bird and Bat-Friendly?* SCIENTIFIC AMERICA (Aug. 20, 2012), <http://www.scientificamerican.com/article/wind-turbines-and-bird-conflicts/>.

138. Robert Arthur Ballard III, *The Wheel in the Sky Keeps on Turnin’: The Migratory Bird Treaty Act and its Impact on Wind Development* (May 1, 2013) (unpublished manuscript, Seton Hall Law eRepository), Paper 181, at 20, available at http://scholarship.shu.edu/student_scholarship/181/.

139. WIND ENERGY GUIDELINES, *supra* note 14, at vii.

C. Flexing Prosecutorial Muscle: *United States v. Duke Energy Renewables*

On November 22, 2013, Duke Energy Renewables entered into a plea agreement with the United States on charges stemming from MBTA violations.¹⁴⁰ Duke marked the first-ever wind energy prosecution under the MBTA.¹⁴¹ The government's prosecution arose after the take of 14 golden eagles and other protected birds at Duke's two wind turbine sites, "Campbell Hill" and "Top of the World."¹⁴² The two sites, situated on private land, include 176 wind turbines.¹⁴³ The Top of the World site is "17,000-acre site with 110 turbines located about 35 miles east of Casper."¹⁴⁴ The settlement required Duke to pay a total of \$1,000,000 in fines, restitution, and community service payments,¹⁴⁵ and Duke was sentenced to a five-year probationary period.¹⁴⁶ Duke must also develop and apply a prevention plan aimed at minimizing bird deaths at its four sites in Wyoming.¹⁴⁷

The Duke prosecution and settlement occurred partly because there was no requirement forcing Duke to consult with FWS. Before construction, FWS warned that Duke's "baseline studies regarding potential avian impacts were inadequate to allow for fully-informed turbine site selection."¹⁴⁸ Because consultation with FWS was voluntary, the FWS had no mechanism to force Duke to alter its projects.¹⁴⁹ Despite these efforts by FWS, the spinning blades of Duke's wind turbines began to kill and injure protected birds.

Duke built its wind energy projects knowing birds would die.¹⁵⁰ Duke mitigated the bird deaths post-construction by establishing low-tech policies to help prevent bird takes, such as encouraging slow driv-

140. *U.S. v. Duke Energy Renewables Inc.*, No. 2:13-CR-00268 (D. Wyo. Nov. 22, 2013).

141. Press Release, U.S. Dep't of Justice, *supra* note 18.

142. *Id.*

143. *Id.*

144. Cappiello, *supra* note 5.

145. Press Release, Dep't of Justice, *supra* note 18.

146. *Id.*

147. *Id.*

148. BRIAN K. FERRASCI-O'MALLEY, *Recent Developments Regarding Avian Take at Wind Farms*, (Jan. 27, 2014), <http://www.martenlaw.com/newsletter/20140127-avian-take-wind-farms> (citing Plea Agreement at 7-10, *United States v. Duke Energy Renewables Inc.*, No. 2:13-cr-00268 (D. Wyo. Nov. 22, 2013), ECF No. 2, Attachment A at 4-7).

149. WIND ENERGY GUIDELINES, *supra* note 14, at 6.

150. Upon entering into the plea agreement with Duke, Robert G. Dreher, acting assistant attorney general for the Justice Department's Environment and Natural Resources Division, stated that Duke "acknowledges that it constructed these wind projects in a manner it knew beforehand would likely result in avian deaths." Press Release, U.S. Dep't of Justice, *supra* note 18. Duke continued with its plan and constructed its sites, choosing "micro-

ing to avoid scaring roosting birds, removing dead animals and prey habitat,¹⁵¹ and powering off turbines as birds approached.¹⁵²

Duke now faces mandatory compliance with a FWS mitigation plan as part of its plea agreement.¹⁵³ FWS's assistant director for law enforcement expressed FWS's interest in investigating wind companies that do not comply with wildlife laws.¹⁵⁴ The Duke case illustrates the problem with FWS's voluntary compliance program. FWS alerted the company that its project would likely result in a MBTA take, yet FWS had no ability to force Duke to re-site its turbines. Duke built its wind farm and paid its fine, and the turbines continue to spin.

IV. A DIFFERENT FLIGHT PLAN: FEDERAL AGENCIES' MANDATORY FWS CONSULTATION

On January 10, 2001, President William Clinton signed Executive Order 13186: Responsibilities of Federal Agencies To Protect Migratory Birds (Executive Order).¹⁵⁵ The Executive Order requires federal agencies to develop and implement a Memorandum of Understanding with FWS if the agency's sanctions might measurably impact migratory birds.¹⁵⁶ Under the Executive Order federal agencies must identify where their actions might result in both intentional and unintentional takes.¹⁵⁷ Furthermore, the Executive Order mandates federal agencies to uphold the MBTA's conservation purpose by mitigating takes,¹⁵⁸ stating that a federal agency "*shall* develop and use principles, standards, and practices that will lessen the amount of unintentional take, developing any such conservation efforts in cooperation with the Service."¹⁵⁹ Lastly, the Executive Order charges federal agencies to restore and even enhance migra-

siting of several turbine arrays and alteration of transmission lines." FERRASCI-O'MALLEY, *supra* note 148.

151. Wind turbine sites themselves can lead to habitat destruction. *See, e.g.,* NAT'L WIND COORDINATING COLLABORATIVE, *supra* note 25, at 1 (stating that one reason for bird and bat population declines is related to habitat destruction and fragmentation); *see also* Ray Managh, *Wind Turbines Would Destroy Hen Harrier Habitat, Court Hears*, IRISH TIMES (Sept. 11, 2014), <http://www.irishtimes.com/news/crime-and-law/courts/wind-turbines-would-destroy-hen-harrier-habitat-court-hears-1.1925265>.

152. Cappiello, *supra* note 5.

153. FERRASCI-O'MALLEY, *supra* note 148.

154. *Duke Reaches \$1 Million Settlement for Bird Deaths at Wind Farms*, NORTH AMERICAN WINDPOWER (Nov. 25, 2013), http://www.nawindpower.com/e107_plugins/content/content.php?content.12323.

155. Exec. Order No. 13186, 66 Fed. Reg. 3853 (Jan. 10, 2001).

156. *Id.* at sec. 3.

157. *Id.* at sec. 3(e)(9).

158. *Id.* at sec. 3(e)(1).

159. *Id.* at sec. 3(e)(9) (emphasis added).

tory bird habitat.¹⁶⁰ In short, federal agencies have a mandate to consult with FWS in order to develop mitigation strategies for avoiding takes, and to restore migratory bird habitat when possible.

In an unprecedented move, FWS recently granted a federal agency the special purpose permit for an incidental take. The Pacific Islands Regional Office NMFS is a federal agency that regulates commercial fishing, including a shallow-set long line fishery.¹⁶¹ The Pacific Islands Regional Office of National Marine Fisheries Service (NMFS) consulted with FWS pursuant to the Executive Order. On August 20, 2012, the Pacific Islands Regional Office of NMFS applied for an MBTA special purpose permit.¹⁶² NMFS's special purpose permit application related to MBTA incidental takes from NMFS's regulation of a shallow-set long line fishery.¹⁶³ FWS published a Notice of Availability and Request for Comments in the Federal Register.¹⁶⁴ The FWS publically announced that issuing a special purpose permit for MBTA incidental takes would be novel.¹⁶⁵ FWS's biological opinion¹⁶⁶ determined issuing a permit would result in no significant impact.¹⁶⁷ FWS then issued the special purpose permit to NMFS.¹⁶⁸

FWS's selection of the special purpose permit for incidental takes breaks new ground by acknowledging an avenue for non-liability. A re-

160. WIND ENERGY GUIDELINES, *supra* note 14, at 54.

161. Shallow-set long-lining consists of deploying a mainline 18 to 60 nautical miles long with floats at 360-meter intervals. The mainline is set 25 to 75 meters deep. About four branch lines, 10 to 20 meters long, with baited hooks and artificial light sticks to attract swordfish, are suspended between floats, for a total of about 700 to 1,000 hooks per deployment. The line is deployed, or set, after sunset, left in the water overnight and retrieved in the morning. Seabirds, as well as sea turtles and other non-target species, can be killed or injured either during deployment or retrieval of the lines when they are unintentionally hooked or entangled in fishing gear.

News Release, U.S. Fish & Wildlife Serv., Permit Issued for Hawaiian Fishery (Aug. 20, 2012), <http://www.fws.gov/pacific/news/news.cfm?id=2144375094>.

162. 77 Fed. Reg. 50,153 (Aug. 20, 2012).

163. *Id.*

164. 77 Fed. Reg. 1501 (Jan. 10, 2012).

165. FWS stated that issuing the special purpose permit to another federal agency would be "the first permit under these regulations issued to authorize incidental take of migratory birds by an agency regulating a commercial, non-conservation activity." *Id.* at 1502.

166. U.S. FISH & WILDLIFE SERV., BIOLOGICAL OPINION OF THE U.S. FISH AND WILDLIFE SERVICE FOR THE OPERATION OF HAWAII-BASED PELAGIC LONGLINE FISHERIES, SHALLOW SET AND DEEP SET, HAWAII 5 (2012), <http://www.fpir.noaa.gov/SFD/pdfs/2012-01-06%20USFWS%20BiOp%20Hawaii%20Deep-set%20%26%20Shallow-set%20Longline.pdf>.

167. 77 Fed. Reg. 1501.

168. *Id.* at 1502.

cent court decision, however, expresses uncertainty about if, and when, a federal agency must apply for a special purpose permit for incidental takes. In *Public Employees for Environmental Responsibility v. Beaudreu*,¹⁶⁹ individuals and environmental groups brought suit, claiming among other things, that the Bureau of Ocean Energy Management (BOEM) violated the MBTA when it failed to apply for a special purpose permit for incidental takes.¹⁷⁰ Cape Wind is the first offshore wind energy project in Nantucket Sound.¹⁷¹ It is not yet operational, but anticipates building 130 wind turbines at an estimated \$2.5 billion price tag.¹⁷²

On March 14, 2014, the United States District Court for the District of Columbia issued *Beaudreu*,¹⁷³ its opinion regarding the Cape Wind Project. The Court held the MBTA does not mention which government agencies must apply for, or obtain, a special purpose permit.¹⁷⁴ Moreover, if the BOEM needed a special purpose permit, it could apply any time before a take might occur.¹⁷⁵ The timing issue proved critical for the court.¹⁷⁶ The court reasoned that if BOEM needed a special purpose permit, the application probably did not need to occur before Cape Wind became operational, as little imminent threat to migratory birds existed before the turbines started spinning.¹⁷⁷ The court stopped short of determining when and if federal agencies must apply to the FWS for special purpose permits as an avenue for dealing with incidental takes.

V. USING THE SPECIAL PURPOSE PERMIT TO MANDATE COMPLIANCE AND RESOLVE LIABILITY

FWS should issue special purpose permits¹⁷⁸ for commercial actors in exchange for mandatory compliance with Wind Energy Guide-

169. *Pub. Employees for Env'tl. Responsibility v. Beaudreu*, No. CV 10-1067, 2014 WL 985394, (D. D.C. Mar. 14, 2014).

170. *Id.*

171. *Id.*

172. Marie Szaniszló, *Cape Wind Powers up Website*, BOSTON HERALD (Apr. 12, 2014), http://bostonherald.com/business/business_markets/2014/04/cape_wind_powers_up_website.

173. *Pub. Employees for Env'tl. Responsibility v. Beaudreu*, No. CV 10-1067, 2014 WL 985394, (D. D.C. Mar. 14, 2014).

174. *Id.* at *32.

175. *Id.*

176. *Id.* The court distinguished the special purpose permit application by the Pacific Region Office of the NMFS because it applied to an operational fishery that had, in fact, taken protected birds.

177. *Id.*

178. Some legal commentators have opined that the special purpose permit is unlikely to be a feasible option for a general incidental take permitting scheme. HOLLAND & HART, *supra* note 40, at 30.

lines.¹⁷⁹ The Wind Energy Guidelines Advisory Committee¹⁸⁰ recommended the special purpose permit as a possible solution to wind energy takes.¹⁸¹ The committee first acknowledged FWS occasionally uses special purpose permits to authorize incidental takes,¹⁸² and went on to state the wind energy developers could utilize the approach:

[A] wind energy project theoretically could apply to the FWS for a special use permit for an incidental take of birds based on a showing that the wind facility was providing an overall positive benefit to the migratory bird resource, perhaps through accompanying mitigation measures, or constitutes a situation of compelling justification due to the benefits of renewable energy generation.¹⁸³

It is possible to abide by MBTA, *force* wind energy developers into compliance, and allow migratory bird takes. By issuing a special purpose permit for incidental takes, FWS solves conflicts between the MBTA and commercial actors' wind energy development. First, a permitting system would resolve the ambiguity in courts' interpretations of commercial actors' liability. Next, a permitting system would force pre-siting analysis, which is a key factor in mitigating takes.

179. This is not the first time FWS has considered using special purpose permits for incidental takes under the MBTA. In 1996, the Assistant Solicitor of Fish and Wildlife acknowledged that an incidental take permit granted under the Endangered Species Act (ESA) could afford a permittee protection from MBTA liability. See Memorandum from Pete Raynor, Assistant Solicitor, Fish and Wildlife Branch, to John Rogers, Deputy Director, U.S. Fish and Wildlife Service (Feb. 5, 1996), <https://www.fws.gov/endangered/esa-library/pdf/HCPAPP5.PDF>. The Deputy Director concluded that FWS had the "authority" to provide "some assurance" no prosecution would occur if a permittee had an ESA permit. *Id.* This assurance arose "using a combination of permitting provisions" and FWS's discretion. *Id.* Alternatively, others suggest that FWS should use its powers to promulgate a completely new permit allowing for incidental take. U.S. FISH AND WILDLIFE SERVICE WIND TURBINE GUIDELINES ADVISORY COMMITTEE RECOMMENDATIONS at B15 (2010), http://www.fws.gov/windenergy/docs/Wind_Turbine_Guidelines_Advisory_Committee_Recommendations.pdf.

180. The Wind Turbine Guidelines Advisory Committee was established in 2007 by the Federal Advisory Committee Act. In 2010, its 22 members were drawn from federal, state, and tribal governments, wildlife conservation groups and wind industry the committee. Working together, the committee provided the Acting Director of FWS policy considerations and voluntary guidelines. U.S. FISH AND WILDLIFE, *supra* note 179, at Cover Letter.

181. *Id.* at B15.

182. *Id.*

183. *Id.*

A. Can FWS Use Special Purpose Permits for Commercial Actors?

The Supreme Court expounded a test to determine whether an agency is acting within its authority to interpret a statute in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*¹⁸⁴ Courts reviewing an agency's interpretation, and rules promulgated out of such interpretation, look at two issues. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."¹⁸⁵

Once Congress's intent is clear, courts defer to agency interpretation.¹⁸⁶ If Congress "has not directly addressed the precise issue,"¹⁸⁷ then the court must determine "whether the agency's answer is based on a permissible construction of the statute."¹⁸⁸

The text of the MBTA specifically authorizes the Secretary of the Interior "to issue such regulations as may be necessary to implement the provisions of the convention[s] between the United States" and treaty signatories.¹⁸⁹ In addition to the general power to promulgate regulations, the MBTA authorizes the Secretary of the Interior to allow certain migratory bird takes.¹⁹⁰ The MBTA further instructs the Secretary of the Interior to develop and effectuate regulations permitting migratory bird-related activities.¹⁹¹

Applying the first prong of *Chevron* to the MBTA, a court would likely determine Congress intended to delegate authority to the Secretary of the Interior. MBTA's statutory language authorizes and directs the Secretary of the Interior to allow takes of protected birds.¹⁹² MBTA also

184. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

185. *Id.* at 842–43 (internal citations omitted).

186. When Congress explicitly leaves "gaps" for agencies to fill, courts are deferential to agencies unless the agencies' decisions "are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843–44.

187. *Id.*

188. *Id.*

189. 16 U.S.C. § 712(2) (2012).

190. The authorization includes "hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof." 16 U.S.C. § 704 (2012).

191. 16 U.S.C. §§ 704, 712(2).

192. "[T]he Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, and killing. . . ."

authorizes the Secretary of the Interior to issue necessary regulations and permits.¹⁹³ Under the congressional grant of authority, the Secretary of the Interior, acting through the FWS, promulgated regulations pursuant to the MBTA. FWS first defined take,¹⁹⁴ and then promulgated a permitting system for takes.¹⁹⁵ This approach comports with the statutory requirement of Congress.¹⁹⁶

B. The Special Purpose Permit for Commercial Actors

FWS should use the special purpose permit for commercial actors' incidental takes. FWS issuance of the special purpose permit to NMFS lays the groundwork for use by commercial actors. The Executive Order requires conservation of migratory birds and mitigation of takes. FWS could develop an application process with the same goals. Incidental takes could fall within the parameters of the special purpose permit. If permittees were required to mitigate takes, issuing the permit would actually benefit migratory birds.¹⁹⁷ For instance, FWS could also mandate additional research as a condition of the special purpose permit.¹⁹⁸ As continuing research develops, wind energy developers and FWS will have better opportunity to mitigate takes.

Thoughtful pre-construction planning is one of the most effective measures to mitigate takes. By providing companies with an incidental take permit in exchange for proper pre-construction mitigation, FWS would benefit the migratory bird population. By permitting wind energy sites, FWS removes a commercial actor's choice, because compliance is mandatory, not elective. Under this proposed change, companies could not ignore FWS's warnings. Instead, companies would be obliged to make "all reasonable efforts to build the projects in a way that would avoid the risk of avian deaths by collision with turbine blades."¹⁹⁹

Altamont Pass is currently the focus of independent researchers' three-year "Sand Hill" study.²⁰⁰ This study is breaking ground by creat-

16 U.S.C. § 704.

193. "The Secretary of the Interior is authorized to issue such regulations as may be necessary to implement the provisions of the convention[s] between the United States and" treaty signatories. 16 U.S.C. § 712(2).

194. 50 C.F.R. § 10.12 (2013).

195. 50 C.F.R. § 21.1 (2013).

196. 16 U.S.C. § 704 (2012).

197. 50 C.F.R. § 21.27 (2013).

198. *Id.*

199. Press Release, U.S. Dep't of Justice, *supra* note 18.

200. Jeremy Thomas, *Researchers, Wind Energy Companies Seek More "Bird-Friendly" Turbines on Altamont Pass*, CONTRA COSTA TIMES (Jan. 1, 2014), <http://www.contracostatimes>

ing a wind farm controlled experiment²⁰¹ that has the potential to modify or phase out older turbines.²⁰² For instance, one potential solution to bird deaths includes “shrouding” a wind turbine by placing circular covers around the blades to create a “visual and physical obstacle that, in theory, will prevent birds from flying into the rotor zone.”²⁰³

Understanding best practice for wind energy development requires more research.²⁰⁴ Much remains unknown about the interaction between birds and wind turbines. For example, design changes in the turbines might make it easier for birds to see and avoid the structures,²⁰⁵ however, researchers need further studies to determine how such changes, including changes in a wind turbine’s height, might affect birds.²⁰⁶ Scientists also need to determine best practices for aligning pre- and post-construction studies to maximize efficacy.²⁰⁷ Commercial actors can and should be part of this research.

VI. CONCLUSION

Wind energy development needs certainty. If a court enforces violations of the MBTA broadly, the wind energy developer may face liability for protected-bird takes. As evidenced by the Duke case, a wind energy developer’s decision can bear both criminal and civil costs. Furthermore, even compliance with the Wind Energy Guidelines does not guarantee freedom from prosecution. In this “compliance” scenario, investors are understandably hesitant to fund wind energy development.²⁰⁸ These factors push wind energy to the brink of disaster²⁰⁹ which will not do. Commercial actors need a clear, coherent, and predictable permitting structure.

FWS can solve these certainty problems and further the MBTA’s conservation principles through the special purpose permit for incidental

.com/contra-costa-times/ci_24826842/researchers-wind-energy-companies-look-for-more-bird-friendly#.

201. *Id.*

202. *Id.*

203. *Id.*

204. WIND ENERGY GUIDELINES, *supra* note 14, at 56.

205. NAT’L WIND COORDINATING COLLABORATIVE, *supra* note 25, at 7.

206. *Id.*

207. *Id.*

208. *Bay Area Wind Farm Exempted From Prosecution If Eagles Die From Turning Blades*, CBS (June 26, 2014), <http://sanfrancisco.cbslocal.com/2014/06/26/bay-area-wind-farm-exempted-from-prosecution-if-eagles-die-from-turning-blades/>. Uncertainty also arises over funding when Congress may not approve federal subsidies. Christopher Martin, *Gasping for Air: Wind Energy Industry Seen Under Siege*, ALBUQUERQUE JOURNAL, Apr. 20, 2014, <http://www.abqjournal.com/386666/news/gasping-for-air.html>.

209. *Id.*

takes. Commentators point out that the regulations do not define a “sufficient showing of benefit” to migratory birds nor a “compelling justification.”²¹⁰ This flexibility would allow FWS to maintain its discretion in issuing special purpose permits.²¹¹ Extractive industries, for instance, could apply for special purpose permits when constructing electrical lines and towers. Wind energy developments should always apply for a special purpose permit since a take is practically certain. Further, to protect migratory birds, FWS could *force* wind energy developers to follow the mitigation principles in the Wind Energy Guidelines. Such compliance would result in a sufficient showing of benefit to migratory birds and the important research considerations required by the special purpose permit.

FWS’s use of the special purpose permit for incidental takes resolves the liability question for wind energy developers. Such a resolution would likely spur investment because criminal liability would no longer be an issue. The benefit does not flow just to wind energy developers, but also to the protected migratory birds with mitigation principles built into the permitting process. Such a proposal provides much needed certainty—for wind energy and for the birds.

210. Commentators point out that the regulations do not define what constitutes a “sufficient showing of benefit” to migratory birds or a “compelling justification.” HOLLAND & HART, *supra* note 40, at 8.

211. Courts will likely apply *Chevron* deference when FWS interprets its own regulations.

